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Dentons' Pick of Canadian Regulatory Trends to Watch in 2021

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2020 witnessed unprecedented turmoil and upheaval resulting largely (though not solely) from the COVID-19 pandemic. Apart from the devastating consequences of the virus itself, Canadian businesses were affected by a variety of challenges and developments: threats to financial stability, climate change, social justice and governance challenges, trade frictions, a rise in geo-political tensions and an even greater shift towards online commerce and the digital economy, among many others. Legislators and regulators responded in turn with new rules to address the evolving business environment, including the introduction of laws affecting the digital economy (e.g., digital taxation and privacy laws), and with clarifications on how existing rules would be applied and enforced in the new context.

In this annual publication, Dentons' team of leading regulatory lawyers and government affairs specialists has forecast key trends for 2021 across a gamut of areas: trade, competition law, foreign investment review and national security, energy regulatory, privacy, anti-corruption, communications, environment and climate change, and health product regulation.

Competition

Competition: From tech titans to “failing firms”, the Competition Bureau’s agenda in the recovering economy

Simon Kupi, Sandy Walker and Adam S. Goodman

As 2021 proceeds and the COVID-19 landscape continues to evolve, governments worldwide appear to have set their sights on competition law and policy to a degree not seen in years. In Europe, the United States, China and beyond, recent months have seen a patchwork of enforcement and legislative activity targeting the perceived market power of the large tech firms behind the ascent of the digital economy globally, which has been accelerated by the COVID-19 pandemic. In Canada, observers will be awaiting any sign of the Competition Bureau (Bureau) or the federal government joining this trend in 2021.

The Bureau is likely to continue shifting away from COVID-19-specific activities (such as targeting misleading virus treatment claims) in 2021 as vaccinations roll out and potential recovery starts to take hold. However, a recent proliferation of distressed M&A deals suggests that one issue to watch is whether “failing firm” analysis assumes more importance in Bureau merger reviews. Following a 2020 decision in which the Bureau relied upon this rarely used doctrine to clear a merger that might otherwise have been considered anti-competitive, the Bureau’s approach will remain in focus as pandemic conditions continue to challenge many sectors of the Canadian economy.

Digital economy issues at the forefront?

In recent months, lawmakers and competition authorities worldwide have become more assertive with respect to digital economy enforcement. On December 15, 2020, the European Commission released proposed legislation applicable to firms operating platforms reaching more than 45 million users that would create, among other things, new obligations around data use and the treatment of other firms using such platforms. The following day, Texas and nine other U.S. states launched a lawsuit against Google for alleged manipulation of online advertising markets. That lawsuit's announcement followed separate Federal Trade Commission and Department of Justice cases against Facebook and Google, respectively, that had been announced that same quarter.

Later in December 2020, China's State Administration for Market Regulation (SAMR) announced a probe into exclusivity arrangements between Chinese tech firm Alibaba and its e-commerce merchants. On February 7, 2021, SAMR also finalized guidelines under the country's *Anti-Monopoly Law* designed, in part, "to prevent and stop monopolistic behaviors in the platform economy." In February 2021, Australia's Parliament passed a Competition and Consumer Commission code contemplating payments by platforms to media organizations for linked content following a months-long public dispute with platform operators over the law. The government of Canada is considering similar legislation.

By comparison—and notwithstanding the Bureau's stated goal of being "at the forefront of the digital economy"[1]—the Bureau has disclosed only a few recent activities in the digital space, including a misleading advertising settlement with one social media platform (May 2020), ongoing work on a tech-related abuse of dominance investigation (August 2020) and an online "Digital Enforcement Summit" hosted with other regulators (October and November). It is also unclear whether the Bureau's late 2019 "call-out" to market participants for information on potential anti-competitive conduct in key digital markets (including online search, social media, display advertising and online marketplaces) has led to any change in the Bureau's caseload or focus relating to those markets.

Given the Bureau's objective of being "at the forefront" of enforcement in the digital space, we expect the Bureau to sharpen its focus on fast-moving digital markets this year. Among other things, the Bureau's most recent annual plan points to its intent to ramp up in-house digital enforcement capabilities, including exploring the use of AI and hiring specialists such as data scientists and data engineers.[2] As discussed below, there may also be some prospect of the Bureau obtaining increased federal resources to maintain pace with its global counterparts in this area.

Will legislators unveil a "made in Canada" approach to competition and digital economy in 2021?

As we have noted, several jurisdictions have drafted laws—general or specific—addressing the interplay between competition law and fast-moving digital markets as of early 2021. In Canada, however, the federal government has not yet followed through on a commitment in its 2019 mandate letter to the Minister of Innovation, Science and Industry (Minister) to introduce new measures "encouraging greater competition in the digital marketplace." Similarly, the government has not released the details of any proposed competition-related reforms within its "Digital Charter"[3] policy platform.

In a December 2020 press interview weeks after the Trudeau government tabled a long-awaited bill that would implement the private-sector privacy reforms promised by the Digital Charter, then-Minister Navdeep Bains indicated "more to come" in relation to the *Competition Act*. Bains signaled that the Bureau was "definitely part" of the government's strategy and that

1 See Competition Bureau, "Competition in the Digital Age: The Competition Bureau's Strategic Vision for 2020-2024" (11 February 2020), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04513.html>.

2 Competition Bureau, "2020-2021 Annual Plan: Protecting competition in uncertain times" (6 July 2020), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04533.html>.

3 See generally Government of Canada, "Canada's Digital Charter: Trust in a digital world," online: <https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00108.html>.

"additional resources" for the Bureau could be in play.[4] Weeks before, Commissioner of Competition Matthew Boswell had pointed to a limited Bureau budget and gaps in in the Bureau's legislative powers as obstacles to its effective regulation of large tech firms.[5]

With a new Minister (the Honourable Francois-Philippe Champagne) in 2021 and with a possible election looming on the horizon, it is not clear whether 2021 will see significant progress on a Digital Charter–themed competition policy platform.

The Bureau transitions away from its COVID-19 mandate

As with other regulatory agencies, the Bureau made public efforts early in the pandemic to adjust its mandate to address the dramatic new realities of COVID-19. This started with the Bureau (like many businesses) moving to a remote-work model in 2020. This arrangement is now in its second year. The Bureau also continues to monitor the market for false and misleading claims relating to virus protection or protection after reporting in December 2020 that businesses had largely been responsive to its compliance actions earlier in the year.[6] On the other hand, a Bureau process announced in April 2020 to provide guidance to competitors collaborating to address COVID-19 challenges (see our prior bulletin) appears to have received less of an industry reaction: in Fall 2020, the Bureau made public that, in fact, no business had sought its advice under the process.

More recently, Commissioner Boswell has emphasized competition law's role in promoting economic recovery "by stimulating entry, productivity, and innovation."[7] As vaccinations enable more of Canada's economy to re-open over the course of 2021, the Bureau is likely to reiterate this theme while restoring its pre-pandemic focus on identified "key sectors" such as digital services, online marketing, financial services and infrastructure.[8]

Will "failing firm" merger analyses become more common in industries hard-hit by COVID-19?

In April 2020, the Bureau released a position statement outlining its rationale for not challenging a transaction that would consolidate Total Metal Recovery Inc. (TMR) and American Iron & Metal Company (AIM), Québec's two largest processors of scrap metal obtained from car bodies, household appliances and other sources. Central to the Bureau's decision was a seldom-invoked "failing firm" analysis. We anticipate that failing firm analyses may become increasingly important for parties to distressed M&A transactions driven by pandemic conditions.

More specifically, under section 93(b) of the *Competition Act*, a merger assessment requires considering "whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail". Where evidence indicates that a merging party's failure is imminent absent the transaction, the Bureau may not attribute any lessening or prevention of competition resulting from the transaction to the transaction itself. The Bureau's *Merger Enforcement Guidelines* (MEGs) elaborate on the Bureau's view of the analysis required to assess a firm's likelihood of failure, including a consideration of the alternatives available to the firm (e.g., acquisition by a competitively preferable purchaser, restructuring/ retrenchment or liquidation).

In the TMR case, the Bureau offered guidance on the application of the MEGs' failing firm criteria to a real-world transaction, concluding that:

- TMR was at high risk of making a bankruptcy filing in the near future, based on the assessment of the Bureau's financial expert;

4 Sean Silcoff, "Navdeep Bains on navigating through the COVID-19 pandemic and what's ahead for 2021" The Globe and Mail (29 December 2020), online: <https://www.theglobeandmail.com/business/article-navdeep-bains-on-navigating-through-the-covid-19-pandemic-and-whats/>.
5 Christine Dobby, "Federal competition commissioner says international regulators have stronger tools to take on Big Tech" The Globe and Mail (1 December 2020), online: <https://www.theglobeandmail.com/business/article-federal-competition-commissioner-says-international-regulators-have/>.
6 See Competition Bureau, "Protecting Canadians during the pandemic and driving economic recovery" (opening statement of Matthew Boswell, meeting of the House of Commons Standing Committee on Industry, Science and Technology, 3 December 2020), online: <https://www.canada.ca/en/competition-bureau/news/2020/12/protecting-canadians-during-the-pandemic-and-driving-economic-recovery.html>.
7 Ibid.
8 Competition Bureau, "2020-2021 Annual Plan: Protecting competition in uncertain times" (6 July 2020), <online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04533.html>.

- Further attempts at retrenchment or restructuring of TMR would not have prevented its failure;
- A thorough search for potential alternative purchasers had taken place, but no "competitively preferable" purchaser to AIM existed (i.e., a firm whose acquisition of TMR would have better preserved competition in the market); and
- Liquidation of TMR's assets would not have better preserved competition by facilitating the entry of a competing scrap metal processing operation in Québec.

The facts at issue in the TMR case precede the economic fallout from COVID-19-related shutdowns in North America—including highly publicized bankruptcies in the retail, travel and energy sectors and, in Canada, the largest annual number of filings under the *Companies' Creditors Arrangement Act* in a decade. We expect that TMR-like failing firm arguments may become increasingly important features of Canadian merger review amidst heightened levels of distressed M&A activity in the wake of the pandemic, even if overall the recovery accelerates in 2021.

In this regard, the federal government's recent conditional approval of the Air Canada/Air Transat merger on February 11, 2021 appears to have been informed, in part, by a failing firm rationale. While this merger was approved under a distinct, Minister of Transport–led review process premised on a broader assessment of "the public interest as it relates to national transportation"—albeit with the Commissioner's input relating to competition—Transport Canada's explanatory note released alongside the approval noted that Air Transat's significant COVID-19-related financial challenges meant that rejecting the merger would not necessarily mitigate a loss of competition for service "because much of this service could be lost anyway."[9]

Significantly, however, this logic did not appear to influence the Commissioner's competition assessment: following a March 2020 report to the Minister of Transport opining that the merger would result in significant anti-competitive effects (as well as rejecting Transat as a failing firm based on pre-COVID evidence), the Commissioner concluded in December 2020 that undertakings offered by the parties "do not conform to the principles of merger remedy design and are unlikely to result in effective entry for new competitors" [10] Together with the detailed evidence the Commissioner required in the TMR case, this may suggest the maintenance of a "high bar" for parties relying on failing firm arguments to the Bureau. Indeed, in December 2020 comments before a House of Commons committee, Commissioner Boswell expressly noted that despite the potential for a rise in mergers involving failing businesses, "[r]elaxing our standards in a crisis period could cause irreversible enhancement of market concentration, leading to deeper and longer-term harm to consumers and the economy."[11] The Bureau's approach to weighing these concerns in merger cases—including against the risk that over-enforcement could further limit distressed companies' options for preserving their operations' value—will be closely watched in 2021 and beyond.

9 See Transport Canada, "Explanatory Note" (11 February 2021), online: <https://tc.canada.ca/en/aviation/commercial-air-services/explanatory-note>.

10 See Transport Canada, "Explanatory Note," ibid; Competition Bureau, "Report to the Minister of Transport and the Parties to the Transaction Pursuant to Subsection 53.2(2) of the Canada Transportation Act" (27 March 2020), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04522.html#sec08>.

11 See Competition Bureau, "Protecting Canadians during the pandemic and driving economic recovery" (opening statement of Matthew Boswell, meeting of the House of Commons Standing Committee on Industry, Science and Technology, 3 December 2020), online: <https://www.canada.ca/en/competition-bureau/news/2020/12/protecting-canadians-during-the-pandemic-and-driving-economic-recovery.html>.

Energy regulatory

Energy regulatory: The road to net zero

Bernie (Bernard) J. Roth

As part of its Paris Agreement commitments, Canada has pledged to achieve greenhouse gas (GHG) emission levels 30 percent below 2005 levels by 2030, and has set a goal of net-zero GHG emissions by 2050. As the country emerges from the COVID-19 pandemic in 2021, Canadians can expect to see an increasing focus on achieving these ambitious emissions reduction goals.

Carbon tax increase

The federal *Greenhouse Gas Pollution Pricing Act (GGPPA)*, better known as the carbon tax, remains the cornerstone of federal plans for Canada to achieve its Paris Agreement commitments. The current carbon tax is set at \$30 per tonne carbon dioxide equivalent (CO_2e), and will increase by \$10 each April until reaching a price of \$50 per tonne CO_2e in April 2022.

In December 2020, the federal government announced that the carbon tax, which it previously pledged to maintain at \$50, will rise significantly after 2022. The changes will see the carbon tax rise by \$15 each year after 2022, reaching a price of \$170 per tonne CO_2e in April 2029.

The federal carbon tax remains a backstop, only applying when provinces do not implement their own carbon pricing regime that is at least as stringent as the federal price. Three provinces have challenged the constitutionality of the *GGPPA* in court, with a decision from the Supreme Court of Canada expected in 2021.[1]

1 Governments in Alberta, Ontario and Saskatchewan sought advisory opinions from their respective appeal courts regarding the constitutionality of the GGPPA. Courts in Ontario and Saskatchewan found the GGPPA within federal jurisdiction in 2019 rulings, while the Alberta Court of Appeal found the legislation ultra vires the federal government in 2020. The Supreme Court of Canada heard a combined appeal of the three decisions in September 2020, with a ruling expected in 2021.

Clean fuel regulations

December 2020 saw the federal government unveil draft regulations and associated analyses of the much-anticipated *Clean Fuel Regulations (CFR)*.

The headline *CFR* measure is a requirement that all "primary suppliers" (producers and importers) of liquid fossil fuels achieve reductions in the lifecycle carbon intensity (CI) of their products. Each type of fuel will be assigned a baseline CI to which increasingly stringent CI reduction requirements will be applied, beginning in December 2022, and reaching a final level in January 2030. There are exceptions for aviation fuel and exports.

Under the *CFR*, primary suppliers must acquire "credits" which are then applied to meeting CI reduction requirements. Both primary suppliers and third parties can generate credits via three principal methods:

- Undertaking projects that reduce the lifecycle CI of fossil fuels;
- Supplying low carbon fuels, such as ethanol and biodiesel; and
- Supporting the switch from fossil fuels to lower carbon fuels or energy.

In 2019, the government proposed lifecycle CI reduction requirements for solid and gaseous fossil fuels, in addition to liquid fuel CI requirements, but this proposal was dropped from the published *CFR*. However, activities related to solid and gaseous fuels can be used to generate CI reduction credits.

The *CFR* continues the biofuel blending requirements from the *Renewable Fuels Regulations (RFR)*. Like the *RFR*, the *CFR* requires that primary suppliers blend an average of two percent biodiesel into diesel and an average of five percent ethanol into gasoline.

Environment Canada forecasts that the *CFR* will lead to a reduction of 221 mega tonnes CO_2e between 2021 and 2040 at a cost of $94 per tonne. In 2030, the year when the CI reductions reach their final value, the *CFR* is estimated to result in a GDP decrease of up to $6.4 billion, or up to 0.2 per cent of Canada's GDP. However, the analysis suggests that the *CFR*'s impact on Alberta and Saskatchewan's GDP will be minimal, as their upstream oil industries will have many opportunities to generate CI credit revenue from actions such as carbon capture and storage (CCS).

The *CFS* is expected to bolster investment in sectors such as CCS and hydrogen.

Electricity grid reinforcement

The Canada Energy Regulator (CER) released a report[2] addressing the challenges facing grid operators from increased deployment of intermittently available renewable energy generation.

The CER concludes that meeting Canada's climate targets will entail substantial growth in renewable generation from sources such as wind and solar, which provide variable output based on conditions. This growth in variable output will strain grid operators' ability to balance load with generation in real time. The CER foresees grid operators overcoming this challenge via increased interconnectivity between provincial grids and the installation of grid-scale batteries. Investments in this grid-stabilizing infrastructure are increasingly being made across the country, with the pace of investment expected to build in coming years.

Geothermal energy

Geothermal energy production is achieved by drilling wells deep into the Earth's crust and using these wells to utilize the thermal energy present at these depths, either directly as a heating source or for electricity generation. New techniques, whereby fluids are actively injected into target reservoirs, are gaining popularity, increasing the number of potential sites where geothermal energy production is possible.

2 Canada's Energy Future 2020, Canada Energy Regulator.

Canada is well placed to exploit geothermal energy. The country's geology is favourable for geothermal development, and Canada's sizable oil and gas industry has created a deep talent pool of workers with skills relevant to the geothermal industry.

The Canadian geothermal energy industry has enjoyed significant advances in 2020, with increasing interest in geothermal technology as a source of renewable energy and a number of pilot projects getting underway.

Coal development in Alberta

In June 2020, the Government of Alberta rescinded *A Coal Policy for Alberta*, also known as the 1976 Coal Policy, to encourage coal development by lowering the regulatory burden applicable to certain tracts of land in the province. Additional regulatory changes and incentives were enacted by Alberta at the same time.

The 1976 Coal Policy created four land categories for coal exploration and development, ranging from Category 1, where all development was prohibited, to Category 4, where development was deemed desirable. The rescindment of the 1976 Coal Policy will result in coal exploration and development activities becoming easier in land classified as Categories 2 and 3, which represent a substantial portion of land in the Rocky Mountains and Foothills.

These changes have created renewed interest in coal mining in Alberta, with a number of project applications already at the review stage. These projects focus on producing metallurgical coal, used in the steelmaking process, rather than on thermal coal for use in electricity generation.

Many landowners and organizations are unhappy with the government's coal policy rescindment and the associated projects, and have launched a number of challenges in the courts.

Growth in hydrogen

In December 2020, the federal government released its *Hydrogen Strategy for Canada*, which sets out a blueprint to build Canada's hydrogen industry. The strategy intends that hydrogen will deliver up to 30% of Canada's end-use energy by 2050.

One of the challenges facing increased hydrogen deployment is the transportation of hydrogen between production sites and users, and, because of its extensive network of existing pipelines, Western Canada is well-positioned to overcome this obstacle. Supplemental blending of hydrogen into natural gas streams is an area of growing interest and an accessible opportunity to utilize hydrogen to reduce GHG emissions. However, there are physical and operational challenges associated with this blending, as higher hydrogen concentrations can cause damage to pipelines and hydrogen is more easily ignited than natural gas. These practical issues will increasingly give rise to the need for regulatory solutions in 2021 and beyond.

Carbon capture and storage

This past year saw the completion of the Alberta Carbon Trunk Line (ACTL), which will transport carbon dioxide (CO_2) captured from industrial facilities to oilfields for injection into reservoirs where it will provide enhanced oil recovery and will be permanently sequestered. With a maximum capacity of 14.6 million tonnes of CO_2 per year, the ACTL is expected to become the world's largest CCS project.

Environment and climate change

Environment and climate change: Increasing focus on ESG in the mining sector

Alex G. MacWilliam

Environmental, social and governance (ESG) issues are now at the forefront of corporate thinking, as a source of both risk and opportunity. Several factors are driving this change – including stakeholder activism, consumer choice, ESG-related litigation, and new legislation on ESG related issues, much of which has extra-territorial reach. Stakeholders, including shareholders, employees, contractors, consumers, communities and supply chains are effectively influencing corporate behaviour.

ESG criteria establish a framework used to assess the impact of the sustainability and ethical practices of a company on its financial performance and general operations. Increasingly, ESG data is used to analyze corporate risks and behaviour that can influence and even determine the long-term performance of companies. This type of risk analysis has become very important to investors in all sectors of the economy, but it is particularly germane in sectors where environmental and social issues have assumed greater significance and notoriety – such as in the extractive industries of petroleum and mining.

It is very important to appreciate that, while the acronym ESG is of relatively recent vintage, many of the concepts included in the criteria have been applied to the mining sector for decades. Environmental impact assessments have been required in most countries for a long time. Such regulatory reviews often include detailed requirements to describe the expected environmental risks and mitigation strategies, as well as the socio-economic costs and benefits, expected from a particular project. Those issues were considered as part of the legal landscape within which a company and its projects were expected to operate. They were assessed by regulators and governments. Companies had to meet the requirements in order to have their projects approved and had to continue to meet applicable requirements in order to be compliant and operate without enforcement issues.

The last few years have seen a significant increase in sustainability reporting regulations around the world. The various types of instruments that are included in ESG reporting frameworks range from "soft laws" to actual legislative requirements (aka "hard laws"). It is important for companies to track the development of the former as it often leads to the latter. Soft laws are things like statements of principles agreed to by nations, information collected on corporate performance by NGOs and presented to governments, and codes and practices developed by industry sectors. These can lead to voluntary reporting and disclosure practices. Self-governing bodies such as industry associations may eventually require members to agree to be bound by these reporting practices. Financial market regulators may become more active and make reporting and disclosure a requirement for companies seeking to raise capital in the markets they regulate. Ultimately, governments may enact legislation making reporting and disclosure mandatory and enforcing criminal sanctions for non-compliance against companies and their officers and directors.

What has changed in recent years is the increased focus placed on environmental and social issues by the investment community, and in particular, by large institutional investors with access to trillions of dollars of capital. So in addition to having to address environmental and social issues to the satisfaction of government regulators, companies are now being asked to demonstrate acceptable performance in these and other areas in order to access the capital needed to fund their projects. It is not just borrowers and issuers who are being asked for their ESG report cards. Banks, pension funds and other investment vehicles are being pressured by their shareholders, members and investors, and by NGOs, to direct investments to companies viewed as having positive environmental and societal impacts and to "disinvest" from industries and jurisdictions perceived to have negative impacts.

The treatment of greenhouse gas emissions as a contributor to global warming and climate change provides a good example of how this issue has moved through the spectrum of provisions described above. The 1992 UN Earth Summit in Rio de Janeiro produced a broad agenda focused on sustainable development that led to the signing of the Kyoto Protocol in 1997. The Protocol was a non-binding statement of intent signed by almost 200 countries but was not ratified until 2005. In the meantime, some companies (e.g. Suncor Energy) started to track their GHG emissions and look at ways to offset those emissions. Governments in some jurisdictions decided to encourage emitters to voluntarily report their emissions to government agencies set up to aggregate and track this data on an industry, region and national basis. Lenders took up the issue and frameworks like the Carbon Disclosure Project developed. Financial regulators jumped in, resulting in the Canadian Securities Administrators CSA Staff Notice 51-333 in 2010 to provide guidance to reporting issuers on disclosure requirements relating to environmental matters (including emissions). The Financial Stability Board's Task Force on Climate-Related Disclosure (TCFD) and the issuance of its recommendations regarding the disclosure of metrics and targets used to assess and manage relevant climate-related risks and opportunities is another example. Eventually, GHG emissions reporting became mandated by law and requirements to reduce these emissions are required in certain jurisdictions.

This progression is now being seen in other areas that fall under the ESG rubric, so it is important for companies to recognize the development of the soft laws and prepare for the possibility that they could ultimately lead to hard laws. Companies should become familiar with the UN Sustainable Development Goals (SDGs) as they form the basis for many of the topics covered in existing and developing ESG reporting frameworks.

The UN Environment Programme on sustainability reporting in the mining industry published a report in September 2020 in which it found a growing demand for more detailed disclosures at the mine-site level and the need for increased government involvement and guidance (such as on national SDG priorities) that can inform the context of sustainability disclosures and make them more meaningful to stakeholders. Among the key findings of this report was that "the management of environmental and social aspects, and sustainability reporting of mining companies is not currently meeting the expectation of interested stakeholders, notably communities affected by mining operations and investors".

Sector-specific reporting provisions are an important part of the overall picture. The two reporting standards that have become the most prominent and most commonly used are the Sustainability Accounting Standards Board (SASB) and the Global Reporting Initiative (GRI). Both organizations have developed documents specific to the mining sector. SASB has its Metals & Mining Sustainability Accounting Standard covering 11 topics ranging from GHG emissions to business ethics and transparency, some of which allow for quantitative measurement while others that are not capable of measurement are dealt with by discussion and analysis. GRI's standards are broken down by topic, such as procurement practices, energy use and anti-corruption, but the organization also uses what it calls "Sector Disclosures" to focus on particular industries. The Mining and Metals Sector Disclosures document is intended to cover key aspects of sustainability performance that are meaningful and relevant to this sector and that are not sufficiently covered by the guidelines and standards of more general application.

While SASB and GRI appear to be emerging as the more commonly applied ESG reporting frameworks, there is a plethora of other standards, principles, guidelines, questionnaires and performance indicators. This makes it difficult for companies, investors and other stakeholders to make meaningful assessments and comparisons. Another important issue is the fact that reporting frameworks focus on aggregate corporate performance and may not provide sufficient detail to provide a reliable basis for assessing individual projects or business units.

There is clearly a need for harmonization and a need to ensure that the data being provided is relevant, useful and assessed in the proper context. For example, data on a company's water usage may be much more relevant if it is operating in an arid region than if it is operating in the tropics.

There is also a need for sectors such as mining to do a better job of communicating their accomplishments in ESG to stakeholders and the media. Despite what many of those critical of the performance of the mining industry assert, the mining sector was one of the first global industries to commit to sustainability reporting through the International Council on Mining and Metals. The Mining Association of Canada's "Towards Sustainable Mining" initiative is certainly a step in the right direction as it makes participation mandatory for all its members. It is also the only program in the world that conducts assessments at the facility level.

Privacy and data protection

Privacy: Canada modernizes its private-sector privacy laws

Karl Schober

Canada is seeing its most significant overhaul to its privacy laws in over 20 years. From the federal Bill C-11 Digital Charter Implementation Act, to Bill 64 primed to significantly overhaul Québec's private sector regime, to a possible brand new private sector statute in Ontario, these changes will create numerous obligations for Canadian and foreign businesses.

Introducing Bill C-11

Since January 1, 2001, Canada's *Personal Information Protection and Electronic Documents Act* or PIPEDA, has been Canada's reigning statute governing how private sector organizations collect, use, disclose and safeguard personal information. On November 17, 2020, the Government of Canada introduced Bill C-11 - the Digital Charter Implementation Act – proposing the new *Consumer Privacy Protection Act* (CPPA) as a replacement for PIPEDA. Bill C-11 represents the long awaited legislative shift to modernize Canada's private-sector privacy law regime.

The following are just some of the key elements that will affect businesses:

New powers and new Tribunal

Compared to other jurisdictions such as the European Union's General Data Protection Regulation (GDPR), Canadian privacy laws have very little teeth. Bill C-11 introduces significant new powers and penalties. Enforcement of the CPPA would be divided between two bodies, the current Office of the Privacy Commissioner of Canada (OPC) as well as a new Tribunal.

The OPC would now have the power to launch an official inquiry under the CPPA, which would have basic rules of evidence, and the OPC would be required to complete an inquiry by rendering an actual decision. A decision, unlike its current "report of findings", is open to legal challenge. The OPC would also have limited order-making powers, as well as the ability to recommend monetary penalties to the new Tribunal.

The new Tribunal would act as an appeal body from findings, orders, or decisions made by the OPC and would be established by companion legislation to the CPPA - the *Personal Information and Data Protection Tribunal Act*. The Tribunal would determine whether to impose a penalty, and it may choose to rely on the OPC's recommendation or may substitute its own decision.

Strongest financial penalties among G7 privacy laws

The CPPA would introduce significant monetary penalties. The maximum penalty for all the contraventions in a recommendation taken together is the higher of CA $10,000,000 and 3% of an organization's gross global revenue in its financial year before the one in which the penalty is imposed.

In addition, an organization that knowingly contravenes certain provisions under the CPPA, such as failing to report a breach, failing to retain information that is the subject of a request or violating an order is guilty of an indictable offence and liable to a maximum fine of the higher of CA $25,000,000 and 5% of the organization's gross global revenue in its financial year, or guilty of an offence punishable on summary conviction and liable to a maximum fine of the higher of CA $20,000,000 and 4% of the organization's gross global revenue in its financial year.

Still a consent-centric regime

Organizations hoping for separate legal bases for processing data similar to those under GDPR may be disappointed. Consent will remain at the centre of the CPPA, though there is some new flexibility when it comes to processing data. Organizations continue to require valid consent to collection, use and disclosure of personal information; however, the validity of consent is now contingent upon certain information being provided in plain language, including:

- The purpose of the collection, use or disclosure
- The way in which the information is to be collected, used or disclosed
- "Any reasonably foreseeable consequences" of such collection, use or disclosure
- The specific type of information that is to be collected, used or disclosed; and
- The names of any third parties or types of third parties to which the organization may disclose the personal information.

Essentially, the core requirements of the OPC's 2018 Guidelines for obtaining meaningful consent are now codified into law.

Further, under Bill C-11, consent would have to be expressly obtained unless the organization could establish that implied consent would be appropriate. This obligation will require organizations to establish new, or increase existing, internal documentation requirements.

Additional exceptions to consent

PIPEDA contains numerous exceptions to knowledge and consent, for example, collecting, using or disclosing information for business transactions, employment purposes or investigating fraud, and these remain under the CPPA. Bill C-11 expands on this by adding a number of exceptions to knowledge or consent, in particular, a business operations exemption.

An organization does not require the knowledge or consent of the individual if the collection and use is:

- Within the reasonable expectation of the individual
- Not for the purposes of influencing the individual's behaviour or decisions (i.e., not for marketing or profiling); and
- Falls within the list of prescribed business activities.

The prescribed list of business activities includes, but is not limited to, activities that are:

- Necessary for the organization's information, system or network security
- Necessary to provide or deliver a product or service that the individual has requested from the organization
- Carried out in the exercise of due diligence to prevent or reduce the organization's commercial risk, or
- Necessary for the safety of the provided or delivered product or service.

While this will be good news for many businesses in respect of their ordinary business activities, the focus on a particular purpose will likely mean the exception is not as flexible as the GDPR's legitimate business interest basis for processing.

Also expressly permitted without knowledge or consent are the following:

- Use of personal information for internal research and development purposes provided the personal information is de-identified prior to doing so
- Use and disclosure of information for prospective and completed business transactions. This was provided in PIPEDA, and the Bill version now includes a requirement to de-identify the information prior to using and disclosing in the context of a proposed business transaction
- Transfers to service providers that will process the information on behalf of the controlling organization
- Disclosures for "socially beneficial purposes" provided the information is de-identified and made to government, health care, post-secondary or similar institutions; and
- Disclosures by a breached organization to other organizations or government that may be in a position to mitigate harm to individuals.

No carve-out for anonymized data

A significant concern and disappointment for many businesses will be the lack of a clear carve-out for 'anonymized' data from the CPPA, as exists in other privacy regimes such as the GDPR. Instead, the CPPA includes a definition of "disposal" – the permanent and irreversible deletion of personal information, which appears to contemplate only actual deletion, not anonymization.

Bill C-11 does introduce a definition of what it means to de-identify personal information, which means to modify personal information — or create information from personal information — by using technical processes to ensure that the information does not identify an individual or could not be used in reasonably foreseeable circumstances, alone or in combination with other information, to identify an individual. However, de-identified information, and arguably anonymized information, will remain subject to the CPPA.

Helpfully, organizations are not required to obtain consent to de-identify personal information or transfer personal information to a service provider. The CPPA does establish an obligation for organizations to de-identify personal information prior to sharing it with parties in the context of a proposed business transaction (for example, in the due diligence phase).

Creation of codes of practice and certification programs

The CPPA would contain new provisions to enable the creation of third-party codes of practice and certification programs as a means of encouraging new sectoral privacy protection self-regulation. The OPC would act as an approval body for entities operating a certification program. The language of the proposed CPPA suggests that participation in these schemes is voluntary (though it is conceivable that licensing bodies could make participation in such a scheme a condition of licensing, or a membership-based organization could make participation a condition of membership). Similar to GDPR, under the CPPA, the OPC would have the ability to approve codes of practice and certification programs. The ability to apply for such approval is not limited to "organizations" but includes all "entities," which would presumably include industry associations, interest groups and other loosely organized affiliations. Codes of practice must offer "substantially the same or greater" protections than those offered under the CPPA.

Of importance, compliance with a code of practice or a certification program does not relieve an organization of its obligations under the CPPA.

Timeline of Bill C-11

Bill C-11 is moving through the legislative process with bipartisan support, though some aspects of the Bill may change before it receives royal assent – which is expected to occur in late 2021. Organizations should then expect a 12-month period to prepare before the Bill comes into force.

Québec's new Bill 64

In addition to the new federal Bill C-11, the Québec government proposed a significant overhaul of its current privacy laws through the introduction of the highly anticipated Bill 64, *An Act to Modernize Legislative Provisions Respecting the Protection of Personal Information* (Bill).

Should the Bill pass, both public and private organizations across Québec would see major reforms and significantly increased obligations as to how they hold and protect their customers' personal data, which in many ways, brings Québec's privacy laws in line with the European Union's GDPR.

The key changes include:

- Bill 64 sets out new rules, similar to the ones under PIPEDA and the GDPR, integrating the "adequacy principle" to the transfer of personal information to a foreign jurisdiction. Before communicating personal information outside Quebec (including outsourcing data processing), businesses will now be required to conduct a privacy impact assessment in order to ensure that the personal information would receive protection equivalent to that afforded under the Bill. The government will also play a role in publishing a list of jurisdictions that it deems as having adequate safeguards.
- Privacy by design obligations for the default settings for companies' technology products.
- New rights for individuals including data portability, the right to be forgotten and the right to object to automated processing of their personal information.
- The requirement to appoint a Chief Privacy Officer and establish governance policies and practices.
- Mandatory breach reporting and notification.
- Significant penalties could be imposed by the Commission d'accès à l'information (CAI) of up to CA $50,000 for an individual and CA $10 million or 2% of worldwide turnover, whichever is greater, and penal sanctions of up to CA $25 million or 4% of worldwide turnover for organizations.
- A private right of action (in other words, statutory damages resulting from the unlawful infringement of a right under the Québec privacy acts).
- The introduction of a "business transaction" exception from consent that would allow personal information to be disclosed without consent in the course of a business transaction.

Timeline for Bill 64

As of the date of writing, Bill 64 has not progressed very quickly. Further, the provisions of Bill 64 would generally come into force one year after the date of its assent in order to give businesses additional time to make the appropriate technological adjustments.

British Columbia and Ontario

Businesses may also see changes to private-sector privacy laws in 2021 in the provinces of British Columbia and Ontario.

The British Columbia government is currently reviewing the province's *Personal Information Protection Act* (PIPA), which governs how private sector organizations must collect and manage personal information. A Special Committee of the Legislative Assembly struck in February 2020 will be issuing its recommendations in 2021.

Lastly, the Ontario government is in a consultation process to determine whether a brand new private sector privacy law is required for Ontario.

> "The Québec government proposed a significant overhaul of its current privacy laws through the introduction of the highly anticipated Bill 64, An Act to Modernize Legislative Provisions Respecting the Protection of Personal Information (Bill).

Communications

Communications: Enhancing trust in electronic communications

Y. Monica Song

In 2021, online content and service delivery models will continue to proliferate, workplaces will stay remote and we will usher in the 5G era of mobile wireless communications. The public importance of ubiquitous wide and narrowband Internet connectivity will only increase as everything from the consumer retail sector, the travel and short-term accommodation industry, the taxi industry, and the health and wellness sectors, to name but a few, are increasingly being overtaken by technology companies reliant on ubiquitous and reliable Internet access. Along with the roll-out of edge computing and new applications such as ultra-reliable low latency communications, enhanced mobile broadband, or massive machine type communications, and new practical applications for big data and Artificial Intelligence (AI), 2021 will in many ways represent a watershed moment in Canada's efforts to harness online service providers and platforms. We anticipate a packed legislative and regulatory reform agenda for the communications and information technology sectors. Specifically, in 2021, we can expect:

A. Measures intended to remove the ring fences that previously may have excluded online service providers and retailers from regulation;

B. Continued focus on broadband deployment and universal access to broadband; and

C. Building on the *Digital Charter Implementation Act, 2020*, measures to promote ethical decision-making and accountability as a means to ensure the resilience of Canada's democracy and that the online experience remains accessible, free of hate and harassment, and secure from cyber threats.

A. Mandated contributions by online players to Canadian cultural policy objectives

The Prime Minister of Canada kicked off 2021 with a Cabinet shuffle and supplementary mid-term Mandate Letters issued to the Ministers in his Cabinet. The supplementary Mandate Letter for the Minister of Canadian Heritage called on Minister of Canadian Heritage Steven Guilbeault to "work to ensure that the revenues of web giants are shared more fairly with our creators and media [...]. The same direction was set out in the supplementary Mandate Letter to the Minister of Innovation, Science and Industry. Consistent with this, we expect that the Government of Canada will deliver on its intention that online content providers and platforms contribute to the achievement of Canadian public policy objectives.

1. **Application of broadcast regulation to foreign online media content providers**

Tabled in the fall of 2020 and barring a federal election, [Bill C-10, An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts] will become law in 2021. Bill C-10 will bring both domestic and foreign online broadcasting platforms within the purview of the federal broadcasting regulatory regime. Bill C-10 contains provisions that would allow the Canadian Radio-television and Telecommunications Commission (CRTC) to make regulations and impose orders on all broadcasting undertakings, including online undertakings that provide Canadians with streamed or on-demand programming, with respect to such things as contributions to creating Canadian content and making that content "discoverable", reporting to the CRTC on subscriber numbers and financial information, and making services accessible for users with disabilities.

2. **Compensation for Canadian news media**

Building on the recommendations of the Broadcasting and Telecommunications Legislative Review Panel, the Government of Canada has promised to introduce new legislation mandating compensation of Canadian news services by what are openly referred to in the public discourse in Canada as online "web giants" such as Facebook and Google. It is a stated Canadian government priority to ensure that large digital services share their revenues with Canadian news media.

Minister Guilbeault and Canadian Heritage officials have publicly stated that they are in discussions with the Communications and Media Ministers of Australia, Finland, France and Germany on such "fair compensation" principles, as well as continuing to support a Canadian-led, multi-stakeholder working group to develop international guiding principles on the "diversity of online content."

For its part, the Department of Innovation, Science and Economic Development (ISED), which oversees the development of copyright policy in Canada, has issued a public consultation on a Modern Copyright Framework for Online Intermediaries (closing at the end of May 2021). One of the stated goals of the consultation is to invite proposals that would achieve a "modern framework" that enables rights holders to negotiate remuneration for protected uses of their content online without any undue imbalance in bargaining power. We expect that any new legislation mandating compensation of Canadian news services will await the conclusion of ISED's public consultation.

3. **Digital taxes**

While not specific to communications sector undertakings, online providers of telecommunications, broadcasting and digital media service should note that in 2021, foreign vendors of digital products or services with no physical presence in Canada can expect to see legislation that subjects their products or services to first, a retail sales tax and second, to a proposed revenue tax measure.

The federal government's proposal to apply the GST/HST to all goods and services consumed in Canada, regardless of the way by which they are supplied or the entity supplying them is to take effect starting in July 2021. Some Canadian provinces have already amended their frameworks to introduce rules for cross-border supply of digital services by foreign undertakings. Since 2019, Quebec requires foreign vendors without a significant presence in Quebec to register for and collect the Quebec Sales Tax (the provincial value added tax) on their sales to Quebec-based consumers. Saskatchewan introduced similar rules in 2019 for companies to register and comply with the Provincial Sales Tax system. Finally, similar rules will come in effect in British Columbia in 2021.

The Government of Canada is also seeking to introduce a temporary corporate level tax of 3 per cent of revenue on non-resident corporations providing certain digital services that are reliant on the participation of users in Canada, including by the provision of data and content contributions, by January 1, 2022. This tax would be in place temporarily until a multilateral solution, currently being negotiated through the Organisation for Economic Co-operation and Development, is in place. Details of the proposed measure, including the proposed revenue thresholds and definition of in-scope revenues from certain digital services are set out in an April 19 consultation paper issued by the Department of Finance coincident with the tabling of Budget 2021.

B. High quality and ubiquitous connectivity services

The ongoing digital transformation of the communications sector and the growth of the digital economy means that Canadians rely more heavily on telecommunications access for many aspects of their daily lives. 2021 promises to be busy for both the CRTC and Canada's spectrum regulator, the Minister of Innovation, Science and Industry and ISED.

1. Laying the groundwork for fifth generation mobile communications networks

The retail mobile wireless service market is the largest and fastest-growing telecommunications market in Canada. As the number of connected devices multiplies as a result of the growth of the IoT market, and as more Canadians rely on mobile wireless services to communicate and access online content, demand for mobile wireless services will only continue to grow.

In 2021, both Canada's spectrum regulator and CRTC will undertake work to establish the groundwork for Canada's fifth generation wireless communication networks. To address our ever-growing demand for mobile wireless services, a spectrum auction will be held in 2021 for the 3450-3650 MHz band. The 3450-3650 MHz band is considered to be a priority for the deployment of 5G wireless technology and the conclusion of the spectrum auction will bring us one step closer to 5G services being widely available in Canada.

Moreover, in 2021, we will likely know the outcome of ISED's recent consultation on the repurposing and release of the 3650-4200 MHz spectrum band, including the fate of Telesat's proposal to be permitted to privately auction spectrum in the 3700-4000 MHz band, the proceeds of which Telesat proposes to use to fund the build out of its LEO satellite system.

2. Broadband funding programs

In Telecom Regulatory Policy CRTC 2016-496 (TRP 2016-496), the CRTC established a universal service objective of ensuring that all Canadians, in urban areas, as well as in rural and remote areas, have access to fixed broadband Internet access services at speeds of at least 50Mbps download and 10Mbps upload, along with the ability to subscribe to a service offering unlimited data allowance.

According to the 2020 CRTC Communications Monitoring Report, in 2019, 87.4% of Canadian households had access to the CRTC's target speeds of 50Mbps/10Mbps with an unlimited data offering. This means that 12.6% of Canadian households were considered to be "underserved" in 2019. The proportion of underserved households is significantly higher in rural communities. Indeed, in 2019, only 45.6% of rural households had access to speeds of 50Mbps/10Mbps with an unlimited data offering.

To address this connectivity gap, the Federal Government has committed to connecting 98% of Canadians to speeds of 50Mbps/10Mbps by 2026 and 100% by 2030.[1] The Federal Government has launched a total of eight (8) funding programs to incentivize broadband infrastructure investments in Canada, totalling approximately $7.4 billion, a significant proportion of which have been awarded with more to follow in 2021. Additionally, four (4) provincial governments have launched broadband funding programs to incentivize broadband infrastructure investments in their respective province, totalling approximately $1.45 billion. In contrast to the federal broadband funding initiatives, most of the provincial programs are only getting under way.

1 See Innovation Science and Economic Development Canada, Press Release, March 16, 2021: https://www.canada.ca/en/innovation-science-economic-development/news/2021/03/universal-broadband-fundsupported-projects-will-bring-high-speed-internet-to-alberta-communities.html.

A decision is expected in 2021 in the CRTC's proceedings to consider the adoption of measures to facilitate wholesale access of incumbent carrier pole infrastructure and to remove barriers to the deployment of broadband infrastructure in underserved areas of Canada.

3. **MVNOs, barriers to competition and net neutrality in the spotlight**

Against the backdrop of these major policy initiatives, in 2021, the CRTC and ISED will be called upon to determine a number of issues relevant to the maintenance and promotion of a competitive telecommunications market in Canada.

Already in the first trimester of 2021, the CRTC has determined in Telecom Regulatory Policy CRTC 2021-130 that the Big Three Canadian wireless carriers would be required to provide a further wholesale MVNO access service to benefit smaller regional wireless carriers by allowing the latter's subscribers to permanently roam on the radio access networks of the Big Three for a period of seven years. This new wholesale MVNO access service is in addition to the mandated wholesale roaming service that the Big Three are required to provide to regional wireless carriers on a tariffed basis.

In addition, the CRTC has found that Bell Canada engaged multiple violations of the terms of its wholesale support structure tariffs and licence agreements granted to itself an undue preference over a competitor (Videotron) by unreasonably delaying the processing of four of the competitor's support structure permit applications for purposes of attaching the competitor's fibre to Bell's aerial pole infrastructure. While resolving support structure disputes is nothing new, in an unprecedented move, the CRTC will be proceeding to impose administrative monetary penalties on the basis of these violations. Bell Canada could face penalties of $10 million per violation.

a public consultation on a Modern Copyright Framework for Online Intermediaries (closing at the end of May 2021). That consultation proposes that website blocking be expressly set out as a statutory remedy under the *Copyright Act*.

A decision from the Federal Court of Appeal in the Gold TV matter that is expected in 2021 could have profound implications for the law of common carriage, net neutrality and ISP liability in Canada. An independent ISP appealed a 2020 decision of the Federal Court, which, on the motion of large broadcasting undertakings in Canada, granted an injunction under the *Copyright Act* that would require ISPs to engage in network-level blocking of identifiers and websites related to Gold TV. Prior to their successful court action, the moving parties had initially asked the CRTC to implement a website blocking regime under section 36 of the *Telecommunications Act*, which the CRTC refused on grounds that the matter implicated copyright, which lies beyond the jurisdiction of the CRTC. The appellant and various interveners have argued that the website blocking injunction is not available under the *Copyright Act*, and violates section 36 of the *Telecommunications Act*, which is one of the sources of net neutrality obligations in Canada. As already referred to above, ISED, which oversees the development of copyright policy in Canada, has issued

C. Enhancing trust

The increased reliance on cloud-based infrastructure puts the spotlight on the need to ensure that such infrastructure is properly protected from security threats and that the online environment does not engender undue nuisance and harm. Looking ahead to 2021 and beyond, telecommunications service providers and over-the-top content and service providers will have their hands full with a panoply of legislative and regulatory measures to ensure safety and security and thereby enhance trust in the Internet as a driver of economic activity. We highlight a few key developments that we are monitoring on behalf of our clients:

(a) Modernization of privacy legislation in Canada: As addressed in the "Privacy" trends piece in the 2021 edition of Dentons' Pick of Regulatory trends to watch, if adopted, Bill C-11, aka the *Digital Charter Implementation Act, 2020* and Quebec's Bill 64 will likely see the introduction of order-making powers and new penalties. Ontario appears to be following suit, having launched a consultation on measures that could improve privacy protections for Ontarians. If Bill C-11 is adopted before the current 43rd Parliament of Canada is concluded, in addition to new order-making powers and an administrative monetary penalty regime, it may also address automated decision-making via AI and algorithms. Specifically, Bill C-11 proposes to increase transparency in automated decision-making by requiring organizations to readily make information available regarding the technologies used to make predictions, recommendations or decisions about individuals.

(b) Mitigating "harmful" content: Over and above the backstop of criminal law, Canada continues to explore the possibility of sector-specific legislation to inhibit the proliferation of yet-to-be defined harmful content and online harms. Canadian Heritage Minister Stephen Guilbeault has stated that the government will soon introduce a new regulatory framework (and potentially, a new regulatory body) that will require online platforms to remove illegal content, focusing on material relating to child sexual exploitation, terrorism, inciting violence, hate speech, and non-consensual sharing of intimate images.

(c) Mitigation of nuisance calling: The CRTC continues to work with the telecommunications service provider industry to implement network-level technological measures to mitigate botnets and number spoofing. In 2021, we will see whether the CRTC will succeed in corralling the industry to implement such measures as widely as possible to maximise their effectiveness in the public interest.

(d) Accessibility remains a priority: Undertakings regulated under the *Telecommunications Act* and the *Broadcasting Act* will be required to implement accessible service obligations under new regulations that will come into force in July 2021 pursuant to the federal *Accessible Canada Act*. 2021 also marks the five-year anniversary of mandated Video Relay Services in Canada and the CRTC's scheduled review of the regime in the Review of video relay service proceeding.

(e) Critical infrastructure and cyber security are in the lexicon: The increased reliance on cloud-based infrastructure puts the spotlight on the need to ensure that such infrastructure is properly protected from cyber security threats. Indeed, the Federal Government, through its National Strategy for Critical Infrastructure and corresponding Action Plan for Critical Infrastructure, has made it a priority to protect critical infrastructure in the information and communication technology sector from cyber security threats. As part of this strategy, in 2020, ISED established the Canadian Forum for Digital Infrastructure Resilience, a public-private partnership aimed at enhancing the resilience of critical digital infrastructure and whose current focus areas include cloud security, IoT security and Internet resilience. The federal government recently announced a CAD $80 million funding envelope called "Cyber Security Innovation Network" for research and development and the commercialisation of cyber security products and services in Canada.

D. Conclusion

If the rumours of an imminent federal election ring true, Bill C-10, Bill C-11 and future legislative proposals aimed at regulating online platforms may not become law, leaving these issues to be determined by the next Parliament. The rumours of an imminent federal election also make it less likely that the long-awaited reforms to the *Telecommunications Act* will be introduced in the near future. One thing is for certain – the perceived need to respond through legislative, regulatory and policy measures to the digital transformation of the communications industry and of the economy as a whole – is here to stay, in 2021 and beyond. And as Canada forges ahead on multiple fronts to grapple with the transformation of its economy, democratic institutions and cultural fabric, we anticipate much debate and dissent on policy, jurisdictional, trade law and other legal grounds.

With contributions from Margot Patterson, Counsel and member of the Communications and Intellectual Property Law Practice Groups with Dentons Canada LLP.

Trade

Trade: The continued impact of COVID, CUSMA implementation and other significant developments in international trade relating to Canada

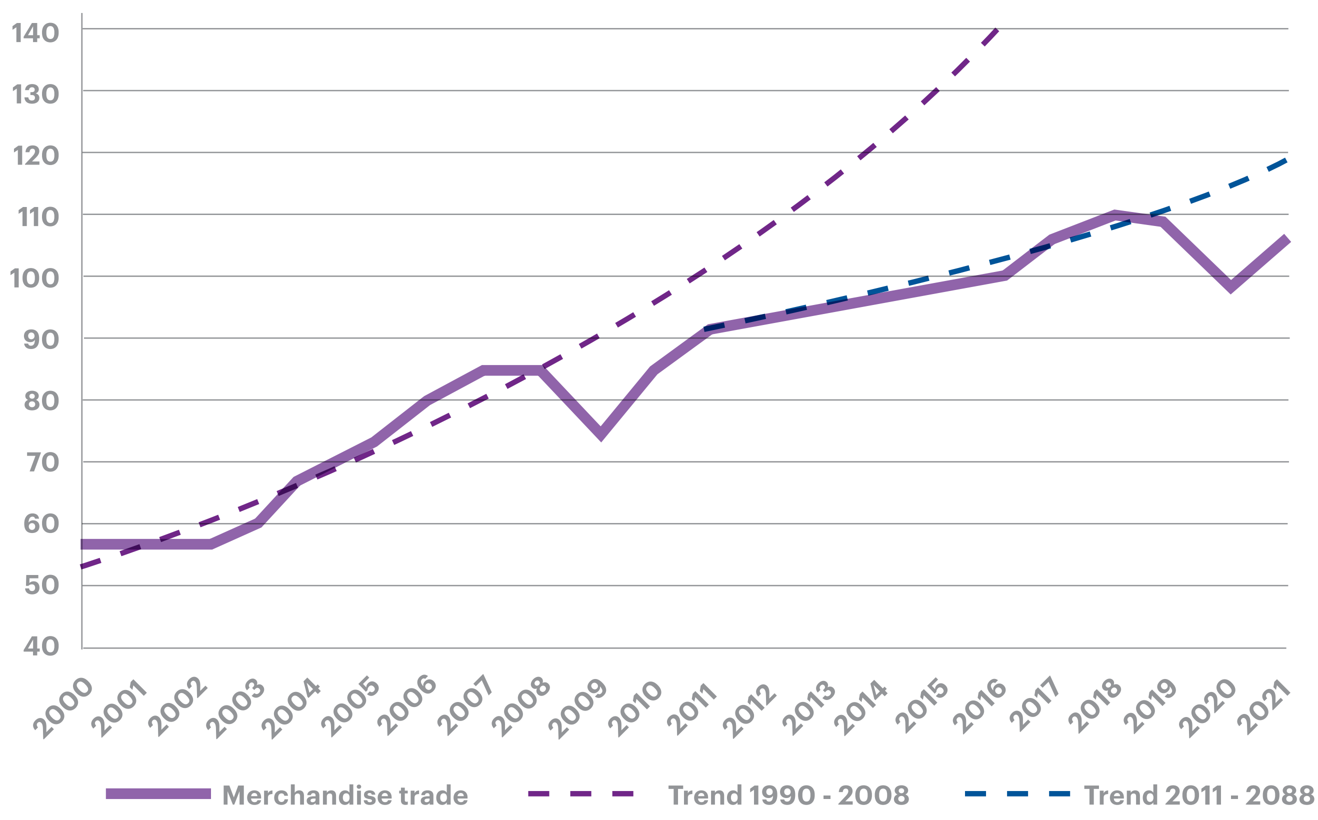
Paul M. Lalonde and Sean Stephenson

2020 was, to say the least, an unusually active year on the trade front. While 2021 may not be as spectacularly eventful, we nonetheless anticipate several significant developments in international trade, and specifically trade related to Canada, over the coming year. COVID-19 will continue to affect global trade flows and economic growth throughout 2021. The pandemic has highlighted the significance of e-commerce and the importance of new digital trade chapters included in mega-regional trade agreements (like the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) as well as standalone e-commerce agreements. We also anticipate further East-West decoupling to impact trade through measures focused on separate supply chains for strategic technology and defence goods, as well as ESG-related supply chain legislation, such as legislation governing modern slavery and human trafficking.

In Canada, the recently implemented free trade agreements will continue to be ramped up. In relation to the Canada-United States-Mexico Agreement (CUSMA), this has meant the re-emergence of dispute resolution between Canada and the US. This has already included long term disputes such as softwood lumber and new disputes relating to market access for dairy and duties on solar energy products. Throughout the year, further trade disputes may emerge as Canada looks to regulate and tax digital services and implement amendments to its broadcasting legislation. At the World Trade Organization (WTO), appeals continue to be hampered by the stalemate to appoint new Appellate Body members. The election of a new WTO Director-General and a potentially different approach to trade, specifically at the WTO, under a Biden Administration, may break that deadlock.

1. The continued impact of COVID-19 on trade

International merchandise trade will continue to slowly recover from the significant impacts of the COVID-19 pandemic. Forecasts for 2021 remain positive. The WTO has noted that though there are still various challenges, recovery is in sight. The WTO forecasts a 7.2% rise in trade over the course of 2021. The World Bank similarly predicts 4% global economic growth over the course of the year, with the Chinese economy predicted to expand by 7.9%. Such forecasts depend on the evolution of the pandemic throughout the year and government responses to it. However, these growth forecasts imply continued resilience in trade and notably in East-West shipping, a key global trade indicator.



Source: WTO Secretariat

2. Continued CUSMA implementation

On July 1, 2020, the Canada-United States-Mexico Agreement (CUSMA) entered into force. Since its implementation, Canada and the United States have shown their willingness to re-engage in state to state dispute resolution under the agreement's improved dispute resolution processes. State to state dispute resolution under the CUSMA's predecessor NAFTA had stalled due to procedural wrangling that effectively blocked the dispute resolution process. With the US's challenge of Canada's dairy quotas, the continuing softwood lumber dispute, and the imposition of US safeguard tariffs on Canadian solar products, it is safe to say that dispute resolution is back between Canada and the US.

A. DAIRY TARIFF-RATE QUOTA DISPUTE

On December 9, 2020, the US announced the first CUSMA dispute under Chapter 31 of the CUSMA. The dispute relates to Canada's allocation of dairy tariff-rate quotas on milk, cream, cheese, industrial cheese, milk powders, condensed milk and butter, among other goods, and targets Canada's:

- practice of setting aside certain allocations to processors and subsequently not being able to allocate requested quantities;
- administration of the tariff quotas; and
- additional criteria not contained in Canada's CUSMA schedule in the allocation process.

The dispute is currently in a consultation phase. Canada has not yet released any official public response. With the recent US election, it is unclear if the Biden Administration will pursue this dispute in the same manner. Should the parties not be able to resolve the dispute in the consultation stage, a dispute resolution panel could be formed under the CUSMA to decide the issue.

B. SOFTWOOD LUMBER DISPUTE

On December 11, 2020, Canada announced that it had requested a panel review under Chapter 10 of the CUSMA regarding the US countervailing duties on imports of Canadian softwood lumber. The request is responsive to the most recent US imposition of duties on Canadian softwood lumber based on a Department of Commerce review of antidumping duty and countervailing duty investigations of imports of certain softwood lumber products from Canada. On November 24, 2020, Commerce established through the first administration process a 7.42% countervailing duty rate for most Canadian producers of softwood lumber. Under Chapter 10 of CUSMA, the parties have a right to challenge each other's antidumping and countervailing duty decisions in front of an expert panel with members from the countries involved in the dispute. The dispute will now move through the CUSMA's dispute resolution process.

C. CANADIAN SOLAR PRODUCTS

On December 22, 2020, Canada requested consultations with the US under Chapter 31 of CUSMA to address the continued imposition of US safeguard tariffs on Canadian solar products. Since early 2018, the US safeguard tariffs have caused Canada's exports of solar products to the US to decline by as much as 82%. On July 23, 2018, Canada requested under the North American Free Trade Agreement (NAFTA) dispute settlement consultations with the US. However, the US blocked Canada's attempts to resolve this issue under NAFTA. With the new CUSMA provisions, the US cannot unilaterally block dispute settlement proceedings. Similar to the dairy dispute, this dispute is currently in consultation and may be subject to the state to state dispute resolution process, which includes the formation of an adjudicative panel.

3. Canada and e-commerce

The COVID-19 pandemic has highlighted the importance of e-commerce and trade. Since 2019, Canada has supported the WTO's negotiations on e-commerce and held a consultation process. In 2020, the Canadian government expressed its interest in joining the Digital Economy Partnership Agreement between Chile, New Zealand, and Singapore, which promotes digital trade and interoperability between different regimes and addresses the new issues brought about by digitalization. This interest follows the inclusion of digital or e-commerce chapters in Canada's most recent mega-regional trade agreements such as CUSMA, the CPTPP and the CETA.

4. Brexit and the Canada-United Kingdom Trade Continuity Agreement

Canada and the United Kingdom agreed on a transitional trade agreement entitled the Canada-United Kingdom Trade Continuity Agreement ("Canada-UK TCA" or TCA) shortly before the end of 2020. The Canada-UK TCA replaces the Canada-EU Comprehensive Economic Trade Agreement (CETA), which governed Canada-UK trade prior to Brexit and during the 2020 transition year.

The Canada-UK TCA is currently working its way through both the Canadian and UK Parliaments. The final text of the TCA can be found here. In the TCA both parties have agreed to continue following CETA, subject to the provisions and modifications of the agreement and its applicable appendices. Canada published the UK Trade Continuity Remission Order, 2021 (Order). This Order preserves access to CETA duty rates for imports from the UK and allows importers to maintain their current trading levels without fear of higher duty rates affecting their bottom line. The Order came into effect on January 1, 2021, and will remain in place until the TCA is formally passed into law. As a result, importers must still ensure their products meet the rules of origin under CETA in order to qualify for the Order.

Throughout 2021 consultations and negotiations on the new Canada-UK Free Trade Agreement will commence, with an understanding that both parties will work towards a final agreement by 2024.

5. Modern slavery legislation potentially coming into force

Bill S-216, An Act to enact the Modern Slavery Act and to amend the Customs Tariff (Bill), was introduced in the Senate on October 29, 2020. This Bill has received two readings in the Senate and will continue to work through the legislative process in 2021. The Bill, in its current form, includes reporting requirements for certain designated entities. We have previously written about the Bill here. We believe that Canada will pass modern slavery legislation similar to its current form in the near term. Several jurisdictions around the world have recently implemented modern slavery legislation.

In addition to the Bill, Canada is actively taking measures against companies that engage in modern slavery practices. In a coordinated action with the UK and later the US, Canada imposed measures related to the human rights situation in the Xinjian Uyghur Autonomous Region. These measures include addressing the risk of forced labour from any country from entering into Canadian and global supply chains by prohibiting the imports of goods produced wholly or in part by forced labour.

6. Digital and broadcasting tax and trade

On November 30, 2020, Canada set out its Fall Economic Statement which included a digital tax if one has not been agreed to under the current Organisation for Economic Co-operation and Development (OECD) digital tax consultations by January 1, 2022. Alongside recent amendments to Canada's *Broadcasting Act* that mandates payments to support Canadian content production, these measures may attract future trade and investment agreement scrutiny. Notably, the US and France are currently disputing a similar digital tax, with a US 25% retaliatory tariff on French goods having been thus far delayed. The US has already launched probes into the UK, Italy, Turkey, Austria, Brazil, Indonesia and the EU for similar digital service taxes.

7. WTO D-G elections, and Appellate Body still in crisis

We anticipate that in 2021 a new Director-General of the WTO will be elected. In May 2020, former Director-General Roberto Azevêdo announced his surprise resignation from the office of WTO Director-General, which took effect on August 31, 2020, a year before the expiry of his mandate. Azevêdo's resignation meant that the WTO had to find a new Director-General in a shortened process. At the end of the nomination period, eight candidates were put forward by WTO members. At the final round of consultations, Dr. Ngozi Okonjo-Iweala from Nigeria had significant support for the position. A final decision had to be taken at a General Council meeting. This meeting was meant to take place on November 9, 2020; however, it was postponed until further notice. The election of the Director-General must be by consensus. It still remains unclear as to whether that will be achieved.

Another event to look out for in 2021 is the development of the current, inoperative WTO Appellate Body. As discussed in a previous article, since December 2019, the WTO Appellate Body has been placed in a state of paralysis due to political disagreements between WTO members that have blocked new adjudicators' appointments. As a result, the Appellate Body lacks the quorum necessary to hear appeals, grinding the dispute settlement system to a halt. This paralysis created uncertainty in 2020 as the number of appeals increased, and this will continue into 2021, leaving countries to either wait it out or seek a resolution by negotiating with the other party to arbitrate the dispute outside of this forum. Nonetheless, for those countries that signed onto the Interim Appeal Arbitration Agreement, they may wish to continue such an arrangement until the Appellate Body is fully functional again.

Foreign Investment Review

Foreign Investment Review: Expanding role for national security in Canada's foreign investment review

Sandy Walker

Most foreign investors will enter Canada without a hiccup. However, a small number of transactions may receive closer scrutiny under Canada's foreign investment review law, the Investment Canada Act (ICA). In 2021, that scrutiny is increasingly likely to be in the form of review under the ICA's national security review process rather than its "net benefit to Canada" review process.

As the monetary thresholds for "net benefit to Canada" review have risen dramatically in the past six years (at least for private sector investors), fewer transactions are subject to ministerial approval under this process. At the same time, however, the ICA's national security review process gives the Canadian government wide discretion to screen a broader range of investments - the acquisition of an existing business or the establishment of a new Canadian business, whether large or small, and whether involving minority interests or control stakes. As "national security" is an undefined term in the ICA, it is an elastic concept that has the flexibility to apply not only to traditional security and defence considerations but also to concerns such as economic security (e.g., self-sufficiency in the health care sector). As a consequence, "national security" can evolve, and is evolving, to encompass new circumstances, including the digitalization of the economy and related risks such as data protection. But while the government has this adaptable instrument to address perceived threats from foreign investment, the lack of clarity and predictability about the scope of potential national security concerns has created uncertainty for some foreign investors.

In addition, Canadian investments by companies controlled by foreign governments or individuals with close ties to foreign investments are continuing to be subject to elevated scrutiny as demonstrated by the government's recent rejection of a Chinese SOE acquisition of a gold mining company in northern Canada.

As a result of these trends, foreign investments in certain sectors and by certain investors may face longer and more difficult clearance processes under the ICA, while the vast majority of foreign investments will continue to sail through ICA screening with relative ease. Canadian companies investing abroad could also face tougher restrictions on planned acquisitions outside of Canada given the proliferation of new and more stringent foreign investment rules abroad.

In summary, our pick of regulatory trends on foreign investment and national security for 2021 includes:

- Heightened use of the national security review process to monitor and potentially block, or require mitigation of risks related to, certain investments by foreigners in Canada. In particular, the Canadian government has indicated it will more closely scrutinize transactions involving the acquisition of companies in health care-related sectors and other sectors involving the supply of critical goods and services to Canadians and the Canadian government and the sale of Canadian companies at distressed values.
- Closer review of investments by state-owned enterprises (SOEs) and individuals or entities closely linked to foreign governments.
- Broader scope of national security review to increasingly encompass risks related to the digital economy, including access to data involving personal information.
- "Thicker" borders for Canadians investing abroad as foreign investment/national security rules multiply at a global level, especially in relation to critical technology, infrastructure (e.g., 5G networks) and data.

A. Investment Canada Act – The basics

The key elements of the foreign investment review regime under the ICA are:

- Acquisitions of control of Canadian businesses, whether currently foreign-owned or not, are subject either to:
    - "net benefit to Canada" review and pre-closing approval by the responsible Minister for investments meeting certain monetary thresholds, or
    - notification (pre or post closing) for all other foreign acquisitions of control.
- Notifications are required for the establishment of a new Canadian business.
- National security screening applies to foreign acquisitions of all sizes including minority interests and to investments in new businesses.

NET BENEFIT TO CANADA REVIEW

Certain direct acquisitions of control of Canadian businesses are subject to review under the "net benefit to Canada" test, a type of national interest test that applies only to acquisitions exceeding very high monetary thresholds for investors ultimately controlled by nationals of a World Trade Organization (WTO) member country or of a country with a trade agreement with Canada, where the target is not engaged in a "cultural business"[1]. Such transactions must be approved by the Minister of Innovation, Science and Industry. (The responsible minister for cultural business investments is the Minister of Canadian Heritage.) Where a transaction falls below the "net benefit to Canada" review threshold, the foreign investor is obliged to file a notification, a short form that includes information on the investor (e.g., who ultimately controls and the extent of foreign government influence over the investor), the Canadian business being acquired and the size of the investment.

As we noted in our 2020 regulatory trends forecast, "net benefit to Canada" review has been on the decline for several years due to a sharp increase in review thresholds over the past six years. There are two main exceptions. First, investments by SOEs from WTO countries are subject to a lower asset value threshold (CA$415 million in target's book value of assets in 2021). Second, investments in businesses that carry on some cultural business activities continue to be subject to very low review thresholds (book value of target assets of CA$5 million) as are acquisitions of Canadian businesses by investors not controlled by WTO nationals from non-WTO sellers (there are very few non-WTO countries).

NATIONAL SECURITY REVIEW

The second review process under the ICA (introduced in 2009) allows the federal Cabinet to take measures to address national security risks related to foreign investments. Those measures include blocking the acquisition of an interest in a Canadian business (or the establishment of a new Canadian business) or authorizing an investment subject to terms and conditions. If an investment has already been completed, the Cabinet can also order a divestiture of the business and such disposition may occur at fire sale prices. Investments subject to national security review include acquisitions of control of Canadian businesses (whether or not Canadian owned) of any monetary value, minority investments and the establishment of a Canadian business. In addition, national security reviews can be lengthy – up to 200 days or longer with the investor's consent.

1 The 2021 "net benefit to Canada" review threshold for WTO investors is a target enterprise value of CA$1.043 billion while the threshold for trade agreement investors is CA$1.565 billion, where the target is not engaged in a "cultural business".

B. Trends to watch in 2021

TREND #1:

NATIONAL SECURITY SCREENING, RATHER THAN "NET BENEFIT TO CANADA" REVIEW, WILL BE THE INVESTMENT CANADA REVIEW PROCESS OF GREATEST CONCERN TO MOST FOREIGN INVESTORS

The government's most recent Annual Report - Investment Canada Act (from 2018-2019) states 962 filings were made in the government's fiscal year ended March 31, 2019 in respect of the acquisition of control of a Canadian business or the establishment of a Canadian business. However, only a small fraction (nine, or less than 1%) of that number received a notice of possible national security review (effectively an extension of the initial screening period) and/or a formal national security review order made by Cabinet.

Despite this small number, foreign investors need to consider the potential for national security review where the investment relates to a range of factors outlined in the government's Guidelines on the National Security Review of Investments. These factors include, among other things, target businesses engaged in defence industries, critical infrastructure and sensitive technology or those whose physical plant is located close to sensitive military or communications facilities. What's new is that the Minister of Innovation, Science and Industry (ISI) added a gloss to the list of risk factors in April 2020, a month into the COVID-19 pandemic. Then ISI Minister Bains issued a statement providing guidance on how the government would exercise its review discretion both under the "net benefit" review process and the national security review process. Specifically, the Minister flagged concerns about the economy during the pandemic including acquisitions of distressed Canadian companies at bargain basement prices. In addition, the Minister signalled that the government would more closely scrutinize investments involving health care-related industries as well as those providing critical goods and services to Canadians and governments.

The Canadian government's concerns in the health care sector likely reflect worries about the level of domestic capacity or self-sufficiency in health care (e.g., production of vaccines, drugs or personal protective equipment or PPE). With respect to "critical goods and services", this term could encompass a broad array of industries from food to information and communication technologies to finance and manufacturing. Despite the Minister's statement, 2020 did not witness a rash of rejected foreign investments in those sectors (at least publicly). Nevertheless, we expect that in 2021 the government will continue to closely review acquisitions of Canadian businesses, especially distressed Canadian businesses and firms in sectors related to health and critical goods, services and infrastructure, given the ongoing impact of the pandemic on the economy.

TREND #2:

ENHANCED SCRUTINY OF INVESTMENTS BY SOES AND PRIVATE INVESTORS CLOSELY TIED TO OR SUBJECT TO DIRECTION FROM FOREIGN GOVERNMENTS

In April 2020, the Minister of Innovation, Science and Industry indicated that investments by SOEs and by individuals closely tied to foreign governments would be subject to enhanced scrutiny – meaning more probing questions over a longer period of time. This policy applies to all investments in Canada, whether they are subject to "net benefit" review and/or national security review.

The first point of interest is that the statement expressly addressed investments not just by SOEs but also by investors controlled by individuals with strong links to foreign states. While SOEs are defined broadly in the ICA, it is noteworthy that in a short statement, the Minister chose to highlight its application to individuals with close ties to foreign states.

Second, the statement reflects the current government's more sober view of SOE investment over the last few years. A number of factors are responsible: the rise in global geo-political tensions fueled by mercantilism and combative rhetoric, greater concerns about cyber-security (including in relation to 5G networks), and a chill in relations between Canada and China. Greater scrutiny of SOE investments (versus private sector investment) is not entirely new in Canada. SOE investments have been subject to a lower "net benefit" review threshold for several years and state-owned investor guidelines were first issued by the previous government in 2007. However, given increasing frictions at the international level, it is clear that Canada, along with many other countries, is applying more stringent screening to some SOE investments.

The most recent public rejection of an SOE acquisition occurred on December 22, 2020 when the federal Cabinet blocked Chinese provincial SOE, Shandong Gold Mining Co. Ltd., from acquiring TMAC Resources, a junior gold mining company in Nunavut (northern Canada) on national security grounds[2]. The deal, which was first announced in May 2020, received notice of a national security review in October 2020. Although the Canadian government has not provided reasons for its decision, citing confidentiality under the Investment Canada Act, key concerns appear to have been TMAC's location on an inlet to the Northwest Passage which serves as a shipping route between the Atlantic and Pacific Oceans – and potentially raises Canadian sovereignty issues - and TMAC's proximity to one of a chain of Canadian early warning radar stations. Press reports also indicate that the US government had pressured Canada to reject the transaction.

We anticipate that the Canadian government will continue to subject SOE investments to enhanced review in 2021. Nevertheless, many SOE investments will proceed undeterred either because the SOE investor is not regarded as a threat or the target Canadian business does not involve particular vulnerabilities.

2 See, for example, https://financialpost.com/commodities/mining/canada-blocks-china-shandong-gold-mining-buying-tmac; https://www.wsj.com/articles/chinas-move-to-buy-arctic-gold-mine-draws-fire-in-canada-11595764801; and https://www.theglobeandmail.com/business/industry-news/energy-and-resources/article-ottawa-rejects-bid-by-chinas-shandong-gold-for-canadian-miner-tmac/

TREND #3:

MORE NATIONAL SECURITY CONCERNS RAISED BY THE DIGITALIZATION OF THE ECONOMY, INCLUDING ACCESS TO DATA

Given the diffusion of technology in all aspects of the economy and the significance of data and communication networks, national security is expanding well beyond traditional domains such as national defence, creating uncertainty for some investors about whether their proposed transaction will be delayed or threatened by a national security review.

For example, an acquisition that gives a foreign investor access to data, in particular, sensitive personal information, can raise national security risks. As many businesses rely upon vast stores of personal information, an investment in a wide variety of businesses from financial services to dating applications could trigger national security concerns. In 2019, the Committee on Foreign Investment in the US or "CFIUS", the body responsible for national security screening of US investments, required the divestiture by Beijing Kunlun Tech Co. Ltd., a Chinese gaming company, of its interest in Grindr, a dating app for the LGBTQ community. A key national security concern related to access by a Chinese company to a database containing personal information such as user location, messages and medical information.

A government concern about foreign access to sensitive personal or business information does not necessarily mean that the investment will be prohibited outright. The Canadian government's 2018-2019 annual report offers a list of potential mitigation measures that have been considered in national security cases, including a number that could be relevant to investments involving data and information flows:

- Requiring that all servicing and support for some or all business lines be conducted in Canada;
- Creating approved corporate security protocols to safeguard information and access to a site;
- Requiring employees with access to sensitive information to attest to compliance with approved security protocols;
- Providing notice to the Minister of new prospective employees who would have access to sensitive Information or technology as a part of their job description.

2021 is likely to witness even greater volumes of data being collected (e.g., with the Internet of Things) and used across a broader range of economic sectors. With this evolution, we can expect even more foreign acquisitions of Canadian businesses will be subject to close monitoring under the national security review process.

TREND #4:

THICKENING BORDERS TO FOREIGN INVESTMENT AROUND THE WORLD

2020 saw the proliferation of new and enhanced national security screening processes around the globe, including in the UK, Germany, France, Italy, Spain and Australia. Foreign investment review is widely regarded as an important policy instrument at a national and sometimes supra-national level as governments address concerns about threats to national security, critical infrastructure (e.g., communications networks) and sensitive technologies from foreign investors. Canadian investors in those sectors outside of Canada will need to be aware of these potential restrictions and how they may apply. Even Canadian pension funds will have to contend with more close questioning from some regimes (e.g., Australia) that characterize them as state-owned. For a survey of national security laws globally, please see Dentons' Foreign Direct Investment (FDI) Global Tracker.

C. Conclusion

In summary, our expectation is that a higher but still relatively small number of foreign investments in Canada may face greater headwinds due to heightened governmental scrutiny of a broader range of national security concerns. Foreign investors can address this risk by giving early consideration to the potential for national security concerns and possible mitigating measures as well as consultation with the federal government to gauge its likely reaction to the investment.

Over the past year, some Canadian politicians have openly advocated for much more stringent restrictions on foreign investment. In particular, in June 2020, some members of the House of Commons Industry Committee suggested a review of the Investment Canada Act and further restrictions such as lowering "net benefit" review thresholds to protect Canadian "strategic industries" as well as a temporary moratorium on acquisitions by SOEs from authoritarian countries.

Despite this, our expectation is that 2021 is unlikely to witness a raft of new rules restricting foreign investment into Canada. New legal measures are unlikely to find traction in part because the government already has the ability to block any transaction it chooses on the basis of "national security" concerns so the necessity of taking such drastic steps is questionable. Second, the Canadian government cannot ignore the significant role played by foreign capital in expanding the economy. And the COVID-19 pandemic has only amplified the need for foreign investment to spur economic growth and a much-needed recovery.

Anti-corruption

Anti-corruption: A busy year ahead for financial crime enforcement

Anthony J. Cole, Paul M. Lalonde and Murray A. Rodych

2021 will offer an interesting spotlight on the Government of Canada's commitment to its anti-corruption enforcement activity. 2020 was largely silent on anti-corruption activities and enforcement as compared to 2019, which had seen an uptick in cases from previous years, particularly when considering the SNC-Lavalin prosecution and legislation establishing the Canadian Deferred Prosecution Agreement (DPA) regime (called 'Remediation Agreements' in Canada).

Charges against an individual as opposed to a corporation is a trend witnessed over the last few years in Canada in relation to the enforcement of the Corruption of Foreign Public Officials Act (CFPOA). This trend continued in 2020, notably with charges being laid in late 2020 (resulting from an investigation initiated in October 2018), against a former executive of IMEX Systems Inc., after new management of the company, self-reported allegations of bribery relating to activities in Botswana to the RCMP. The former executive, Mr. Damodar Arapakota is charged with bribing a public official from Botswana under section 3(1) of the CFPOA for providing financial benefits to a Botswanan public official and their family.

While 2020 did not see the use of the Remediation Agreement provisions of the *Criminal Code*, we anticipate the possibility of greater use of this means of resolving a corruption charge in 2021. The regime has now been in effect long enough for corruption investigations active since the regime was first introduced to reach their conclusion, requiring prosecutors to decide whether to pursue criminal prosecution of corporations implicated or instead make use of a Remediation Agreement. If 2021 does indeed see the first Remediation Agreement being concluded, it is likely to attract significant attention, with onlookers eager to understand how the statutory framework will be applied in a practical context.

The Organisation for Economic Co-operation and Development (OECD) Working Group on Bribery was also scheduled to conduct a working visit to Canada in October 2020. Unfortunately, the visit and the report have faced delays, with the Working Group report now scheduled to be issued in June 2023. Canada's implementation and enforcement of the OECD Anti-Bribery Convention is monitored by the OECD Working Group on Bribery through a rigorous peer-review monitoring system. The lack of visible enforcement, potential for increased corrupt activities across several sectors as seen by trends in other countries and the impetus by the Government of Canada to demonstrate its commitment to investigating and enforcing anti-corruption measures to the OECD also hint at an increase in anti-corruption enforcement for 2021.

This enforcement activity should also be bolstered by the Government of Canada's renewed interest in anti-money laundering activities. As of December 2020, the Canadian government announced it will invest CA$98.9 million over five years to modernize the RCMP and strengthen its ability to help fight money laundering and identify proceeds of crime. New money laundering investigative teams will be created in British Columbia, Alberta, Ontario, and Québec, bringing together expertise from a variety of agencies to address high-profile cases and advance investigations into money laundering and proceeds of crime nation-wide.

The negative and wide ranging impact of money laundering has been brought to light via the Cullen Commission in British Columbia which has been conducting virtual hearings through 2020. The Commission's hearings are presently scheduled to conclude in May 2021. The Commissioner has determined that the Commission team will need time beyond the original delivery date of May 15, 2021 to complete its final report due to the breadth of the issues being addressed, the length of the public hearings, the effects of the pandemic, and delays and challenges in obtaining documents.

Even considering the hurdles faced by the Commission, based on the robust work to date, it is believed the final report will be issued in the latter part of 2021, if not sooner. Based on both the anticipated findings of the Report as well as the federal government's initiative on money laundering, we expect a marked increase in enforcement actions relating to money laundering activities.

Considering that corruption and money laundering are generally complementary activities, 2021 could see robust enforcement on both fronts not simply because there is more illegal activity but because public concern is heightened and expectations are building.

In short, 2021 has all the potential for a busy and interesting year ahead in the anti-corruption and anti-money laundering sphere. The conclusions reached by Commissioner Cullen in his much-anticipated report, combined with the prospect of a precedent setting Remediation Agreement, may mean 2021 becomes a year to remember for financial crime enforcement.

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Health product regulation

Regulated health products in 2021: Post-COVID enforcement trends in Canada

Y. Monica Song and Yulia Konarski

With the approval of the first COVID-19 vaccine in Canada at the close of 2020 and with large-scale vaccination programs underway, in 2021, Canada transitions to a post COVID-19 reality.

In 2020, activity in the regulated health product sphere was largely focussed on ensuring that products necessary to combat COVID-19 were available in Canada as quickly as possible. At the start of the pandemic Health Canada issued a number of interim orders to facilitate the rapid coming to market of new and existing drugs, natural health products and medical devices. These interim measures relaxed regulatory requirements allowing certain non-compliant products to be marketed in Canada (for example, those with a foreign product approval number rather than a Canadian product approval number).

In parallel, Canadians were flooded with messages encouraging individuals to sanitize their personal environments. This translated into a marketing opportunity for many businesses to supply products necessary to meet the demand, including hand sanitizers, disinfectant cleaners, face masks etc. For many businesses, this meant branching into new lines of business (distilleries manufacturing hand sanitizer is an example that comes to mind).

Taken together, 2020 saw an unprecedented volume of new health products (and general consumer products making health claims) coming to market in Canada from both old and new players in the arena.

A consequence of this race to market is a growing number of recalls for product non-compliance. The two most common reasons for recall include:

- Health products, such as drugs, natural health products and medical devices, that are not approved and/or do not comply with labelling requirements; or
- Health products or general consumer products making non-compliant health claims, such as claims to be "effective against COVID-19" or general consumer products claiming to have disinfecting properties.

The increased volume of recalls and post-market surveillance of packaging/labelling and advertising of health products and general consumer products may be short-lived compliance initiatives taken by Health Canada in response to COVID-19 related products. On the other hand, increased enforcement measures in the regulated health product sphere may be here to stay. As 2021 unfolds, we can expect to see the lessons learned from COVID-19 regulatory landscape to have a lasting impact on the manner in which compliance of health products and general consumer products making health claims is monitored and enforced.

Businesses selling health products or other consumer products making heath claims should expect heightened enforcement of applicable regulations, particularly as interim measures begin to expire or are modified to become more stringent. Already in the first quarter of 2021, Health Canada has moved to reinstate applicable regulations for health products:

- **New COVID-19 Interim Order (IO2) came into force on March 1, 2021:** *Interim Order No. 2 Respecting Drugs, Medical Devices and Foods for a Special Dietary Purpose in Relation to COVID-19* repeals and replaces *the Interim Order Respecting Drugs, Medical Devices and Foods for a Special Dietary Purpose in relation to COVID-19* made by the Minister on March 30, 2020 (IO1). Under IO2, flexibilities provided under IO1 for certain product categories are beginning to be rolled back. Businesses will have 6 months to come into compliance after which it is expected that Health Canada will strictly enforce regulatory requirements for health products that no longer benefit from regulatory exemptions. For example, IO2 reintroduces the requirement for companies to have a drug establishment license to conduct regulated activities related to drug-based hand sanitizer.
- **Amendments to the post-market surveillance requirements under the *Medical Device Regulations* coming into force beginning on June 23, 2021:** The post-market surveillance regulations amending the *Medical Devices Regulations* will provide Health Canada more powers to improve post-market surveillance of medical devices. Examples include:
    - Expanded incident reporting obligations;
    - Mandatory foreign risk notification;
    - Mandatory annual summary reporting and issue-related analyses of safety and effectiveness; and
    - Power to require assessments and power to require tests and studies.

- **Continued enforcement regarding non-compliant health claims:** The public's increased focus on a clean and sanitized personal environment and more broadly, general health and wellness, is a new way of thinking that is likely here to stay. It follows that businesses will continue to innovate and market products responsive to this mind-set. "Hot" products include UV lamps and air filtration devices marketed for sterilizing household goods and indoor environments. These products are already on Health Canada's radar for making unacceptable health claims in relation to COVID-19.

As businesses innovate they must continue to exercise caution in representing general consumer products for medical purposes, as such health claims may be prohibited outright or may push products into the regulated product sphere, for which a host of additional regulatory requirements must be met prior to coming to market.

While Health Canada has expanded compliance and enforcement initiatives to match the rate at which new health products are reaching Canadians under COVID-19 interim measures, there is no reason to expect these enforcement measures will stop once vaccination reaches critical numbers and "COVID-19" recedes from the day's headlines. The pandemic has taught the value in maintaining a clean environment and Health Canada will continue to be vigilant in seeking to protect Canadians from products that may mislead the public with respect to their uses.

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