

Communications trends to watch in 2021: Enhancing trust in electronic communications

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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 (the “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.

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 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 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*.

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.

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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-fund-supported-projects-will-bring-high-speed-internet-to-alberta-communities.html>.

Your Key Contacts



Y. Monica (Monica) Song

Partner, Ottawa

D +1 613 783 9698

M +1 613 302 2372

monica.song@dentons.com