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Dentons' pick of Canadian regulatory trends to watch in 2019

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Dentons' pick of regulatory trends to watch in 2019

Sandy Walker

Message from Sandy Walker, Regulatory Practice Group leader:

Canada's regulatory landscape is constantly shifting in response to political, economic, social and environmental developments. In turn, businesses face an unprecedented number of evolving requirements across most industry sectors. Dentons' regulatory lawyers are well-positioned to provide advice on navigating the regulatory regimes most relevant to you.

In this publication, members of Dentons' regulatory practices prognosticate on the trends likely to dominate in 2019. In particular, we focus on the following areas: public affairs; competition law; energy regulatory; environmenal law; financial regulatory; privacy and data protection; consumer product regulatory (including cannabis); communications regulatory; trade and economic sanctions; foreign investment review; and transportation law.

Not surprisingly, many of the trends we have spotted reflect the digitalization of the economy (well beyond the tech sector). Others reflect the political and economic disruptions occurring both outside of Canada and within Canada as well as an increased governmental focus on privacy, consumer protection and other social and environmental concerns.

Dentons' regulatory lawyers – and our public affairs specialists – will help you anticipate changes in a broad spectrum of regulatory requirements and assist you in achieving effective and creative compliance solutions -- whether the context involves a transaction, a regulatory investigation or proceeding, or a compliance process.

In doing so, we are able to leverage our deep experience, strategic insights, and intimate knowledge of both the regulatory regimes and the government agencies responsible for them. While our team focuses on Canadian law, we rely upon our network of Dentons' lawyers and professionals in over 78 countries to help you prepare for the latest regulatory trends and developments around the world.

For more information about this report, or how we can help you, please reach out to one of our Contributors or Key contacts noted on the final pages of this report.

Public affairs

Public affairs

Overview

2019 will present a number of key policy and political challenges that are important for businesses to track and manage. This includes, in particular, a number of critical issues that will pit the Government of Canada, under Prime Minster Justin Trudeau, against provinces now led by Conservative premiers eager to take on the federal government in an election year. This includes pipeline politics (namely, construction of the Trans Mountain Expansion Project), implementation of pan-Canadian carbon pricing, regulatory modernization (Bill C-69 / National Energy Board (NEB) reform), the Alberta election and national Pharmacare.

This high-level overview considers these challenges in the context of the forthcoming 43rd Canadian federal election, scheduled to take place on or before October 21, 2019. The period between now and when the House of Commons rises on June 21, 2019, will be an important period for firms to manage their engagement with the federal government, as officials shift their focus from governance and policymaking to campaigning.

Trans Mountain Expansion Project (TMX)

At the same time that Kinder Morgan shareholders approved the sale of the Trans Mountain Pipeline to the federal government in late May of 2018, the Federal Court of Appeal quashed the Governor-in-Council's Order under the NEB Act which directed the NEB to issue a Certificate of Public Convenience and Necessity (CPCN) (a permit which is needed to construct and operate federally regulated pipelines of this length) finding that federal government consultations with First Nations were inadequate and that the NEB failed to include marine shipping in the scope of the project. NEB will prepare a final report by February 22, 2019 that will include a recommendation to the federal government as to whether to issue a new CPCN and will consider the marine safety issue in BC to address concerns about the impact on all species including the Southern Resident Killer Whale. The federal government's Phase III consultation with First Nations will be based on the NEB Report. Public support for TMX has begun to crystallize; however, federal NDP leader Jagmeet Singh (who is running in Burnaby South - the location of the TMX terminus) will continue to oppose the project, using it as a wedge issue. TMX will remain front and centre in 2019 and will generally influence the public's level of support for fossil fuel and natural resource development.

Pan-Canadian climate framework: Carbon pricing

In October 2016, the federal government announced the Pan-Canadian Approach to Carbon Pollution, thereby setting a federally-mandated benchmark price on carbon. The price was initially set at CA$20 a tonne, which will increase to CA$50 a tonne in 2020. This policy has and will continue to face significant headwinds in 2019, particularly from Alberta, Ontario, New Brunswick and Manitoba.

Alberta implemented its own carbon price on January 1, 2018, under the Notley government's Carbon Competiveness Incentive Regulation (CCIR), which means the province will not immediately be impacted by the federal policy. The CCIR benchmarks emissions performance across all facilities producing the same products. Alberta's current price is CA$30 per tonne and its gasoline tax is 6.73 cents per litre. Notably, Alberta has permanently withdrawn from further increasing its price on carbon until the federal government makes progress on TMX. United Conservative Party (UCP) leader Jason Kenney has said that, if the UCP wins the forthcoming Alberta election (which must be held by May 31, 2019), it will repeal economy-wide carbon pricing, but will maintain a carbon price for large industrial emitters.

In October 2018, the Ontario government under Premier Ford cancelled the province's cap-and-trade regime and committed to fighting the federal government on carbon pricing. Shortly after, it delivered its 'Made-in-Ontario Environment Plan', which cites significant climate policy initiatives (such as a shutdown of coal-fired electric plants, previously implemented by the Wynne government), and focuses on 'climate resilience' measures (such as energy efficiency, land use planning, and disaster recovery) rather than carbon pricing. The Ford government has initiated a constitutional challenge to the federal pricing regime in the Ontario Court of Appeal. This follows an earlier court reference case launched by the government of Saskatchewan challenging the constitutionality of Ottawa's carbon pricing legislation. Last year, Manitoba initially agreed to a flat tax of CA$25 a tonne, but then backtracked on this commitment when it learned it would not be able to maintain that price level under the federal regime. Further, in late 2018, the federal government rejected New Brunswick's climate plan, making it subject to the federal benchmark, which that province opposes. Taken together, Alberta, Ontario, New Brunswick and Manitoba, are strongly incentivized to challenge the federal government's carbon tax this election cycle.

Bill C-69 (NEB modernization)

Bill C-69 seeks to overhaul both the National Energy Board Act and the Canadian Environmental Assessment Agency Act, changing how major infrastructure projects are reviewed and approved in Canada. This includes replacing the NEB with a new Canadian Energy Regulator and federal environmental assessments process, led by a new Impact Assessment Agency. The energy sector and energy-producing provinces, most notably Alberta, have heavily criticized the bill, which has passed through the House of Commons and is currently with the Senate for review. The federal government has expressed an openness to amend the bill, and the business community widely supports such a move. Modernization of the NEB and the ability to ensure major projects are approved and built under the new regime will be a major test for the federal government. This is particularly important for international oil market access and investment attraction.

Federal-provincial division: Alberta election

Alberta's 30th general election will take place on or before May 31, 2019. Rachel Notley's NDP will face stiff competition from Jason Kenney's UCP. The UCP has positioned itself as staunchly pro-energy industry in ways that contrast with the Notley and Trudeau governments. The following positions are worth highlighting:

- If elected, Kenney will align with Ontario Premier Doug Ford, Saskatchewan Premier Scott Moe, and Leader of the Conservative Party of Canada, Andrew Scheer, to oppose the federally-mandated carbon pricing regime.
- The UCP will continue to advocate for TMX. The federal government is currently undertaking indigenous consultations, as per the direction of the Federal Court of Appeal, and aims to have shovels in the ground before the federal election in October. The UCP would likely advocate for the development of TMX in ways that test the Trudeau government.
- The UCP will oppose the federal government on its oil tanker ban in Northern BC (Bill C-48), which will further challenge the federal government on its willingness to support Alberta and the energy sector, attract investment, and manage the natural resource economy more generally.
- The UCP will advocate / push for the withdrawal of Bill-69, to which, as noted above, industry is lobbying for amendments.

National Pharmacare

In the 2018 Budget, the federal government launched a yearlong consultation into the future of Pharmacare in Canada, led by Dr. Eric Hoskins, former Minister of Health in Ontario. These consultations will inform what broad-based institutional reforms might look like, and may be a focal issue during the federal election campaign. Without question, this process—and the recommendations of the Hoskins Council—will require close observation. Another aspect of the Pharmacare debate that is worth highlighting are reforms to the Patented Medicine Pricing Review Board (PMPRB), which will likely be decided on in the first quarter of 2019. These reforms will change the methodology for patented medicine pricing in Canada and will force cost reductions. It remains to be seen, however, how PMPRB reforms will align with the adoption of some incarnation of national Pharmacare, if at all.

The NDP, under leader Jagmeet Singh, is strongly advocating for sweeping reforms, and has sent a letter to Prime Minister Trudeau urging the government to implement a universal single-payer system immediately. The Conservatives have been significantly more muted on the matter thus far, though they will, without question, become more vocal in the coming months. If both the Liberals and NDP are advocating for increased coverage (for those approximately 10 percent of Canadians who do not have it), and lower costs, it will be difficult for the Conservatives to oppose reform to the system. Of particular importance is how Conservative leaders at the provincial level stake out their positions and engage with the federal government should national Pharmacare reforms be adopted.

Conclusion

While this list is not exhaustive, it highlights a number of key issues that will pit Conservative premiers and the federal Conservative Party against the federal Liberals this election year. In doing so, the federal government will be challenged on its management of the energy / environment portfolios, and its ability to bolster investor confidence and grow the economy. While Pharmacare is a bit of a wild card, as the public debate has yet to mature, it may also serve as a flashpoint between Conservative premiers and the Federal government. Taken together, and coupled with challenges surrounding the ratification of the CUSMA, Steel and Aluminum tariffs, Brexit, immigration, housing availability, Canada-China relations, and international leadership more generally, this election cycle will no doubt be turbulent.

Competition law

Competition law

More enforcement in the digital economy

Last year began with two linked and dramatic headlines from *The Economist newspaper*: "How to tame the tech titans – Competition in the Digital Age," (January 20, 2018), followed by an article titled, "Coping with techlash". We expect similar headlines and concerns in 2019, but anticipate the concerns to go beyond the "tech titans", as competition lawyers and policy makers try to come to grips with the impact of the digitalization of the economy on antitrust/competition analytical frameworks. There is a sense that regulators do not sufficiently understand the digital transformation, including the proliferation of online platforms and networks, the use of pricing algorithms, Big Data and the ecosystem surrounding the leading technology companies. This has become significant enough that the US Federal Trade Commission launched a series of hearings in the latter half of 2018 and into 2019, on the topic of "Competition and Consumer Protection in the 21st Century".

Canada's Competition Bureau (Bureau) has also completed a number of studies relating to the digital economy, leading to two reports, *Big Data and Innovation* and *Technology-Led Innovation in the Canadian Financial Services Sector*. While taking the position that its current enforcement tools are adequate to meeting the challenges of the digital economy, one of the Bureau's signature priorities outlined in its Annual Plan is, "fighting new forms of anti-competitive conduct to reinforce consumer confidence in the digital economy".

As a reflection of this focus, as of May 2018, the Bureau had 49 ongoing digital economy cases. The Bureau's enforcement efforts have included cases relating to deceptive marketing practices in the online retail segment, and the Bureau has stated it will challenge misrepresentations made by companies in relation to the collection and use of data, the enforcement of which may overlap with that under privacy law. The Bureau also plans to enhance its capacity to understand and take action involving new technologies that may hinder competition and innovation, such as pricing algorithms and blockchain technologies. To that end, the Bureau will be filling the newly-created position of Chief Digital Enforcement Officer in the coming months.

As we reported in, "From hipster antitrust to Big Data: fresh challenges to competition law?", the digital economy has led to some political and opinion leaders in the US and elsewhere – the so-called "hipster antitrust" movement – to question the ability of traditional competition law to address broader concerns such as employment and market power itself. In the context of merger review by competition authorities, when a dominant firm acquires a small firm in an adjacent, but not directly, competing market, traditional antitrust analysis may not identify any concerns because of the focus on adverse price impacts. However, "hipsters" ask whether such an acquirer will have further entrenched its market power in a way that undermines competition in the long run. These, and related concerns, will be on the minds of competition policymakers and enforcers in 2019, but it remains to be seen whether they will translate into concrete policy changes and enforcement decisions at this juncture.

Abuse of dominance

In 2018, we also witnessed the final chapter of the Commissioner of Competition's successful challenge of restrictions on the display and use of certain property-related data imposed by the Toronto Real Estate Board (TREB) on its members providing Virtual Office Website services to their clients. In August, the Supreme Court of Canada denied a leave to appeal from the Federal Court of Appeal's upholding of the Competition Tribunal decision against TREB. The decision provides a number of lessons for dominant firms and associations operating in Canada that could be significant factors in future Bureau enforcement efforts.

First, the case applied the abuse of dominance provision to a trade association's rules. At first instance, the Competition Tribunal ruled in favour of TREB on the basis that the board did not compete with the member real estate brokers against whom the restrictions applied. This decision was overturned, and trade associations and similar organizations can now expect that if they are dominant, their by-laws and rules could be subject to scrutiny as an abuse of dominance.

Second, the *TREB* decision highlights the application of the abuse provision to the digital economy, underscoring that the refusal to provide access to data that prevents the emergence of new products and types of competition can be regarded as anti-competitive, and fines of up to CA$10 million might apply. If a data owner is dominant within a particular product market, it may be required to provide rival firms with access to that data if it is a critical input. Moreover, the *TREB* case could have wider repercussions beyond data in the digital economy. For example, access to networks and platforms may be seen as essential to competing in certain markets. Third, the Federal Court of Appeal decision recognized that compliance with privacy law could be a legitimate defence to a restriction on the use of data.

Cartel enforcement

The Competition Bureau will continue to pursue conspiracies that fix prices or allocate markets and bid-rigging in the coming year. The Competition Bureau is also investigating alleged anti-competitive conduct by parties in the context of a merger in the media sector, where the merger itself was not challenged. This is a relatively rare occurrence in Canadian competition law and we will be watching developments in this case closely.

The repercussions of revisions to Canada's Immunity and Leniency programs in 2018 may well reduce their attractiveness to immunity and leniency applicants in 2019. Among other changes, immunity is now provided later in the process, with cooperation expected under a "Grant of Interim Immunity". Immunity for directors, officers and employees is no longer automatic, and instead will be considered based on an individual's cooperation. Leniency discounts are now contingent on the value of cooperation provided, not necessarily when markers were placed.

Competition class actions

We will be following the *Toshiba Corporation, et al v. Neil Godfrey* case, which goes to the Supreme Court of Canada. Among other things, the court will consider whether "umbrella purchasers", i.e., those who purchase from sellers who are not part of a conspiracy, have a cause of action in Canada. The argument is that non-cartelist sellers are able to charge higher prices as a result of the conspiracy, and therefore, umbrella purchasers have also suffered damages.

New Commissioner of Competition

Finally, the direction and enforcement activity undertaken by the Competition Bureau could change significantly, depending on who is chosen as the new Commissioner of Competition. The Bureau is expected to appoint the Commissioner within the first half of 2019.

Energy regulatory

Energy regulatory

Given the events of 2018, even the most avid proponents of Canada's law legalizing recreational cannabis may struggle to envision a clear path for the construction of a pipeline that would deliver Alberta's petroleum resources toward Canada's east or west coasts.

Pipe dream: Getting Canada's petroleum resources to tidewater

Upstream petroleum and pipeline industries have faced significant headwinds in recent months and years, in addition to those created by depressed global oil prices. Many of the regulatory challenges facing those industries will continue to unfold in the coming months. With elections expected in Alberta and Canada this year, observers can expect the struggle for access to new markets for petroleum resources to play out before regulatory tribunals, in legislatures and, potentially, the courts.

When it returns in February, the Canadian Senate will resume its consideration of two bills that could have big implications for Canada's energy industry, generally, and the pipeline sector in particular. In mid-2018, Canada's House of Commons passed the Oil Tanker Moratorium Act, which prohibits large oil tankers from stopping or unloading crude oil at ports along British Columbia's north coast. Later in the year, the House of Commons passed the highly controversial Bill C-69, which would introduce significant changes to Canada's environmental assessment framework (see here), and rebrand the National Energy Board (NEB) (see here). The Oil Tanker Moratorium Act would make it practically impossible to pursue the development of an oil export pipeline through northern British Columbia, a preferred route for accessing Pacific markets. As for Bill C-69, many stakeholders, including those in the energy and pipeline industries, have publicly expressed concerns over the potential consequences of the new law if passed in its current form, and are lobbying for major changes. The impact on Canada's resource industry (and the broader Canadian economy), will not be clear until the Bill passes the Senate, and the federal Cabinet releases regulations spelling out the types of projects that will have to comply with the new impact assessment requirements.

The fate of the Trans Mountain Expansion Project (Project) – the proposed twinning of the existing crude oil system that currently runs between Edmonton and Burnaby – will also continue to be a major story in 2019 from a regulatory perspective. After the federal government was forced to step in and buy the Project from the original proponent, the Federal Court of Appeal struck down the federal Cabinet's prior approval of the Project, citing inadequate government consultation with potentially affected Aboriginal groups along the Project's right of way (see here). At the federal government's direction, the NEB is currently reconsidering the impacts of Project-related marine shipping, while the federal government works to re-do its Phase III consultation for the Project. The NEB will report on its reconsideration by February 22, 2019, with a decision from Cabinet on whether to approve the Project based on the NEB's reconsideration, which will likely be made before the fall election. As with the initial Cabinet decision, any new decision approving the Project could (and likely would) be subject to judicial review.

In late 2017, the Energy East Project (EEP), a proposed 4,500 km pipeline that would carry 1.1 million barrels of crude oil per day from western Canada to refineries in Eastern Canada, was permanently shelved. That project faced a number of struggles in its short life, and the applicant withdrew the application after the NEB announced it would take the unprecedented step of considering upstream and downstream emissions associated with the EEP. Politicians in Alberta and New Brunswick have recently expressed support for revisiting the EEP. As it stands, Energy East does not have a proponent willing to advance that project or a similar one, and any oil pipeline passing through Québec would face stiff political opposition. Unless circumstances change dramatically, there is no reason to expect any movement on the EEP or one like it in 2019.

The inability to make progress on an oil pipeline to Canada's east or west coast has prompted some surprising actions from within Alberta in 2018. Last spring, the Alberta government responded to opposition from British Columbia politicians to the Trans Mountain Expansion Project by passing a law that would give the provincial Energy Minister the power to restrict the flow of oil and gas exports using licensing requirements (see here). By December, faced with an unprecedented glut as a result of the lack of pipeline access, the Alberta government announced (with bi-partisan support) it would curtail production of oil by up to 325,000 barrels per day (see here). With tensions between Alberta and British Columbia politicians subsiding, it is not clear whether Alberta might take steps to restrict exports in 2019. The Alberta Energy Regulator is administering curtailment, which could be in place through all of 2019.

Actions in legislatures and decisions of regulatory tribunals and courts have created challenges for Canada's energy industry. Those actions and decisions have also come at a significant cost to Alberta and Canada, both in terms of economics and, potentially, national unity. These issues will continue to unfold throughout 2019.

Environmental law

Environmental law

Canadian environmental regulation and policy is constantly changing. Issues relating to climate change, ocean pollution and toxic substances are frequently in the headlines and often lead to calls on all levels of government to regulate certain activities. We have selected three areas of recent or proposed federal legislation that have the potential to impact various business sectors in 2019.

Challenges to federal GHG pricing legislation

In June 2018, the Government of Canada passed the Greenhouse Gas Pollution Pricing Act (GGPPA), legislation intended to give effect to Canada's voluntary commitment under the 2015 Paris Agreement to reduce its 2015 greenhouse gas emission levels by 30 percent by 2030. The GGPPA applies to provinces that have not implemented their own cap-and-trade or carbon tax regimes by January 1, 2019, which provide for a comparable price on carbon.

The Provinces of Saskatchewan and Ontario are challenging the constitutionality of this legislation in reference cases filed with their respective Courts of Appeal. The basis of Saskatchewan's challenge is as follows:

1. As the GGPPA will only apply in provinces that choose not to implement their own carbon pricing, it violates the principles of federalism;
2. The legislation deals with matters that fall under provincial responsibility and are, therefore, outside the federal government's areas of responsibility; and
3. The carbon price is a tax and, therefore, in violation of the constitutional requirement that taxes may only be imposed by Parliament. The Cabinet determines in which provinces and territories the tax will apply.

In its reference, Ontario says Canada does not have general jurisdiction over the vast range of provincially-regulated activities it is purporting to regulate under the GGPPA. The Province also says the charges imposed by the legislation are neither valid regulatory charges, nor valid taxation. Both cases are set to be heard in 2019, with Saskatchewan's first up in mid-February and Ontario's scheduled for mid-April. As Ontario's case was triggered by a change from a Liberal to a Conservative government, and elections will take place this year at the federal level and in a number of provinces (notably Alberta), further litigation could follow. In addition, it is likely the decisions of the Saskatchewan and Ontario Courts of Appeal will end up before the Supreme Court of Canada.

Moving to zero plastic waste

Environment Canada engaged in an extensive public consultation process in 2018, seeking input from Canadians as to how Canada should reduce plastic waste and marine litter. Environment Canada received almost 2000 submissions, recommending improvements in recyclability and packaging standards, increased access and incentives to use compostable plastics and reusable items, limits or fees on single-use plastics and packaging, and improved recycling programs and infrastructure. Following the closure of the public process, Environment Canada announced it would be working with the provinces, territories, indigenous groups, industry, municipalities, NGOs and research institutions to develop an approach to a Canada-wide framework for eliminating plastic waste and reducing marine litter. The framework initially took the form of a "strategy" issued by the Canadian Council of Ministers of the Environment (CCME) at the end of 2018. The CCME strategy outlines necessary changes across the plastic lifecycle, from design to collection, clean-up and value recovery, and will lead to the development of an action plan in 2019 that will set out the measures and actions needed to achieve these changes.

Changes to regulation of cross-border movement of hazardous waste and recyclables

Following another extensive consultation process, in December 2018, Environment Canada published proposed new regulations governing the transboundary movement of hazardous waste and recyclable materials under the Canadian Environmental Protection and Enhancement Act, 1999 (CEPA). Environment Canada will accept comments on the proposed regulations until February 13, 2019. According to the Regulatory Impact Analysis Statement that accompanied the draft regulations in the Canada Gazette, the new regulations are intended to do the following:

1. Consolidate and streamline the requirements set out in the three existing regulations (which will be repealed);
2. Provide the flexibility to more efficiently implement the electronic movement tracking system currently being developed;
3. Adjust and harmonize the definitions of "hazardous waste" and "hazardous recyclable material"; and
4. Improve the management of permits and overall administration of the regulations.

The proposed regulations should contribute to further regulatory alignment with the United States by reducing regulatory differences and increasing regulatory compatibility. Approximately 97 percent of the transboundary movements of hazardous waste and recyclables are between Canada and the US.

Financial regulatory

Financial regulatory: Retail sales practices

Following on the heels of the account fraud scandal in the US banking industry, media reports of Canadian banks employing similar tactics began to surface in late 2016. In response, the Financial Consumer Agency of Canada (FCAC), which oversees federal consumer protection legislation, reaffirmed and clarified its expectations regarding express consent for new products and services. When complaints of aggressive sales practices continued to be reported, the FCAC announced, in March 2017, it would conduct an industry review of business practices related to the sale of products and services by federally-regulated financial institutions (FRFI).

While the FCAC's final report, released in March 2018, stated that widespread "mis-selling" was not found, it listed five key findings, which indicated a need for the following:

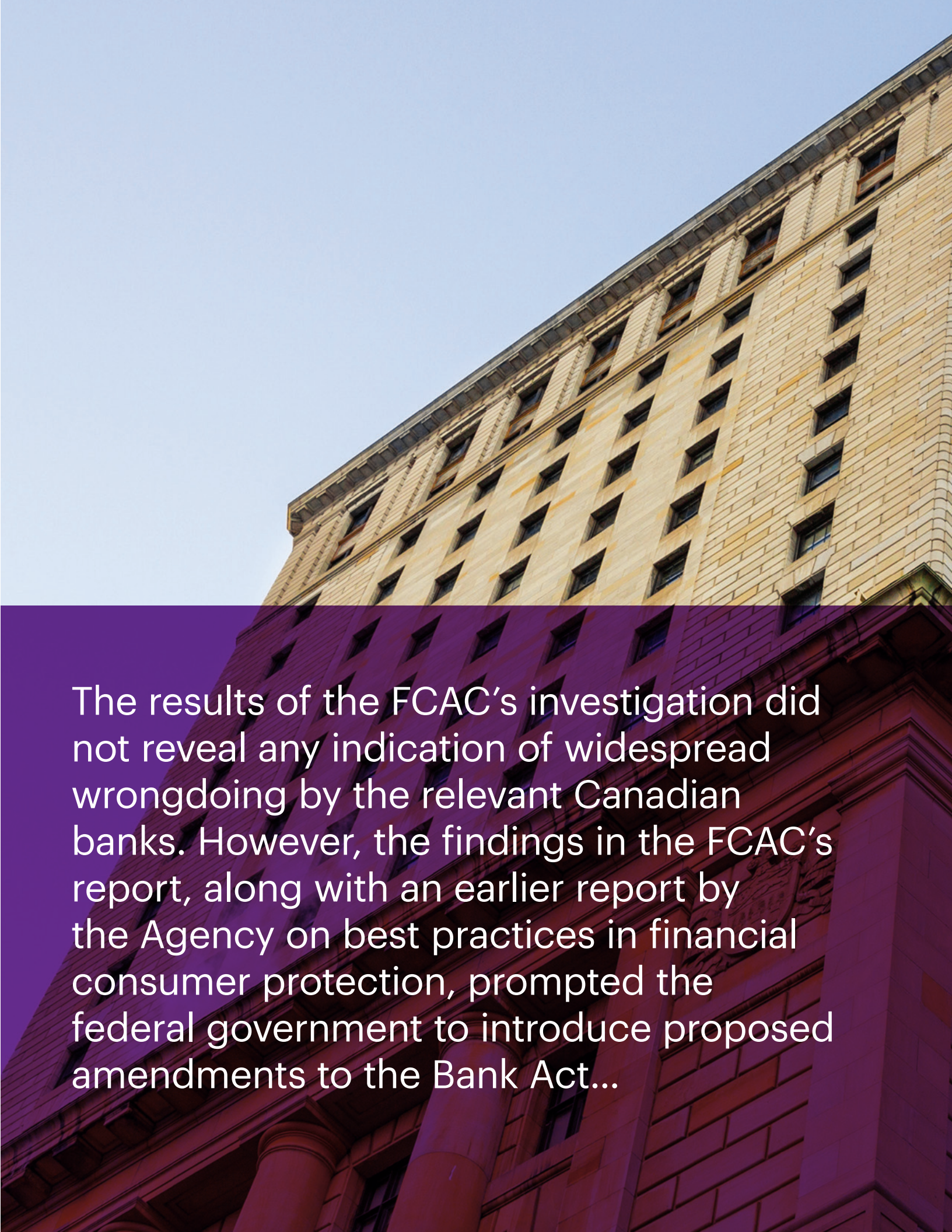
- Industry-wide enhancements of the management of sales practices risk, including the establishment of formal sales practices governance frameworks; and
- A modernized FCAC supervisory framework, with stronger supervisory and enforcement functions.

The results of the FCAC's investigation did not reveal any indication of widespread wrongdoing by the relevant Canadian banks. However, the findings in the FCAC's report, along with an earlier report by the Agency on best practices in financial consumer protection, prompted the federal government to introduce proposed amendments to the Bank Act in November 2018. These amendments set out a more comprehensive "Financial Consumer Protection Framework," including:

- Changes to banks' corporate governance by mandating the designation of an independent board committee to oversee aspects of retail sales practices;
- The introduction of a "fair and equitable" dealings regime, which expands banks' obligations around a variety of retail sales practices, including the introduction of an obligation to provide "appropriate" products and services, mandating the provision of cooling-off periods (during which customers can cancel agreements), and mandatory balance alerts;
- New consumer protections for personal deposit accounts, such as a prohibition of minimum deposits or the maintenance of a minimum balance; and
- A formal process regarding redress, setting out the required actions a bank must take if it imposed a charge or penalty without appropriate notice, or in the absence of clients' express consent given before the provision of the product or service.

Additionally, the amendments propose an enhanced complaints regime, which requires banks to more carefully and transparently track complaints (which are broadly defined as "dissatisfaction, whether justified or not, expressed to an institution with respect to a product or service … or the name in which a product or service … is offered, sold, or provided by the institution"). The new regime also prohibits the use of the term "ombudsman" (or other misleading terms). Most Canadian banks have used the term "ombudsman" to describe an internal office that reviews certain escalated consumer complaints.

Finally, amendments to the FCAC Act, which sets out the Agency's functions, enforcement and administration powers, are also proposed. These amendments include requirements to publicly disclose the nature of a violation, including relevant names and the amount of the penalty. Maximum penalties would also be increased, from $50,000 to $1 million for individuals, and from $500,000 to $10 million for both financial institutions and payment card networks. While these amendments do not significantly alter the FCAC's powers and functions, they do serve as a signal from the federal government that retail sales practices will attract increased and sustained regulatory scrutiny.



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Privacy and data protection

Privacy and data protection

Privacy law has been a fast-evolving field for some years now, and 2019 should be no exception. Building on developments in 2018, here are the top trends we expect to see this year that will affect Canadian businesses.

New breach notification requirement takes off

On November 1, 2018, amendments to the federal Personal Information Protection and Electronic Documents Act (PIPEDA), which were originally adopted in 2015, finally came into force. PIPEDA now requires organizations to give notice of any breach of security safeguards involving personal information under the organization's control that could reasonably create "a real risk of significant harm to an individual." As soon as the organization determines the breach has occurred, it must give notice to the Privacy Commissioner and the individual whose personal information was breached. The organization must notify such individual directly, although indirect notification (e.g., newspaper or online advertising) may be permitted if direct notification is impossible, impractical or inadvisable.

The amendments define the concept of "significant harm" very broadly. "Significant harm" includes "bodily harm, humiliation, damage to reputation or relationships, loss of employment, business or professional opportunities, financial loss, identity theft, negative effects on credit record, and damage to or loss of property". While PIPEDA does not define "risk", the statute sets out some of the relevant factors that determine whether a breach of security safeguards creates a real risk of significant harm to the individual, including the sensitivity of the personal information and the probability that the personal information has been, is being or will be misused. Other factors may be prescribed in the future. As a result, organizations should be diligent about the process they undertake to decide whether a breach is reportable. Even if it is determined that no report is required, PIPEDA now requires organizations keep a record of every breach of security safeguards for a period of at least 24 months after the day on which the organization determines the breach has occurred. Note that there is no materiality threshold to this recordkeeping requirement – an organization is obliged to keep and maintain records of "every" breach of security safeguards involving personal information under its control.

Furthermore, PIPEDA imposes on organizations an obligation to notify third parties. An organization that notifies an individual of a breach of security safeguards must notify any other organization or government institution (in whole or in part), of the breach if the notifying organization believes the other organization or government institution concerned may be able to reduce or mitigate the risk of harm that could result from the breach. It will be challenging for organizations to determine what other third party organizations are relevant, and whether they are in a position to reduce or mitigate the risk of harm. Confidentiality or competitive information may also make it difficult to comply with this provision.

Given the nature of this new requirement, 2019 should see an increase the number of reports received by the Office of the Privacy Commissioner of Canada (OPC), as well as the number of notifications received by individuals. Under the prior voluntary regime, organizations could previously make a considered decision to keep breaches internal; this new regime does not permit that where the "real risk of significant harm" standard is met. As a result, it will be interesting to see if this increased transparency causes an increase in the number of legal actions (particularly class action lawsuits).

GDPR continues to make an impact

On May 25, 2018, the European General Data Protection Regulation (GDPR) came into force, bringing with it sweeping new rules governing the control and processing of personal information by businesses in Europe and across the world. The GDPR applies to a company or entity that processes personal data as part of the activities of one of its branches established in the EU (regardless of where the data is actually processed). It also applies to a company established outside the EU that offers goods/services (paid or not) to persons in the EU, or monitors the behaviour of individuals in the EU (for example, for purposes of behavioural advertising).

The GDPR sets stringent new requirements for organizations, including transparency, security and accountability. It also provides extensive rights to individuals, including the "right to be forgotten." Any business subject to the GDPR needs to ensure its policies and practices reflect these new rules, failing which it may be subject to fines of up to the greater of four percent of its global annual revenues or €20 million.

Although businesses have had several years to prepare for it, the GDPR's sweeping scope means many are still coming to grips with how it affects their operations. In the first full year of the GDPR's existence, the European authorities are likely to increase enforcement action, which will test whether the compliance measures adopted by businesses meet the regulator's requirements.

For more information on how the GDPR may affect your businesses, see Dentons' Guide to the General Data Protection Regulation (GDPR).

New consent guidelines take effect

In May 2018, the OPC released new guidelines for obtaining meaningful consent, which it began to apply on January 1, 2019. While the guidelines are not legally binding, they provide informal guidance and important insight into how the OPC interprets PIPEDA's requirement to obtain consent from individuals to the collection, use and disclosure of their personal information. In brief, the OPC expresses the view (shared by many businesses and other organizations), that "advances in technology and the use of lengthy, legalistic privacy policies have too often served to make the control – and personal autonomy – that should be enabled by consent nothing more than illusory. Consent should remain central, but it is necessary to breathe life into the ways in which it is obtained."

Under its new approach, the OPC suggests putting special emphasis on key points, such as what personal information is being collected, with whom it is being shared, the purposes of its collection and the potential harms that can arise from the information's collection, use or disclosure. The OPC also recommends preparing multiple versions of a privacy policy, allowing the reader to get more or less information depending on their desired level of detail. The OPC also urges organizations to be innovative and creative in their approaches, using methods such as interactive tools to explain their privacy policies, and "just in time" notices to bring privacy-related information to the user's attention as they interact with the organization's website or application.

Many organizations will find some of the OPC's suggestions at odds with a sound litigation risk management approach. Other recommendations, while likely to increase understandability, may simply be too costly or technologically sophisticated for some organizations to implement.

To consult this new guideline, see the OPC's Guidelines for obtaining meaningful consent.

Consumer product regulatory

Consumer product regulatory

Few industries present more complex legal issues than the cannabis industry. The 2016 Access to Cannabis for Medical Purposes Regulations, and the October 2018 Cannabis Act have made Canada a focus for the cannabis industry, and those interested in legalization, worldwide.

Cannabis

The shift from prohibition to cautious legalization is creating opportunities, not only for producers of cannabis, but also for a range of supporting and spin-off industries in Canada, the United States, and beyond. With those opportunities come regulatory challenges, notably in the areas of cultivation and production licensing, and more recently, distribution and marketing. At the federal and provincial levels, the regulatory regimes are based, in part, on long-standing legal requirements, and restrictions for alcohol and tobacco. Not surprisingly, many cannabis industry insiders have come from those industries, and are trying to "read" the opportunities and risks based on that experience.

For those in the industry, 2019 will bring new focus on franchising, as the western provinces, Ontario and Newfoundland have opened the door to private sector retail sale. Retailers will continue to navigate the new rules of the various provinces and municipalities. The legalization of cannabis edibles in October 2019 will also represent a new opportunity to present cannabis products to a more "mainstream" set of consumers. In turn, employers will increase their attention to policies related to substance use in the workplace, workplace impairment, and health and safety issues.

Canada's new food regime

On January 15, 2019, the Safe Food for Canadians Regulations entered into force. The new regime modernizes Canada's food regulatory scheme, which is administered and enforced by the Canadian Food Inspection Agency (CFIA). The new Act and Regulations effectively consolidate a range of product-specific regimes for meat, fish, agricultural products, and more. The Food and Drugs Act remains unchanged, and continues to operate to provide "overarching protection for consumers from any foods that are unsuitable for consumption". However, the regime does more than merely consolidate the former legislative measures. In an effort to modernize the regulatory scheme, the Act includes a number of new and expanded provisions and powers, including those related to trade – both international and interprovincial – of "food commodities". In addition to certain new prohibitions respecting the importation of unsafe food, the Act provides for a detailed licensing or registration regime applicable to trade in food commodities, and related activities, such as traceability and preventive controls. These provisions are already increasing import control for Canadian companies. It should be noted that the regime also aims to increase international market opportunities for the Canadian industry, by aligning Canada's standards more closely with those in other countries, and by allowing the CFIA to issue export certificates. The new licensing and compliance requirements present significant operational adjustments for manufacturers, distributors, importers and retailers of food products, and will continue to do so in the months to come. While many requirements have been applied in January 2019, other obligations are being phased in from 2019 to 2021, depending on the food commodity, type of activity and business size.

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Communications regulatory

Communications regulatory

Overview

A central policy platform of the federal government has been ensuring the prosperity and growth of the middle class. As the world shifts to a knowledge-based global economy driven by the creation of ideas and their translation into commercial value, the federal government has committed to readying the Canadian economy for the transformative changes that are underway.

This commitment entails, among other things, the review and reform of the legislation and regulatory frameworks that underpin the generation of value from the electronic communication of unprecedented quantities of rich data sets.

In 2017, the Government of Canada launched the National Innovation Agenda. Included in this Agenda were several forward-looking initiatives, including an investment of CA$950 million over five years towards innovation "superclusters", referring to areas within cities or communities that display both a high concentration of academic strength and business growth. To much less fanfare, but in line with similar initiatives across other high-income countries around the world, the government also launched a number of interrelated public consultations and legislative reform initiatives in the following areas:

- Copyright
- Communications
- Digital and data transformation

The output of many of the public consultation and legislative reform initiatives launched in previous years will become available in 2019. Whether the government will have the opportunity to implement the recommendations flowing out of these consultative processes may also depend on the outcome of the upcoming federal election on October 21, 2019.

Copyright

There are a number of intersecting initiatives in Canada examining copyright reform as an element of preparing Canada for its participation in the global digital economy.

Review of Canadian copyright

On December 13, 2018, Bill C-86, A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures, was made law in Canada.

Bill C-86 amended the Copyright Act in order to specify that settlement offers and demands for personal information are not permitted to be included within a notice given by a copyright owner under the Canadian notice-and-notice regime and to provide for a regulation-making power to prohibit further types of information from being included within these notices. This is intended to rein in the perceived aggressive demands that have been made over the past several years.

One issue that has not been addressed in Bill C-86 involves pirated audio-visual content accessed by Canadians on the Internet, and calls from creators and licensed audio-visual content programming and distribution undertakings for measures to empower or facilitate blocking websites that allegedly provide such access. An industry-led coalition, called the "Fair Play Coalition", sought an order from the Canadian Radio-television and Telecommunications Commission (CRTC), but the request was turned down by the CRTC on grounds that it had no jurisdiction over copyright under either the Telecommunications Act or the Broadcasting Act. Both the audio-visual content production and licensed broadcasting industry in Canada continue to stress the urgency and necessity of measures other than court orders in their fight against pirated online content.

A broader debate has also been opened up in Canada around the copyright policy framework that is required to promote innovation in the digital economy, a large part of which is dependent on ownership, control and/or access to valuable information (data sets). The Parliamentary House of Commons Standing Committee on Industry, Science and Technology is in the midst of undertaking a review of Canadian copyright, and has heard from a wide range of stakeholders on issues such as fair dealing, which is the Canadian equivalent of fair use.

While the question of striking the appropriate balance between publishers, authors and users is not new, there is added complexity arising from the globalization of data flows, and the increasing concentration of large amounts of data in the hands of relatively fewer players. It is worth noting that the terms of the Canada-US-Mexico Agreement (CUSMA) arguably add to this complexity. The CUSMA requires Canada to extend the term of copyright protection from the current term of the life of the creator plus 50 years, to the life of the creator plus 70 years. It also confines limitations on or exceptions to exclusive rights "to certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder." Notwithstanding the preservation of Canada's notice-and-notice regime, the Intellectual Property chapter of the CUSMA requires that signatories legislate incentives for ISPs to cooperate with copyright owners in specified ways. Furthermore, signatories are obliged to impose civil and criminal remedies on any person who circumvents digital locks on copyrighted content, subject to certain specified and limited exceptions for "good faith" copying.

Bill C-86 reforming the Copyright Board

In 2018, the federal government implemented changes to the decision-making processes of the Copyright Board with the objective of making them more efficient. Between August 9, 2017, and September 29, 2017, the government held a Consultation on Options for Reform to the Copyright Board of Canada. Among the measures subsequently implemented in Bill C-86 were:

- A 30 percent increase in the Copyright Board's annual administrative budget, recognizing the importance of its decision-making processes for copyright owners and copyright users, alike; and
- Amendments to the Copyright Act to modernize the legislative framework relating to the Copyright Board, so as to improve the timeliness and clarity of its proceedings and decision-making processes. This includes:
    - Codifying the Board's mandate;
    - Establishing new decision-making criteria;
    - Establishing new timelines in respect of Board matters to streamline proceedings; and
    - Increasing the ability to enforce certain Board-set terms and conditions, including making statutory damages available for certain Board-set royalty rates.

Communications

Prime Minister Trudeau's mandate letter to Innovation, Science and Economic Development Minister Navdeep Bains, dated November 12, 2015, provided that among his top priorities was to "increase high-speed

broadband coverage, and work to support competition, choice and availability of services, and foster a strong investment environment for telecommunications services to keep Canada at the leading edge of the digital economy."

On June 5, 2018, the Government of Canada appointed a panel of seven experts (BTLR Panel) to study and report on 31 questions set out in the panel's Terms of Reference, related to ways in which the telecommunications, broadcasting and radiocommunication (wireless spectrum) statutes of Canada could be modernized.

All three Acts date back to at least the mid-1990s. They predate, and largely do not reflect, the shifts brought about by the Internet or the coming age of connected machine-to-machine wireless communications systems. The BTLR Panel report is not due until January 31, 2020.

In the meantime, the Senate of Canada is scheduled to issue a report on its own study of how the three Acts governing the communications sector "can be modernized to account for the evolution of the broadcasting and telecommunications sectors in the last decades."

Digital and data transformation

As reported in the 2018 edition of Dentons' Pick of Global Regulatory Trends to Watch, Canada's antitrust regulator, the Competition Bureau, stated in a paper on "big data" that its established analytical framework can be applied usefully to cases involving big data, and the application of the Competition Act must remain case-specific to minimize the risk of stifling the innovation that may arise from the operation of competitive market forces.

However, other observers do not appear as sanguine. In the intervening 18 months or so since the Competition Bureau issued its study of big data, there have been increasing calls from various quarters to effect a fundamental rethinking of the regulatory approach to firms whose competitive performance is driven by their ability to collect, analyze and use data.

The Parliamentary House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI Committee) released a number of reports in 2018 pertaining to potential reforms to Canada's privacy legislation, as well as potential new legislation to govern social media platforms:

- 12th Report, dated February 28, 2018: Towards Privacy by design: Review of the Personal Information Protection and Electronic Documents Act;
- 14th Report, dated May 9, 2018: Protection of Net Neutrality in Canada; and
- 17th Report, dated December 11, 2018: Democracy under Threat: Risks and Solutions in the Era of Disinformation and Data Monopoly.

In parallel to the other consultation and legislative reform processes launched in 2018, the Minister of ISED has launched a national public consultation on Digital and Data Transformation that seeks to better understand the drivers of innovation and the future of work, while at the same time, ensuring that Canadians have trust and confidence in how their data is used. In the discussion paper accompanying the launch of the Digital and Data Transformation consultation, the Minister of ISED has recognized that framework laws related to consumer protection and safeguarding of competition must be revisited to ensure Canada's readiness for the digital transformation. It is noteworthy that in the context of both the Digital and Data Transformation consultation and the BTLR Panel's consultation process, Canada's Privacy Commissioner has expressly criticized the Personal Information Protection and Electronic Documents Act (PIPEDA) as being essentially an "industry code of practice-inspired" statute that is based on the principles of consent, transparency and accountability. In submissions dated November 29, 2018, and January 11, 2019, the Privacy Commissioner stated that while PIPEDA should continue to be principles-based and allow for responsible innovation, it should be re-drafted to confer enforceable rights on individuals, and strong direction-making and investigatory powers on the Office of the Privacy Commissioner.

Whatever the outcome of the fundamental public policy debate on the appropriate balance to be struck between an innovation-based economic growth strategy, and the preservation of trust and confidence in the levers of the new economy, one thing is certain: legislative and regulatory changes across a broad swath of information and communication statutes are a key regulatory trend to watch in 2019 and beyond.

Trade and economic sanctions

Trade and economic sanctions

From Brexit, to sanctions, to new trade agreements entering into force and being implemented, 2019 will continue to provide both challenges and opportunities in international trade for business.

Brexit

The fate of Brexit remains unclear as the March 29, 2019, deadline approaches. As of mid-February 2019, considerable uncertainty exists as to a possible agreement, if any, that may be achieved between the United Kingdom (UK) and the European Union (EU) to govern the UK's exit from the EU. There are three main scenarios:

1. **A deal is possible**. There remains time to reach an agreement between the UK and EU. This may include an extension of the negotiating period beyond March 29, 2019, if there is a willingness to continue negotiations.
2. **No deal**. The UK exits the EU without any agreement governing the UK's relationship to the EU, and third countries rely on the UK's status as a World Trade Organization (WTO) member.
3. **Unilateral revocation of notice under Article 50**. Prior to the March 29 deadline, the UK can unilaterally revoke the notice it provided to the EU under article 50 of the Treaty of the European Union, and remain in the EU.

Given the UK is Canada's largest trading partner in the EU, Canadian businesses should consider the potential impacts of Brexit on their business operations and supply chains, if they rely on goods or services from the UK. While there is a good likelihood that Canada and the UK will agree to some form of continuity agreement (meaning a standstill of current trade treatment for goods and services between the two countries), they have not yet secured an agreement. As such, it is prudent for businesses to ensure they are prepared for all realistic scenarios.

US secondary sanctions and Iran

US sanctions on Iran will continue to be a consideration in 2019 for anyone doing business in Iran or with Iranian persons. On November 5, 2018, the majority of the US secondary sanctions came into effect. At the same time, the US Administration added more than 700 individuals, entities, aircraft and vessels to the Specifically Designated Nationals and Blocked Persons List (SDN List). The re-imposition of sanctions fulfilled the US Administration's promise to withdraw from the 2015 Joint Comprehensive Plan of Action (JCPAO), and resume sanctions against Iran.

The US secondary sanctions target non-US persons and financial institutions with no connection to the US that engage in transactions related to specified sectors of the Iranian economy, as well as individuals and entities included on the SDN List. Penalties for a breach of the secondary sanctions include being added to the SDN List, freezing of property and interests in property within the US, denial of visas to the US and restrictions on entry into the US, exclusion from US procurement, and denial of licenses and permissions from US agencies, among others.

Over the course of 2019, the US Administration may add additional sanctions, or individuals and entities to the SDN List to increase the financial pressure on the Iranian regime. Anyone with ongoing or future business opportunities in Iran must not only consider the primary sanctions within their home jurisdiction, but also the impact that US secondary sanctions may have on their business given their extra-territorial reach.

New international trade agreements – CETA and CPTPP

The Comprehensive Economic and Trade Agreement (CETA) continues to be provisionally in force between Canada, the EU and the EU's 28 members. CETA provisionally entered into force in September 2017, and save for certain investment, financial services and intellectual property provisions, the entire agreement has been operational since that time.

Early reports indicate increases of 6.3 percent and 5.4 percent in trade in goods and services, respectively, from October 2017 until July 2018. Significant opportunities remain for Canadian businesses given the increased market access in the EU. European businesses have been more proactive in seeking out opportunities and have correspondingly seen greater growth as a result of CETA.

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) entered into force on December 30, 2018, for Australia, Canada, Japan, Mexico, New Zealand and Singapore. On January 14, 2019, CPTPP came into force for Vietnam. The expansive 30-chapter trade agreement covers digital trade and ecommerce, investment, procurement, supply chain goods and rules of origin, and services, including financial services, among others.

The CPTPP opens several markets for which Canada did not previously have preferential trading. Prior to the CPTPP, Canada only had free trade agreements with Chile, Peru and Mexico, through the North American Free Trade Agreement (NAFTA). It is expected that the CPTPP will produce opportunities for growth in the financial services, fish and seafood, forestry, and the metals and minerals sectors. Canada is well poised to take full advantage of the CPTPP as an access point to North America, and will have no competition from the US under the agreement.

The CPTPP will enter into force for the remaining CPTPP Parties (Brunei Darussalam, Malaysia, Chile and Peru) 60 days after they have notified the Depositary (New Zealand) of the completion of their applicable domestic legal procedures. Notably, the CPTPP may continue to expand its reach over the coming years with various countries—including Colombia, Indonesia, the Philippines, South Korea, Taiwan, Thailand and the UK—having expressed an interest in joining the agreement.

Canada-United States-Mexico Agreement implementation

On November 30, 2018, during the 2018 G20 meeting in Buenos Aires, the Canada-United States-Mexico Agreement (CUSMA) was signed. Notable aspects of the CUSMA include updated rules of origin, specifically for the automotive sector, increased dairy market access into Canada, increased protections for intellectual property, increased de minimis thresholds for sales tax and customs duties on imports for Canada and Mexico, and a new chapter on digital trade. The CUSMA needs to be ratified in all three countries before entering into force.

The CUSMA is anticipated to receive significant attention and debate while passing through the US Congress. There is no clear timeline for congressional consideration of the CUSMA. The domestic process within the US has been affected by the US government shutdown, with employees from the United States International Trade Commission and United States Trade Representative having been affected. In Mexico, legislators did not meet the January 1, 2019, deadline for the adoption of labour reform legislation required under the CUSMA. The adoption of this legislation has been postponed to February 2019, at the earliest, and may further postpone Mexico's domestic ratification procedures. It does not appear there will be significant issues with the CUSMA moving through the Parliament of Canada before the federal election on October 21, 2019.

The NAFTA remains in force and continues to be applicable, notwithstanding the domestic implementation process that each country is currently undertaking. Any party seeking to withdraw from the NAFTA is required to provide six months' notice to the other NAFTA parties.

Foreign investment review

Foreign investment review

Liberalization of review thresholds for private sector investors

Since 2015, the Canadian government has raised the threshold for "net benefit to Canada" reviews from CA$600 million in the target's enterprise value to CA$1.568 billion for investors from trade agreement countries, such as the US, Europe, Singapore, South Korea and Japan, and to CA$1.045 billion for investors from World Trade Organization countries. A reviewable transaction requires approval of the Minister of Innovation, Science and Economic Development (ISED), or the Minister of Canadian Heritage (in the case of cultural businesses), on the basis that it will lead to "net benefit" in relation to factors such as the level of Canadian employment, participation of Canadians in senior management, head office location, and level of capital expenditures in Canada.

The trends towards liberalization of foreign investment into Canada is partially undercut by two factors. First, investments by foreign state-owned enterprises (SOE), entities that are controlled or influenced by a foreign government, continue to be reviewable at relatively low thresholds—CA$416 million in book value of the target assets. SOE investments have not been subject to significant restrictions since the 2012 policy statements by the previous government (and not repealed by the current government) that banned SOE acquisitions of control in the Canadian oil sands absent exceptional circumstances. Nevertheless, as discussed below, the second factor undercutting the trend towards liberalization of foreign investment—and likely a bigger obstacle to SOE investment—is Canada's national security review process. Any investment, regardless of size or whether control is acquired, may be challenged if it could harm Canada's national security.

Given rapidly increasing global tensions among Ca
major trading partners, and a rising focus on cyber
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National security review

Given rapidly increasing global tensions among Canada's major trading partners, and a rising focus on cybersecurity threats, we can expect the Canadian government to diligently review potential threats arising from the establishment of a new Canadian business or an acquisition, especially in sectors such as telecommunications, defence, or other critical infrastructure or technologies. These efforts may align with, but will not necessarily mirror, the ramping up of enforcement under The Committee on Foreign Investment in the United States (CFIUS) national security review regime in the US.

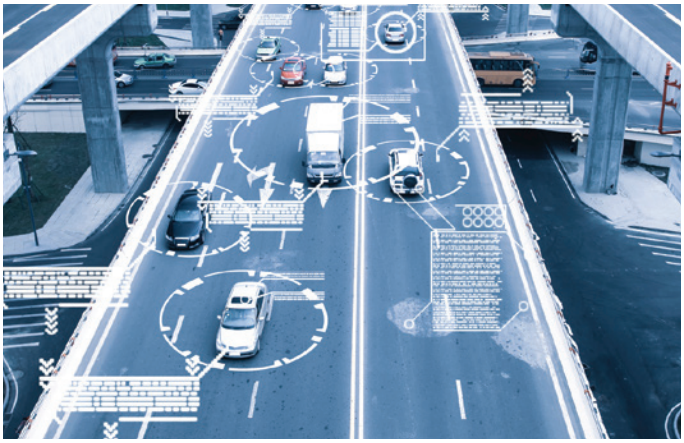
The Canadian government's rejection in 2018 of the proposed CA$1.5 billion acquisition by Chinese SOE, CCCC International Holding Ltd. (CCCI), of Aecon, a Canadian construction company, on unspecified national security grounds, may continue to reverberate in 2019. Aecon is a significant player in the construction of infrastructure, including telecommunications networks, transportation, electricity grids and military facilities, as well as the refurbishment of nuclear power plants. The government's decision to prohibit the transaction after more than three months of deliberation, will certainly affect the willingness of Chinese SOEs to bid on critical infrastructure assets, as well as other sensitive sectors. This rejection, coupled with challenges to the Chinese/Canadian relationship in late 2018 and early 2019, arising from Canada's arrest of a Chinese corporate executive in response to a US government extradition request, may serve to chill Chinese investment in Canada in 2019, whether by SOEs or by private sector investors.

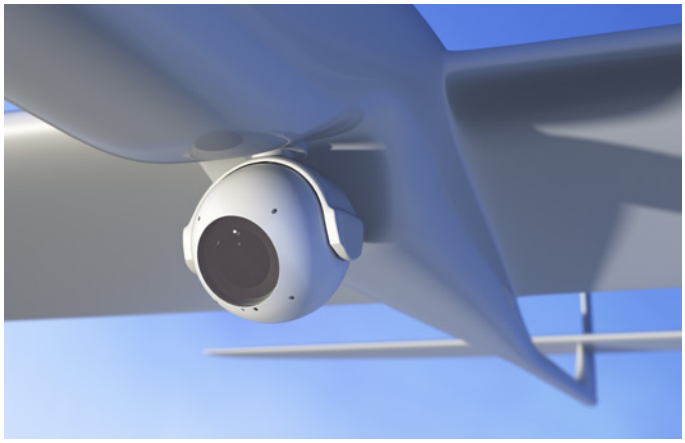
Although the government issued guidance on national security risk factors in December 2016 (see Dentons' client alert here), there is continued investor uncertainty about the magnitude of the risk presented by the national security review regime. For example, it was certainly not a foregone conclusion that the CCCI/Aecon deal would be scuppered for national security reasons. As a result, it is likely that the government's offer in its *National Security Guidelines* to consult with investors prior to prospective investments—even small transactions or those involving non-controlling interests—will increasingly be accepted by foreign investors given that the consequences of a post-closing review (e.g., divestiture at fire sale prices) can be devastating.

Transportation law

Transportation law

Perhaps no sector better encapsulates the opportunities and challenges inherent in the current transition from the industrial age to the digital age than the transportation sector.





Innovation in Transportation

The federal government has identified innovation in the transportation sector as a key factor in ensuring that Canada takes its place as a global innovation hub that offers high quality and sustainable employment prospects to Canadians. 2019 marks the third year of the federal government's commitment to the development of a coordinated approach to innovation in the transportation sector. Here, we focus on recent developments and regulatory trends to watch in the following areas:

- Establishment of a coordinated approach to the development of regulations and standards for the safe use of automated and connected vehicles (AV/CV), and to the establishment of pilot projects for testing of AV/CVs;
- Development of federal regulations and standards for the safe use of unmanned air vehicles (UAVs or drones);
- Creation of an aviation Passenger Bill of Rights; and
- Creation of data exchanges on transportation information.

Autonomous and connected vehicles

With dozens of companies around the globe working on rolling out autonomous vehicles—including traditional automobile manufacturing firms, technology companies, and proponents of the new "shared economy"—Canada must catch up to countries like Germany, the United States and Japan in carving out a leadership position in the AV/CV sector.

The modernization of a large array of regulatory frameworks, originally designed with human-operated motor vehicles in mind, is a precondition to the smooth deployment of AV/CVs. The regulatory frameworks that are affected include those governing motor vehicle safety, cybersecurity and public safety, privacy, motor vehicle liability insurance, product liability and consumer protection, not to mention the labour market disruptions and opportunities the development of an AV/CV sector will have on the economy as a whole.

Both the federal Departments of Transport Canada, and Innovation, Science and Economic Development Canada, as well as provincial governments, have made a concerted effort at creating a coordinated federal-provincial-municipal policy framework to govern the AV/CV sector. While all levels of government are expected to play a role in public education on motor vehicle safety issues arising from AV/CV, the Policy and Planning Support Committee (PPSC) of the Working Group on Automated and Connected Vehicles—made up of representatives from the governments of Canada, Ontario, New Brunswick, Québec, Alberta, British Columbia and Manitoba—has proposed the following division of legal and regulatory authority over the deployment of AV/CV in Canada:

1. Role of the Government of Canada:

- Setting and enforcing Motor Vehicle Safety Standards for new or imported motor vehicles, and motor vehicle equipment;
- Investigating and managing the recall and remedy of non-compliance and safety-related motor vehicle defects, nationwide;
- Monitoring and developing rules on privacy and cybersecurity; and
- Setting and enforcing compliance with technical standards related to wireless technologies integrated in vehicles and roadside infrastructure.

2. Role of provincial/territorial governments:

- Creating legislation for AV/CV testing and deployment in their own jurisdictions;
- Managing
    - Testing and licensing of human drivers
    - Registration of motor vehicles in their jurisdictions
    - Safety inspections;
- Regulating motor vehicle insurance and liability;
- Enacting and enforcing traffic laws and regulations (including trials);
- Adapting provincially-owned highway infrastructure to support AV/CV deployment; and
- Planning for future transportation projects (e.g., highway management, transit).

3. Role of municipal authorities:

- Enacting and enforcing bylaws consistent with the legislative and regulatory framework created by provinces and territories in relation to:
    - Traffic laws and regulations
    - AV/CV safety regulations;
- Making land use planning decisions to support AV/CV deployment;
- Managing passenger transportation (including public transit, taxis and ridesharing services);
- Managing and creating new logistics for traffic control and parking enforcement; and
- Providing access to public education on motor vehicle safety issues.

Recent highlights of regulatory developments and pilot projects approved under the above-noted framework include:

- Bill S-2: On March 1, 2018, the Strengthening Motor Vehicle Safety for Canadians Act received Royal Assent. Bill S-2 introduced amendments to the federal Motor Vehicle Safety Act to strengthen federal enforcement and compliance authorities in the area of road safety, affording greater flexibility to keep pace with the development of new safety features or new kinds of vehicles, technologies, systems or components.
- Federal guidelines: The federal government has issued a number of guidelines for organizations interested in launching a trial of AV/CV; for Canadian jurisdictions seeking to navigate the interlocking technical, regulatory and policy issues that will arise as a result of the introduction of AV/CVs; and for industry seeking to understand the federal government's approach to the testing and deployment of AV/CVs in Canada.
- Québec amended its Highway Safety Code in 2018 to allow for the implementation of pilot projects to test for the new modes of autonomous vehicles, and how to regulate their operation. Regulations regarding motor vehicle safety fall under federal authority, and vehicles with a Level 3 automated driving system have yet to be approved for purchase. The success of testing for the Level 3 automated driving system might start the ball rolling for new rules under the Mobile Vehicle Safety Act.

- As of January 2019, Ontario has started to allow the testing of Level 3 automated cars without a person in the actual driver's seat, but with a passenger on board, and on public roads. Level 3 automated vehicles are not completely independent and still require some form of human intervention, while autonomous cars—the dream of the future—would decide routes to destinations and specific tasks, such as when to change lanes.
- The City of Toronto, Toronto Transit Commission and Metrolinx submitted a successful funding proposal to Transport Canada to operate a pilot project with an automated transit shuttle. The proposal was submitted as part of Transport Canada's Program to Advance Connectivity and Automation in the Transportation System (ACATS). The project involves running a new transit route in Toronto for 6-12 months, starting in late 2020. The service will use new automated shuttle vehicles that carry between 8-12 passengers. While the vehicles are driverless, on-board ambassadors will staff the vehicles at all times.

Changes in aviation rules and regulations

Transport Canada's Interim Order Respecting the Use of Model Aircraft is still in effect, but new rules have been introduced for Remotely Piloted Aircraft Systems ("RPAS"), also known as drones. Under the new rules, if the drone weighs between 250 grams and 25 kilograms, the pilot must get a drone pilot certificate. The drone(s) must also be registered with Transport Canada, and be clearly marked with the registration, stay below 400 feet, and be operated within the pilot's visual line of sight. The rules will come into effect on June 1, 2019.

In December 2018, the Canada Gazette published the Passenger Bill of Rights. The Air Passenger Protection Regulations will fall under the Canada Transportation Act with the aim of establishing a minimal standard for airlines' obligations towards passengers. A few examples of these standards include requiring airlines to communicate clearly why there are delays or cancellations, and what type of compensation is available; providing compensation ranging from CA$1,000 to CA$2,400 for flight delays or denied boarding; and providing compensation for lost or damaged baggage.

Data exchanges on transportation information

The federal government has recently launched a new Canadian Centre on Transportation Data, and Transportation Data and Information Hub. The Centre seeks to build partnerships with the transportation industry, transportation users, researchers and other levels of government, and thereby make available better data, analysis and information about the national transportation system. The Hub was developed in partnership by Transport Canada and Statistics Canada to provide the Canadian public with an authoritative source of data and information about transportation in Canada.

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