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2018 Legal Year in Review

DECEMBER 20, 2018 9 MIN READ

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As 2018 comes to a close, it is time again to share with our clients and friends our observations about some of the most significant legal developments affecting Canadian business over the past year and their implications for 2019 and beyond.

Without a doubt, the top legal story in Canada for 2018 was the legalization of cannabis for recreational use. The federal *Cannabis Act* took effect in October of this year, creating significant opportunities for businesses that can navigate the complex web of legislative and regulatory oversight at the federal, provincial and municipal levels. Canadian cannabis companies must also be mindful of differences in the legal stances of other jurisdictions – especially the U.S.

Despite the fact that the sale, cultivation and use of cannabis remains a crime under the federal *Controlled Substances Act* (CSA) in the U.S, four Canadian cannabis companies were successful in 2018 in obtaining U.S. stock exchange listings. These companies were able to take advantage of the fact that the CSA's prohibitions do not apply to activities that are carried out legally in another jurisdiction, such as Canada. We expect this will pave the way for more Canadian company listings in 2019.

Once again, 2018 was marked by ongoing uncertainty about the scope of the duty to consult in connection with project development decisions that affect Indigenous communities. The courts grappled with this issue on several notable occasions over the past year. The Federal Court of Appeal quashed the approval of the Trans Mountain Expansion project for failure to satisfy the duty to consult, while the Supreme Court of Canada ruled that the duty to consult does not apply to the Government's legislative acts. Messages from the various courts are not entirely consistent and our top court appears more internally divided than ever. In this uncertain environment, the best practices for getting projects approved, while treating Indigenous Peoples fairly, is for project proponents and governments to exceed the standards currently articulated by Canadian courts.

Uncertainty also increased in the area of climate change regulation. The federal carbon pricing plan came into force, but without the near-unanimous provincial "buy in" that was expected. A number of provinces withdrew their support from the federal plan – including Ontario and Saskatchewan, which are bringing court challenges. Others are pursuing their own plans that may not comply with the federal plan. High carbon-emitters are well-advised to monitor this shifting landscape to identify efficient and cost-effective ways of complying. Other businesses may be able to take advantage of incentives and other opportunities, including offset credits and emissions reduction funding.

Turning to M&A, it has now been over two years since Canada's take-over bid regime was

revamped to provide for a minimum 105-day bid period, a mandatory 50% minimum tender condition and a 10-day extension once the minimum tender condition has been satisfied. There were a number of unanswered questions about the new regime following its adoption. Two key questions were (i) whether the 105-day minimum bid period would have a chilling effect on hostile bids; and (ii) how would rights plans be treated by securities regulators under the new regime? Developments in 2018 may suggest answers to both of these questions.

Cryptoassets like bitcoin and ether began 2018 with prices at or just off record highs. It appears that the year will end with prices down 75% or more. The initial coin offering phenomenon of 2017 is now clearly on the decline. Meanwhile, securities regulators, primarily in the U. S., have announced an increasing number of settlements and enforcement actions against individuals and companies that have dealt in cryptoassets without complying with applicable securities laws. Nonetheless, institutional interest in cryptoassets has held steady, and has perhaps increased, over the past year. We foresee continued institutionalization and professionalization of cryptoassets in 2019.

In welcome news for those engaging in cross-border securities offerings, new rules have been introduced to facilitate the distribution and resale of securities outside Canada. OSC Rule 72-503 came into effect in March 2018 and provided clarity with respect to when a prospectus is required for treasury or secondary distributions of securities from Ontario to investors outside of Canada. The new rule includes four “safe-harbours” that provide for such distributions without the need to satisfy the Ontario prospectus requirement. Equivalent rules in British Columbia and Alberta have also recently been updated. In addition, there is a new exemption for Canadian accredited investors seeking to resell securities purchased through a private placement in a primarily non-Canadian offering.

South of the border, the Securities Exchange Commission (SEC) introduced new rules for property disclosure for mining companies that align more closely with current industry and global regulatory practices and standards. The SEC’s settlement with Elon Musk over his “tweets” serves as a reminder to companies that material information publicized by them or their management teams using social media accounts is subject to disclosure requirements under U.S. securities laws. The SEC also further simplified disclosure requirements for registration statements used in securities offerings and periodic reports, including for foreign private issuers. Finally, the SEC issued guidance on disclosure requirements for cybersecurity risks and incidents.

In the mining sector, strategic investment transactions – in which major mining companies acquired significant minority equity stakes in junior exploration companies – became more prevalent. These transactions represent a win-win outcome for both parties. The junior companies, which had been experiencing a shortage of capital in an uncertain and risk-averse market, received much-needed financing. The major companies obtained a “toehold” in relation to future opportunities on potentially accretive projects.

Environmental, social and governance (ESG) issues – including climate change and diversity – continued to be top of mind for corporate boards and regulators this past year. Although there were few substantive changes to corporate governance requirements in 2018, this may well change in 2019 with the impending amendments to the CBCA and regulations, as well as potential CSA responses to consultations currently underway on governance topics.

While there was not a significant uptick in “on the ground” securities and white collar enforcement activity in 2018, there were a number of noteworthy developments, as regulators attempt to keep up with the ever-changing dynamics of white collar crime. Among other initiatives, the Government of Canada expanded its “integrity regime” which establishes the rules governing the eligibility of parties to contract with the federal

government. Amendments to the *Criminal Code* introduced deferred prosecution agreements – namely, a form of settlement of criminal charges in exchange for undertakings by a corporate wrongdoer. Draft amendments to anti-money laundering legislation were introduced in June 2018. A number of key capital markets enforcement decisions were issued and regulators such as IIROC acquired expanded powers.

Of all the technological advances over the past year, artificial intelligence (AI) stands out as raising the most novel legal and ethical issues for users, advisers and policy-makers. In 2018, the federal government began to lay the groundwork for policies that will govern AI into the future. At the same time, change in the payments sector is also accelerating, including an end-to-end modernization of the Canadian payments infrastructure, which may well be the most ambitious of its kind ever initiated worldwide.

Privacy concerns continued to feature prominently on board agendas in the face of major data breaches, leading to increased scrutiny of management in relation to corporate data security and risk planning. The new mandatory data breach notification regime under PIPEDA came into force, imposing new reporting and record-keeping obligations on corporations in connection with privacy breaches. The EU General Data Protection Regulation also took effect, with implications for Canadian companies offering goods or services to EU data subjects. As AI becomes a growing reality, emerging principles of digital ethics may be the basis for future regulatory action.

The British Columbia Court of Appeal's decision in *Brecknell* also has important privacy implications. The Court's decision to grant a production order under the *Criminal Code* to compel disclosure of Canadian user information held by Craigslist in California is likely to be of interest to all foreign businesses that have a "virtual presence" in Canada and that possess data relating to Canadians.

On the Canadian tax front, the year was marked by the landmark victory for the taxpayer in the *Cameco* case, which was the first decision to address Canada's transfer pricing "recharacterization" rule. During the past year, Canada also introduced legislation (Bill C-82) to enact the OECD's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the MLI) into Canadian law. This is the next step in the process for Canada to ratify the MLI – which will make significant amendments to many of Canada's tax treaties.

Meanwhile, U.S. tax reform and its seismic shift in tax policy has important implications for Canadian businesses. The full impact of these changes will be better understood as further regulations and guidance emerge on issues such as the base erosion anti-abuse tax, interest deductibility, anti-hybrid financing rules, and others. We provide an overview of some of the issues on which Treasury is likely to issue further guidance and that could affect cross-border tax structuring or planning for Canadian businesses.

It was also an eventful 2018 for Canadian foreign investment review. Canada's national security regime took centre stage as a result of the federal government's decision to block the proposed acquisition of construction firm Aecon Group Inc. by a Chinese buyer. Meanwhile, increasing the monetary thresholds for review of acquisitions under Canada's long-standing net benefit regime meant that 60% fewer transactions were subject to review in the 2017-2018 fiscal year, as compared to the prior year.

The unpredictable, and often volatile, renegotiation of the North American Free Trade Agreement (NAFTA) and the reciprocal application of duties on goods traded between Canada and the U.S. were undoubtedly the biggest international trade developments in years. The United States-Mexico-Canada Agreement (CUSMA) begins the ratification process that could ultimately lead to the replacement of NAFTA with this new trade deal. The

Comprehensive and Progressive Trans-Pacific Partnership will also be brought into effect in Canada by the end of this year.

The CUSMA will require material amendments to Canadian laws in favour of intellectual property (IP) rights holders in areas such as trade secret protection, copyright, measures against counterfeit goods, patent delay and protection for biologics. Apart from the CUSMA, Canada updated its industrial design legislation in November 2018 and has recently introduced omnibus amendments apparently intended to implement new measures to protect Canadian companies using IP and to impose safeguards against overly aggressive assertions of rights.

We will monitor these and other legal developments in 2019 as they unfold and we would be happy to discuss them with you.

Articles

- Canada first G7 country to legalize retail cannabis
- Climate change regulation: New tensions between federal and provincial legislators
- Cryptoassets in 2018: Prices down, enforcement up, institutional interest steady
- Canadian cannabis companies conquer U.S. capital markets
- The take-over bid regime after two years
- U.S. capital markets developments in 2018: From rocks in the ground to rolling with cannabis, and everything in between
- Canadian developments affecting cross-border offerings of securities
- Resource projects and Indigenous consultation – What is best practice after a year of uncertainty?
- Strategic investment transactions create benefits for mining companies
- Technology highlights from 2018: Growth in artificial intelligence and modernization of the payments system
- White-collar crime enforcement
- Corporate governance: More engagement
- Privacy stakes higher than ever in 2018 for regulators, businesses and citizens
- The slow burn of U.S. tax reform
- From transfer pricing to tax treaties: Canadian cross-border tax update
- Foreign Investment in Canada: Focus on national security and liberalization of the net benefit regime
- Cross-border investigations: B.C. Court affirms broad power to issue legal process against foreign companies
- CUSMA and regulatory amendments create challenges and opportunities for IP owners in 2018
- A busy year in trade: CUSMA, CPTPP and Tariffs

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