2020

Legal Year in Review

Osler's insights on key developments and their implications for Canadian business.

OSLER

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Introduction

Without a doubt, 2020 has been a year like no other. Inevitably, the COVID-19 pandemic and its effects is a theme that flows through many of the articles in our seventh annual Legal Year in Review publication. At the same time, the business of our clients and the laws that regulate those businesses have evolved in ways that are unrelated to the pandemic and despite the pandemic. In some cases, the challenges presented by COVID-19 have accelerated changes that were already in process, creating benefits or opportunities that may extend well beyond the pandemic. We are pleased to offer our consolidated views of the most important legal and business developments from the past year.

2020 has highlighted a clear and unfortunate dichotomy in our economy. The economic overview by Stephen Poloz, our esteemed Special Advisor and the former Governor of the Bank of Canada, speaks of the “K-shaped” recovery. The top branch of the “K” represents those parts of the economy that experienced declines in the early days or weeks of the first lockdowns, but are rebounding or have already rebounded. This group includes intellectual capital businesses that have remained largely unscathed throughout the pandemic, often due to their capacity to transition to remote work or service delivery environments. While parts of this economy could experience a “double dip” as the second wave of the virus leads to new lockdowns and restrictions, it is resilient and will undoubtedly recover. At the other end of the economic spectrum are those businesses that fall within the lower branch of the “K” – retail, restaurants, bars, airlines, hotels and other businesses that require “in-person” interactions. These businesses may be irreparably damaged. In many ways, this economic overview forms the backdrop to many of the developments discussed by our authors.

For example, the bricks-and-mortar retail sector generally falls in the bottom of the “K”. With government-mandated shutdowns, many retailers have not been able to operate in a manner that can be profitable, or at all. While some have shifted to other delivery mechanisms, such as curbside pickup or e-commerce, many retailers have been unable to adapt. Even with extensive government support, many businesses have been forced to restructure or shut down entirely. By contrast, in the top half of the "K", Canada's mining sector experienced declines early on in the pandemic, but subsequently benefited (significantly) from dramatic increases in commodity prices and a flight to the safety of gold in particular.

The other major force driving change in 2020 is social – namely, the unprecedented increase in focus on diversity and inclusion – and it is entirely unrelated to the COVID-19 pandemic. This has been driven, in large part, by horrific events in the United States that re-energized the Black Lives Matter movement and, in turn, the fight to end anti-black racism in the United States and Canada.

While this has not (yet) led to significant change in the law in Canada, the formation of the Canadian Council of Business Leaders Against Anti-Black System Racism and its BlackNorth Initiative have spurred extensive discussions about systemic racism and positive actions to eradicate it. The BlackNorth Initiative's CEO Pledge, which requires a commitment to specific targets for hiring of persons who are black, Indigenous and people of colour, is but one example of measures implemented to foster broader diversity in the Canadian business and legal community.

Meanwhile, as discussed in our Corporate Governance article, efforts to increase gender diversity around the boardroom table have met with modest success, though very little progress has been made towards achieving broader diversity. Moreover, recent changes to the *Canada Business Corporations Act* regarding diversity disclosure seem to have had limited effect in 2020.

Apart from the (largely temporary) provincial emergency orders imposing lockdowns or similar restrictions, most of the legal developments in 2020 associated with the COVID-19 pandemic have not taken the form of statutory or regulatory change. Instead, there have been widespread adjustments of practices within the existing legal framework or transactional changes seeking to address the effects of the pandemic.

A key adjustment has been the shift from an in-person to a virtual environment. Courts and other tribunals across the country shifted to accommodate virtual hearings, depositions and other processes. Lockdown restrictions prevented in-person annual shareholder meetings, accelerating the trend towards electronic shareholder meetings, and moving even further to provide for virtual-only shareholder meetings. The electronic execution of documents and electronic signatures, although increasingly commonplace in the pre-pandemic world, suddenly became the centre of attention – by necessity. Virtual notarization and commissioning of documents quickly followed. Clearly technology has played a key role in ensuring that significant areas of the economy, including the legal industry, are able to continue operating.

Technology has also been a focus of the capital markets, as technology companies became the "market darlings". Payment company Nuvei Corp. completed the largest technology IPO in Canada in a year with several other notable successes, including a U.S. IPO for Lightspeed POS Inc. and significant stock support for Shopify Inc. Similarly, technology issuers have had significant success raising private capital and completing sale transactions as investors seek to take advantage of growth opportunities.

With technology in high demand and playing such a fundamental role in the COVID-19 environment, it isn't surprising to see law firms increasing their focus on innovation through technology to better serve their clients. In particular, the significant growth in alternative legal service providers, who principally rely on technology – such as Osler Works and Osler Workshop – is expected to continue to play an important role in the provision of legal services both during the pandemic and beyond.

COVID-19 has created obstacles as well as opportunities. The onset of the pandemic led transacting parties to reassess their obligations in light of new uncertainties. For a number of M&A transactions, whether due to genuine changes caused by the pandemic or (perhaps) buyers' remorse, acquirors sought ways to retreat from their commitments to buy. Some buyers claimed that the target had breached its interim period operating covenants in complying with applicable pandemic lockdowns. Others claimed that the target had undergone a "material adverse effect" or "material adverse change" that allowed the buyer to terminate its obligations. Although "MAC" clauses have been litigated to some extent in the United States, there is limited case law interpreting similar provisions in Canada. M&A practitioners, in particular, will be interested in the outcomes of these cases, including, most notably, the pending litigation between Cineplex and Cineworld.

Commercial contracting parties faced and are facing similar issues. In relation to existing contracts, certain parties sought to invoke force majeure clauses as a means of obtaining relief from performance. The standard to establish *force majeure* is, however, high and it is generally necessary to show that the alleged *force majeure* event made it impossible to perform the particular contractual obligations that the counter party seeks to avoid. In a similar vein, the effects of the COVID-19 pandemic on their businesses and their finances forced many issuers to seek relief or waivers from their lenders from covenants that could not be complied with, given business shutdowns arising from government-imposed lockdowns and other pandemic-related economic pressures. Contract negotiations began featuring discussions of available means for protecting a contracting party against a potential counterparty insolvency.

Although it initially appeared that regulatory authorities were concerned about the prospect of "opportunistic" foreign investment transactions, particularly in essential industries for the health and safety of Canadians or for economic stability, the Canadian government has not taken steps to lower the thresholds for or expand the scope of mandatory foreign investment reviews. As a policy matter, regulators indicated that enhanced scrutiny may be given to such transactions within existing parameters.

Businesses have had to adjust to the way in which healthcare and health regulatory matters have become top of mind in all sectors, not just the healthcare industry, and in many aspects of operations. From the critical status of front line health care workers to the use of digital healthcare delivery services, from supply chain issues for personal protective equipment to significant health measures to prevent the spread of COVID-19, healthcare and related regulatory issues garnered more attention in 2020 than ever before.

These considerations have also permeated (among others) the employment relationship, as well as the laws and standards applicable to that relationship. Employers must grapple in new ways and at new levels with issues relating to the health and wellbeing of employees both in the physical and remote workplace. Employers must also contend with finding ways to incentivize management in a world where traditional compensation metrics have been dramatically impacted. COVID-19 pandemic-related shutdowns have also threatened employee livelihoods and forced employers to navigate complex federal and provincial support programs. Health, labour and employment issues will clearly continue to be areas of considerable focus for the foreseeable future, especially as our society navigates second and maybe subsequent waves of the pandemic, and then looks ahead to vaccine roll-out.

Government programs developed to support employees and employers through this difficult period, as Stephen Poloz notes, deserve much of the credit for preventing a much deeper downturn in the Canadian economy – perhaps even the dreaded "L". Governments are looking ahead to measures to rebuild the economy, focusing on historic levels of investment and expenditure, particularly in infrastructure, which has often proved to be a tried-and-true means to stimulate economic growth. All across the country, significant governmental programs targeted at construction and infrastructure have been established, including in developing areas, such as renewable power generation in Alberta which was already a focus prior to the pandemic.

There is no denying that COVID-19 has influenced many aspects of the business and legal landscape, not to mention the very fabric of our lives. It is, unfortunately, not over yet. However, not everything in 2020 has been about the pandemic. In some areas, it has been "business as usual" – laws have changed either incrementally or materially, cases have been decided and legislative consultations and regulatory investigations continue, albeit in a virtual environment.

For example, the provinces and the federal government continue to be in fundamental disagreement regarding environmental regulation – particularly in relation to measures directed at slowing climate change – and the constitutional authority of the federal government to design a "one size fits all" solution to a national environmental problem. More litigation may be on the horizon, depending on the Supreme Court of Canada's decision in the climate change cases currently before it.

Among other developments that we discuss in this year's publication are:

- extensive changes in the regulation of financial services, largely directed at regulatory burden reduction and consumer protection;
- important international tax reforms and the results and implications of material tax litigation;
- proposed new approaches to the regulation of cryptoasset platforms, presenting a potentially safer environment for Canadian investors looking to invest in these assets;
- changes to corporate and securities rules both north and south of the border, including those associated with corporate governance and diversity disclosure requirements and a continued focus on reducing burdensome regulation;

- increasing use of flexible and, in some cases new, tools to assist distressed companies in restructuring their operations;
- notable successes in patent litigation relevant to life sciences and software patent protection;
- unprecedented change to privacy laws at both the federal and provincial level, including new potentially harsh enforcement tools;
- new hybrid debt instruments for financial institutions;
- the increasing use of representation and warranty insurance in Canada and the impact of the pandemic on such policies;
- potential shifts in Canada/United States trade relations flowing from the U.S. election; and
- changes to securities enforcement practices, as well as enforcement response to white-collar crime (particularly arising from the COVID-19 pandemic).

Of particular note is the consultation report from the Ontario Capital Markets Modernization Taskforce (the Taskforce). The Taskforce proposed draft recommendations over the summer that could have significant impacts on both the Ontario capital markets and the Canadian capital markets at large. The Taskforce is due to present their final recommendations by year end. The preliminary proposals elicited extensive (and often contradictory) feedback. It remains to be seen how the Taskforce and, ultimately the Ontario Government, will respond to competing viewpoints for the advancement of capital markets regulation. This is a key area to watch in 2021.

When we indicated in last year's Legal Year in Review that 2020 was poised to be an eventful year, we certainly couldn't have predicted the year we have had. All signs indicate that 2021 is likely to be just as eventful, although we are hopeful for positive developments as we collectively work back toward a sense of normalcy.

We hope you enjoy reading this year's Legal Year in Review. As always, we would be pleased to discuss these developments with you.

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ECONOMIC OVERVIEW

Understanding the K-shaped economic recovery

COVID-19 is a natural disaster of the first order. It is altering the very fabric of our society, that much is clear. Predicting how this will all turn out is, of course, very difficult. But what we can do is to help people understand the forces acting on the economy so they can make more informed personal and business decisions.

The natural response to the pandemic last spring was to shut everything down, asking people and their children to stay home. Those who could work from home did so, while essential front-line workers went about their business, proving how essential they really are. Things stabilized during the summer, but as autumn unfolded so did a second wave. Having learned a few things, governments imposed much more targeted second-round shutdowns.

Where do we go from here? Obviously, much depends on how the infection curve plays out. For the economy, the best descriptor of the situation I have seen so far is the letter “K.” Usually, when the economy experiences a setback, economists look for a “V-shaped” recovery, where all the lost activity is made up fairly quickly. If the recovery is slower than hoped, it is called a “U”; if there is a double-dip, it is a “W”; and if it is a depression, then the dreaded “L-shape” is what emerges. The second wave could produce a “W” but looking forward the “K” is still apt. It captures a basic idea – that the pandemic is having significant adverse economic effects on some parts of the economy (the bottom part of the K) and having very little effect on others (the top part of the K).

Understandably, most of the news and commentary has been about the bottom part of the K. There have been significant impacts on restaurants and bars, hotels, airlines, in-person retail and the oil business. As well, small businesses of all stripes are being affected by the plunge in daily commuting – with so few people going downtown, everything from the corner café to your clothing store to your drycleaner has seen a severe drop in demand.

The rest of the economy is in the top part of the K, where we see a classic V-shaped recovery from the spring shutdown. Even though the shutdown was very widespread, economic activity fell during March and April to a level 19% below where it was before all this started. The economy began to recover as restrictions were eased in May, and by autumn was operating at over 95% of its February level.

The data on employment also suggest that the bottom part of the K represents less than 5% of the economy. Some three million people lost their jobs during the shutdown and many more were working shorter hours than usual. By November, the level of employment had recovered to a point where there were less than 600,000 fewer jobs than in February. That is still close to 3% of the workforce, which of course explains why the unemployment rate in November was 8.5%, while it was 5.5% at the start of the year.

The government's income support programs deserve much of the credit for preventing a much deeper downturn in the economy. Banks' willingness to defer mortgage and loan payments also merit recognition. As a consequence, retail sales have recovered completely, and in September were 3% above the level of last February – a classic V-shaped recovery. Even so, Canadians have boosted their savings considerably.

What this means is that when we look at the economy as a whole, we need to understand that there are really two different economies operating. One economy is under considerable stress, with companies struggling for survival. The other economy is going about its business, and there are even signs of excess demand, particularly in housing construction, renovation and home resales. This is a very human reaction – when people cannot travel, dine out or socialize, they spend their money feathering their nest instead. This is exactly what people did immediately after 9-11. At that time, economists predicted a major global economic slowdown that never materialized because people chose to spend their money around the house instead of travelling.

The economy's "K" and the diverse responses of Canadian companies is clearly reflected in the activities at Osler during the past year. Many important transactions were derailed by the arrival of the pandemic, of course. But as the situation evolved, firms in the top part of the K shifted into expansion and acquisition mode and the capital markets continued to provide investment opportunities. The Fourth Industrial Revolution – the digitalization of business and the deployment of artificial intelligence – appears to have been accelerated by the pandemic, both in customer service channels and in employment channels. Global supply chains, already under review in light of U.S. protectionist policies, were quickly reorganized to ensure domestic supplies of strategic health care items. Indeed, Canada's health care system, under strain for obvious reasons, was forced to innovate – adopting automated appointment

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management, video consultations and around-the-clock diagnostics and surgical delivery. Meanwhile, the bottom part of the K saw numerous mergers, restructurings or, sometimes, insolvencies. The associated labour market stresses meant a busy year for employment law. At the same time, entrepreneurs created and investors invested in thousands of new and growing businesses in Canada.

Since part of the economy is struggling, it will take a long time for the total economy to return to normal, even if most of it already has. People who have been displaced permanently from their jobs will need help to shift to sectors of the economy where there is more economic growth, like the construction and renovation sector, for example. They will need government support during that transition, along with enhanced programs for training and cross-country mobility. Canada has managed through major shocks before, including the 2014 collapse in oil prices. Our system has also managed through periods of much higher unemployment than we are experiencing today.

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Nevertheless, many are wondering how governments are going to pay for all this. Indeed, the International Monetary Fund has projected that public debt will exceed 100% of global GDP in 2021. However, it is worth noting that this is not unlike the situation the world faced in the mid-1940s. Most baby boomers today have no memory of labouring under the debt burden left behind by World War II. In fact, our economy grew its way out of that debt burden.

There is no reason why this cannot happen again. Technically, the critical debt sustainability condition requires that headline economic growth (including inflation) be greater than the rate of interest that governments must pay on their debt. In that situation, regular debt service payments stay low, while total debt shrinks as a share of the economy. To help ensure this outcome, governments can do three things in particular. First, they can lock-in long-term financing at today's very low interest rates. Second, they can ensure that their spending programs are aimed at growth-enhancing investments – including physical infrastructure, digital infrastructure, and social infrastructure like daycare and education – and more immigration. Third, they can eliminate inter-provincial barriers to trade and worker mobility, thereby adding meaningfully to long-term economic growth.

The Canadian economy will never be the same as it was before the pandemic. A return to normalcy will mean a new normal, with many scars from this experience. But we can be confident that Canada's fundamental strengths – its unique and extensive resource base, its world-class financial system, and its diverse and talented people – will continue to serve us well.

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M&A

Top public M&A legal developments in 2020

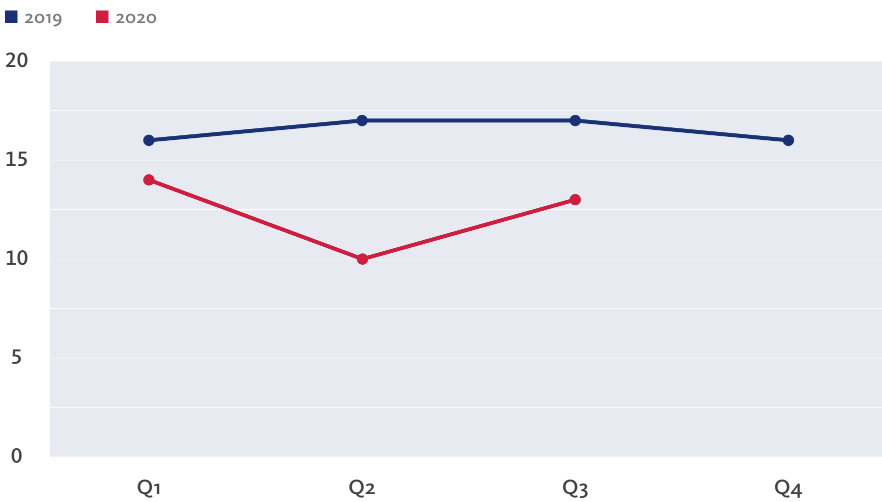
While the declaration of the novel coronavirus (COVID-19) as a global pandemic in Q1 – and its subsequent impact – resulted in a sharp decrease in deal volumes in the first and second quarters of 2020, deal volumes rebounded strongly in Q4. This article provides an overview of those trends as well as some of the most notable Canadian legal developments in public M&A in 2020.

COVID-19 market and deal term impacts

COVID-19 had a profound impact on Canadian M&A volumes and deal terms in 2020. It also led to several high-profile deal terminations and renegotiations.

As of October 30, 2020, there were 40 announced acquisitions of Canadian public companies in 2020, as compared to 58 for the same period in 2019 according to Practical Law Canada. Deal volumes at the start of 2020 were slightly lower than in 2019. This was followed by a significant decline at the outset of the pandemic, with volumes recovering in the latter half of 2020, albeit not to 2019 levels.

FIGURE 1: **TOTAL NUMBER OF CANADIAN PUBLIC COMPANY ACQUISITIONS BY QUARTER**



The COVID-19 pandemic also focused attention on the precise wording of material adverse effect (MAE) definitions and interim operating covenants.

An MAE clause is a standard provision in M&A agreements that generally allocates business-specific risks to the target and economic and market-based risks to the buyer. The provision states that, where an MAE occurs before closing, the buyer is not obligated to complete the transaction, either structured as a condition or as a termination event for the purchaser.

MAE definitions routinely contain exceptions for the benefit of the vendor, including for general economic and industry conditions, unless those conditions cause a "disproportionate impact" on the vendor. They often include additional exceptions for events such as war, terrorism and natural disasters, which (if included) are typically also subject to a "disproportionate impact" standard. Since April 1, 2020, our research indicates that approximately 87% of negotiated Canadian public company M&A deals have included a carve-out for pandemics, epidemics or similar outbreaks of illness, and approximately 65% of negotiated Canadian public target M&A deals now include an explicit reference to COVID-19 in the MAE carve-outs.

Interim operating covenants to which companies are subject between signing and closing now frequently feature COVID-19 exceptions, although the breadth of these exceptions and degree to which the target must consult with the buyer in order to avail themselves of the exception varies considerably. Since April 1, 2020, our research indicates that approximately 52% of Canadian public target M&A deals have carved out "COVID measures" or a variation thereof from the restrictions on the target's business conduct covenants.

Although a substantial body of case law on MAEs has developed in the United States, there has been a dearth of Canadian case law on the topic until a December 2, 2020 decision of the Ontario Superior Court of Justice. In *Fairstone Financial Holdings Inc. v. Duo Bank of Canada*, a private transaction, the Court found that no MAE had occurred, nor had the ordinary course covenants been breached by actions taken by the vendor in response to the COVID-19 pandemic, awarding specific performance in favour of the vendor.

In *Fairstone*, the Court adopted a legal test for an MAE similar to the test that applies in Delaware, requiring an unknown event, a threat to overall earnings potential and durational significance. While each of those were established, the Court found no MAE as there was an exception for material adverse effects resulting from, among other things, emergencies.

In interpreting whether the ordinary course covenants had been breached, the Court found that the ordinary course covenant should be read in the context of the entire transaction. Given the emergency exclusion in the MAE clause, it would not be appropriate to use the more general ordinary course provision to effectivelyoverride the more specific MAE provision. The Court also found the target's response to the pandemic was consistent with its practices in allowing the target to continue its day-to-day operations.

The Court's decision in *Fairstone* stands in stark contrast to the November 30, 2020 decision of the Delaware Court of Chancery in *AB Stable VIII LLC MAPS Hotels and Resorts One LLC*, et al. In that case, the Delaware Court found that significant changes to the target's business in response to the COVID-19 pandemic violated the target's covenant to operate its business in the ordinary course consistent with past practices. The Court's finding on this point was made despite the Court also having concluded that the pandemic did not constitute an MAE as it was excluded from the definition by an exception.

No Canadian court to date has made a finding of an MAE in the context of a public company merger agreement or adopted the legal tests that are now established under Delaware law.

Three Canadian public M&A transactions that were announced pre-pandemic were terminated or renegotiated following the declaration of COVID-19 as a global pandemic; one of these remains the subject of pending litigation. We are aware of other private M&A transactions announced prior to the pandemic that have been the subject of renegotiations, as well as threatened or pending litigation.

Buyer/ Seller	Announcement Date / Termination or Renegotiation Date	Status	Cause for Litigation or Renegotiation
Air Canada / Transat AT	June 27, 2019 / October 9, 2020	Parties renegotiated transaction, reducing consideration from $18/share to $5/share	Transat required consent to put in place a short-term debt facility/ possibility of not obtaining regulatory approvals prior to outside date

Buyer/ Seller	Announcement Date / Termination or Renegotiation Date	Status	Cause for Litigation or Renegotiation
Cineworld / Cineplex	December 15, 2019 / June 12, 2020	Cineplex has commenced an action in the Ontario Superior Court of Justice seeking damages for loss of bargain	MAE / failure to operate in ordinary course
CanCap Management / Rifco	February 2, 2020 / March 30, 2020	Settled for $1.5 million (5.9% of transaction value, and 50% more than negotiated termination fee)	MAE

New guidance on special committees and going private transactions

The Ontario Securities Commission's (OSC) reasons for its decision in *Re The Catalyst Capital Group Inc.* has important disclosure and procedural implications for material conflict of interest transactions. Although the OSC did not cease trade the privatization proposal by a group of shareholders led by management of Hudson's Bay Company (HBC), it ordered remedial disclosure to address what it determined were a number of disclosure deficiencies and required the mailing of a blacklined circular to HBC shareholders. The OSC was also critical of the fact that certain business judgments were made by HBC's lead director prior to the formation of a special committee of independent directors.

The decision reinforces the importance of establishing a special committee and the engagement of independent legal and financial advisors early in the process of considering a material conflict of interest transaction. It further emphasizes the need for detailed disclosure of key judgments made in the course of board deliberations and the process for reviewing and approving the transaction. Market participants that do not do so risk additional regulatory intervention. This is particularly important in the case of management buyouts, where the conflicts are especially acute and key decisions about access to confidential information and group formation can have material impacts on the outcome of the transaction.

For further detail, see our Osler Update entitled "New guidance on special committees and going private transactions" on osler.com.

ESW/Optiva decision

Since May 2016, bids under National Instrument 62-104 *Take-Over Bids and Issuer Bids* have been subject to a mandatory minimum tender requirement of more than 50% of the outstanding securities of the class that are subject to the bid, excluding those beneficially owned by the bidder and its joint actors. In the first decision addressing a request for a discretionary exemption from this 50% mandatory minimum tender requirement, the OSC dismissed the application for exemptive relief brought by ESW Capital Inc. (ESW), the largest shareholder of Optiva Inc. (Optiva).

ESW sought an exemption from the mandatory minimum tender condition before it would make an unsolicited offer to acquire the outstanding shares of Optiva not already owned by ESW. It did so because of its concern that blocking positions held by other shareholders would prevent its proposed offer from succeeding. Rival shareholders Maple Rock Capital Partners Inc. and EdgePoint Investment Group Inc. were expected to reject ESW's offer to acquire all of the Optiva shares it did not own. The pair collectively owned approximately 40% of Optiva, which, when combined with ESW's 28% stake, was sufficient to block ESW's bid from meeting the 50% mandatory minimum tender condition, unless a discretionary exemption was granted.

Although the availability of exemptive relief under NI 62-104 is necessarily a fact-specific enquiry, the OSC order demonstrates, and reinforces previous decisions to the effect, that the Commission is reluctant to interfere with the rules prescribed in the Canadian take-over bid regime absent facts requiring intervention on public interest grounds. The decision follows a 2018 decision where the OSC also declined to deviate from the established rules of the take-over bid regime in the context of the CanniMed/Aurora take-over battle. Reasons for the ESW/Optiva decision have not yet been released.

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Yukon Court of Appeal upholds transaction value in dissent decision

In its decision in *Carlock v. ExxonMobil Canada Holdings ULC, 2020 YKCA 4*, the Court of Appeal of Yukon (Court of Appeal) found that the negotiated deal price was the fair value of the dissenting shareholders' shares in connection with the 2017 acquisition of InterOil Corporation by ExxonMobil Canada Holdings ULC. The Court of Appeal's ruling overturned the earlier decision of the Supreme Court of Yukon (Trial Court) which awarded the dissenting shareholders a surprising 43% premium to the negotiated deal price, which was itself a topping "superior proposal" in respect of an agreed-upon transaction.

This judgment signals that Canadian courts will view the negotiated deal price in public M&A transactions as a strong indicator of fair value, consistent with recent decisions on this issue in Delaware and prior decisions in Canada. This decision provides market participants with a clear and detailed formulation of this principle, overturning the surprising ruling of the Trial Court. Further, the decision confirms that corporations are not required to run an auction process in order to obtain fair value for their shares.

For further detail, see our Osler Update entitled "Yukon Court of Appeal upholds transaction value in dissent decision" on osler.com.

Outlook

We are currently observing a strong rebound in Canadian public target M&A activity and the outlook for 2021 is strong. We anticipate that the lessons learned from deal-making during the COVID-19 pandemic will continue to inform market practice going forward.

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LITIGATION

Litigating during COVID-19 and other notable litigation developments in 2020

In March 2020, the COVID-19 pandemic forced many courts and tribunals to shut their doors. This article highlights a number of the changes and adaptations related to the conduct of litigation that were adopted as a result of the lockdowns. It also examines several other significant litigation developments during 2020, including material amendments to the Ontario class actions statute, as well as important guidance from the Supreme Court of Canada regarding litigation funding as a tool in restructurings and the test for authorizing a class proceeding in Québec.

The emergence of virtual hearings and examinations

Although shutdowns associated with the COVID-19 pandemic had a significant impact on litigation proceedings, litigation activity has largely rebounded across Canada, even as many courts continue to limit in-person attendance. Courts and tribunals have increasingly embraced virtual hearings and examinations. Indeed, many courts and tribunals have required matters to proceed virtually over the objections of the parties.

In the early stages of the pandemic, many judges indicated that litigants were expected to co-operate and use technology to advance out-of-court processes, such as examinations for discovery. One judge (and former Osler lawyer) explained that using available technology is part of the basic skillset required of civil litigators and courts. In a decision in May, he ordered that an examination proceed by videoconference, despite objections, stating:

> In my view, the simplest answer to this issue is, "It's 2020." We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back.

It is not merely that courts are making the best of a bad situation. The pandemic has accelerated a shift that many, including Toronto's Commercial List, had already encouraged. And as the technology has improved, and comfort using the technology has grown, many judges and tribunals appear to be increasingly skeptical of the conventional wisdom that virtual attendances are inferior. For example, some judges have found that there are advantages in hearing live testimony by videoconference because a judge can focus directly on a video of the speaker, without having to pivot between the examining lawyer and the witness box.

Of course, there are a variety of challenges associated with virtual litigation. And, as business literature has often canvassed, long videoconferences can be exhausting. Lengthy virtual hearings can be particularly challenging for a judge who has to digest hours of online submissions. For the most part, however, judges, lawyers and parties have transitioned efficiently to virtual hearings.

As the technology has improved, and comfort using the technology has grown, many judges and tribunals appear to be increasingly skeptical of the conventional wisdom that virtual attendances are inferior

Arbitration as an alternative to court proceedings

In the face of court delays relating to government-mandated shutdowns, many businesses have also come to view arbitration as an increasingly valuable alternative to court proceedings. In addition to other benefits – such as maintaining confidentiality and having the ability to select an arbitrator who has particular experience or expertise – parties can design a process and rules to efficiently address their matters. We anticipate that many parties will continue to turn to arbitration to resolve business-critical disputes as the pandemic continues.

Pandemic-related class action filings

The COVID-19 pandemic has also spawned an increase in class action filings across Canada, including dozens of actions advancing allegations relating to the pandemic. So far, these proceedings have tended to be confined to a few discrete contexts, such as actions filed on behalf of consumers seeking refunds or the return of membership fees (with many of these focusing on specific sectors of the economy like travel, post-secondary education or platforms selling tickets for entertainment or other events). Other class action filings in Canada have targeted insurers and long-term care facilities arising from the impact of the COVID-19 pandemic. Fortunately, other areas – such as securities class actions alleging misrepresentations – have not manifested in Canada to the extent that many predicted.

Some governments are considering legislation to protect businesses from liability relating to the COVID-19 pandemic. For example, on October 20, 2020, the Ontario government introduced the *Supporting Ontario's Recovery and Municipal Elections Act, 2020*. This bill, if passed, would give businesses liability protection against certain claims resulting from an individual being infected with or exposed to coronavirus. This protection is available if the business: (i) acted or made a good faith effort to act in accordance with public health guidance relating to coronavirus; and (ii) the act or omission does not constitute gross negligence. The bill explicitly excludes some claims, such as certain types of claims by employees, from the scope of its protection.

Other notable litigation developments (unrelated to the pandemic)

In addition to the direct impact of the COVID-19 pandemic on litigants, 2020 saw a number of developments unrelated to the pandemic.

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CCAA proceedings and litigation funding

Third-party litigation funding has increased in recent years across a range of practice areas. In May, the Supreme Court of Canada released reasons in the "Bluberi" case *(9354-9186 Québec Inc. v. Callidus Capital Corp.)*, a unanimous decision confirming that, in appropriate circumstances, third-party litigation funding may be approved as interim financing for insolvent debtors under section 11.2 of the *Companies' Creditors Arrangement Act*. This gives insolvent debtors who hold a valuable litigation asset a potential additional tool to seek to maximize creditor recoveries.

Overhaul of Ontario's class actions statute

Ontario made extensive changes to its class actions statute. Some of the amendments add more rigour to the certification test, bringing it closer to the U.S. approach by legislating that a class proceeding cannot be certified unless common factual and legal issues "predominate" over individual issues. Other changes include amendments that are intended to increase the pace of litigation. Also included are mechanisms to help courts and defendants address the inefficiency and prejudice caused when plaintiffs file overlapping class actions in multiple provinces against the same defendants regarding the same subject matter.

These changes have led many to speculate that plaintiffs will increasingly choose to file their actions in provinces such as Québec and British Columbia instead of Ontario. It remains to be seen whether that will be the case as these changes only took effect on October 1, 2020. There is not yet a large enough sample size to begin drawing any conclusions.

Confirmation of low certification threshold for class actions in Québec

On October 30, 2020, the Supreme Court of Canada confirmed in a 6 to 3 decision that a Québec judge's role at the authorization stage (i.e., certification) is to "filter out frivolous claims, and nothing more" (*Desjardins Financial Services Firm Inc. v. Asselin*). The Court held that a plaintiff at the authorization stage is not required to show that the claim has a sufficient basis in fact. The *Desjardins* decision sets Québec even further apart from other Canadian provinces, and in particular Ontario, considering the recent amendments it has adopted.

Expectations for 2021

Given the anticipated economic challenges, we expect that 2021 will be a busy year for litigation and that many businesses will be forced to litigate business-critical disputes. As the pandemic intensifies, the dynamics may shift and litigants may need to manage additional complexities (e.g., risks relating to the solvency of litigation opponents and other relevant businesses), in addition to the usual legal and business considerations. The dynamics could also be affected by government intervention, particularly if governments enact legislation aimed at protecting businesses in this environment.

These complexities reinforce the importance of having skilled in-house and external counsel who understand the legal and business issues at stake and can develop and implement strategies to manage the risks. The experience of 2020 has confirmed that, even if there are court closures and other shutdowns, litigation can still proceed effectively in a virtual setting to meet the needs of businesses in Canada.

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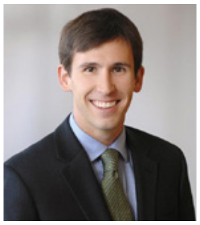

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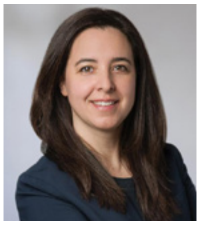

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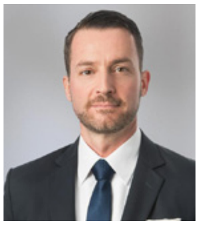

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HEALTH

COVID-19 expands health industry to all sectors

In a year defined by unpredictability and constant change, the COVID-19 global pandemic has pushed health regulatory matters to the forefront of all sectors and industries. Factors such as provincial states of emergency, increased adoption of digital health technologies, a heightened recognition of responsibility for the health and safety of employees and clients, worldwide shortages of personal protective equipment (PPE) and unprecedented initiatives from Health Canada in the form of temporary federal orders have all forced traditional health industry participants to adapt to a continually changing and uncertain environment. Businesses operating outside of the health industry have also been required to seek highly specialized health regulatory advice in response to the impact that the pandemic has had on their operations and business.

Emergency orders and directives: understanding and adapting to constantly changing restrictions

Businesses in all sectors have had to understand and adjust to emergency orders issued under various provincial emergency legislation as a result of states of emergency or states of public health emergency in all jurisdictions of Canada, such as the *Emergency Management and Civil Protection Act* and the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* in Ontario and similar emergency legislation in other provinces. As the pandemic continues, states of emergency and public health emergency have been resolved, and provincial and municipal governments have implemented various other legislative measures and public health guidance to address the ongoing effects of the pandemic, including, most recently, more restrictive lockdown measures in areas of greatest risk.

Understanding the effects and application of the legislation and orders, as well as the recommendations and requirements of applicable federal, provincial and municipal authorities, has been a necessary priority for businesses in 2020 in connection with businesses closing, re-opening, and now in many jurisdictions, closing again. In the process, businesses have had to adapt to the need to adopt cleaning protocols and procedures, as well as other protective measures, such as screening, physical distancing requirements, capacity limits, reducing unnecessary gatherings, face coverings, PPE and safety plans. Guidance from public health authorities continues to evolve as more information becomes known about the COVID-19 virus.

In the more traditional health industry context, health services providers such as hospitals, long-term care facilities and retirement homes were faced with navigating unprecedented developments arising from emergency legislation, such as extraordinary work deployment powers. In Ontario, for example, the extraordinary work deployment measures include authorizing health services providers to take, with respect to work deployment and staffing, “any reasonable necessary measures to respond to, prevent and alleviate the outbreak of COVID-19.” These powers include, but are not limited to, the authority to, among other things, (a) redeploy staff within different locations in (or between) facilities of the particular health service provider; (b) redeploy staff to work in COVID-19 assessment centres; (c) defer or cancel vacations, absences or other leaves, regardless of whether such vacations, absences or leaves are established by statute, regulation, agreement or otherwise; (d) change shifts and schedules; and (e) employ extra part-time or temporary staff or contractors or volunteers, including for the purposes of performing bargaining unit work.

This has raised considerations relating to healthcare providers’ unique status under occupational health and safety legislation and concerns relating to the reasonable protection of frontline health workers in the rapidly evolving circumstances of the COVID-19 pandemic. This has also highlighted limitations on workers’ rights to refuse work when (a) the circumstance is inherent in the worker’s work or is a normal condition of the worker’s employment, or (b) the worker’s refusal to work would directly endanger the life, health or safety of another person.

Interpreting how various governments’ COVID-19 funding response measures can be applied has also been a challenge for many health industry participants. For example, it has been difficult to assess whether and how Canada Emergency Response Benefit (CERB) payments and temporary pandemic pay could be relied upon within complex employment relationships and arrangements in the hospital context.

Acceleration of digital healthcare delivery

Over the past several years, we have seen an increased emergence of digital healthcare providers across a variety of health industry participants, including, for example, virtual care platforms to facilitate services provided by physicians, nurse practitioners, mental health providers and pharmacies, among others. The COVID-19 pandemic rapidly accelerated the adoption of healthcare delivery through technological and digital means in order to address the limitations of the physical healthcare system infrastructure and its dependence on in-person interactions. While we do not consider digital healthcare delivery to be a 2020 phenomenon, the dramatic accelerated rate of growth in this area, as well as the pace at which it is now being accepted and funded by governments, has significantly increased in part as a response to the COVID-19 pandemic. We anticipate this trend will continue, even after the pandemic is over.

Responding to worldwide shortages of PPE and new COVID-19 testing devices

Generally, the COVID-19 pandemic has elevated the importance of employee occupational health and safety for all businesses and materially increased the risk profile for employers. In particular, the unprecedented worldwide surge in demand for PPE created a number of challenges for those conducting business both within and outside of the health industry. Health industry participants have been facing well-documented challenges in securing adequate PPE stock to protect frontline staff. This has resulted in extraordinary government responses, including new temporary federal orders such as the *Interim order respecting the importation and sale of medical devices for use in relation to COVID-19* under the *Food and Drugs Act* (the Interim Order).

Due to the overwhelming demand for PPE as the pandemic took hold, provincial governments began looking to non-traditional manufacturers to produce, reprocess and distribute PPE. For example, governments requested that luxury clothing manufacturers reprocess expired N-95 masks and with a significant shortage of alcohol-based hand sanitizers, liquor distillers began to manufacture hand sanitizers. The industry expanded dramatically as more participants became focused on the production, reprocessing, distribution and supply of PPE. New market participants also became engaged in the development of new COVID-19 testing devices for benevolent and/or financially motivated reasons.

In seeking to get their products to market quickly, these new health industry participants were faced with navigating complex technical and regulatory requirements to obtain Health Canada authorization to manufacture, import and sell regulated Class I (N95 respirators, medical gowns, face shields and medical goggles) and Class II (medical gloves) medical devices and COVID-19 testing devices under the *Medical Devices Regulations* to the *Food and Drugs Act.* The Interim Order created a new streamlined application process, permitting more participants to obtain Health Canada authorization more rapidly.

While we do not consider digital healthcare delivery to be a 2020 phenomenon, the rate of growth and disruption in this area, as well as the pace at which it is now being accepted and funded by governments, has significantly increased in part as a response to the COVID-19 pandemic.

The PPE shortages have been also exacerbated by supply chain disruptions and rampant fraudulent activity. Unsurprisingly, the PPE supply chain challenges also led businesses to pursue new supply channels and networks, with many industry participants seeking to rely upon force majeure provisions in supply contracts.

Return to work strategies: industry-initiated COVID-19 testing

In addition to employee screening and monitoring, employers in a wide variety of industries have implemented private COVID-19 testing for their employees and workers as one of the measures to assist in maintaining or resuming operations.

Privately coordinated COVID-19 testing raises a myriad of issues. In Canada, paying privately for medically necessary insured services raises issues under the *Canada Health Act*. Other relevant concerns include restrictions regarding the training and qualifications needed to administer COVID-19 tests (which may differ depending on the jurisdiction); medical device regulations governing the testing equipment; considerations around the controlled act of communicating a diagnosis to a patient (which typically may only be performed by a physician or other qualified regulated health professional in each jurisdiction); obtaining appropriate consent to report positive COVID-19 test results to anyone other than the person taking the test; and ensuring that positive COVID-19 test results are reported to the applicable public health authority for contact tracing. It is also necessary to navigate privacy rules relating to personal health information in connection with industry-initiated COVID-19 testing.

In addition to employee screening and monitoring, employers in a wide variety of industries have implemented private COVID-19 testing for their employees and workers as one of the measures to assist in maintaining or resuming operations.

Planning for worst-case scenarios

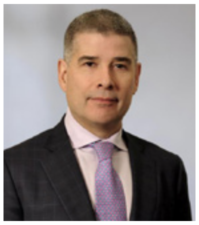
In the early days of the COVID-19 pandemic, the Canadian health industry was consumed by fear that Canadian hospitals would be overwhelmed by demand and face similar tragic circumstances to those experienced in other countries and cities worldwide. In response to these fears, we witnessed the business community entering the health industry in an effort to help to fill infrastructure gaps that could arise if the number of COVID-19 cases in Canada reached unmanageable levels.

Many new and unique arrangements were implemented for a variety of purposes. These included (a) the creation of spaces where healthcare workers who contracted or were at high risk of contracting COVID-19 could isolate from their families and continue to attend work; (b) the establishment of field hospitals to address the potential overwhelming overflow of patients; and (c) the creation of additional temporary morgue space if the death rates became high.

Looking forward to 2021 and beyond

The above examples are just a small sampling of the unique and highly complex work within the health industry that COVID-19 has created for traditional health industry participants and the business community more generally. We believe that the COVID-19 pandemic has created a significant shift, not only in the way that healthcare is delivered in Canada, but also in the way that all businesses think about their operational risks, bringing a health lens to every industry. We anticipate that 2021 will usher in a variety of new challenges and considerations – as well as opportunities – that will require complex health regulatory advice as the COVID-19 pandemic continues.

AUTHORS



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EMPLOYMENT & LABOUR

COVID-19 and difficult decisions for employers: Employment challenges in 2020

The year 2020 has been momentous for employment law. Human resources professionals, legal counsel and others have been forced to deal with constantly shifting rules and evolving legal risks. These changes have arisen not only from the impacts of the COVID-19 pandemic, but also from key case law developments that could profoundly affect the interpretation and enforceability of employment contracts, arbitration clauses and compensation plans.

COVID-19 in the workplace

There has been a significant amount written about COVID-19 and the impact of the pandemic on workplaces in Canada. These are our key takeaways. Please refer to Osler's COVID-19 Workplace Playbook for more detail on these and other topics related to COVID-19 and the workplace.

Remote work can create as many problems as it solves

Over the spring and summer of 2020, many employers – some of whom were forced to adopt "work from home" arrangements hastily as their workplaces were closed – quickly began to embrace the flexibility (and in some cases, cost savings) of having employees working from home (or "working virtually" elsewhere). Some employers have been surprised to learn that laws related to the physical workplace can also apply to remote workplaces. Here are examples of some of the issues associated with remote work:

- *Employment standards legislation:* The minimum requirements contained in employment standards legislation, such as those relating to hours of work, meal periods and overtime, are not suspended or limited when employees are working remotely from home or elsewhere. As such, employers should consider whether and how they will monitor employees' working time – not necessarily (or exclusively) to manage performance or productivity, but also to ensure that all applicable minimum requirements are complied with. This can be a challenge, particularly without the ability to directly supervise the workplace. Clear policies that are communicated to employees, including those addressing hours of work, can assist in this regard. This protection can be enhanced when coupled with software and systems, including self-reporting mechanisms, that facilitate compliance with employer record-keeping obligations.
- *Workers' compensation when working virtually:* Just as workplace injuries can lead to workers' compensation claims in the physical workplace, employees working virtually who become injured in the course of their employment at home may also be covered by the applicable workers' compensation regime. Coverage will depend on where and when the injury occurs, as well as the activity the employee was engaged in at the time of the injury. For employers whose businesses are covered by a provincial workers' compensation insurance scheme, the determination of whether an injury is work-related must be made by the applicable workers' compensation board.
- *Working outside the employer's "home" jurisdiction:* A common request from employees is to work remotely outside the province or country where their employer is based. These types of arrangements are not without risk and should be approached with caution. For example, this situation raises questions as to whether workers' compensation coverage extends across jurisdictions and could expose employers to potential risk in the event of a workplace injury. For provincially regulated employers, the employment standards legislation in the province where the work is being performed may apply to the employee (and their employment contracts), notwithstanding that the employer's actual workplace is elsewhere. Similarly, employees working outside of Canada (and their employers) may be subject to the employment laws of the country in which they are working. Potential issues relating to tax, immigration, privacy and data protection should also be considered in connection with any extra-provincial remote work arrangements.

Some employers have been surprised to learn that laws related to the physical workplace can also apply to remote workplaces.

COVID-19 screening requirements in Ontario have been codified

In late September, the Ontario government imposed mandatory COVID-19 screening requirements for Ontario workplaces (Mandatory Screening). Before that, COVID-19 screening was recommended, but not clearly mandated. As a result, employers (together with their legal counsel in some cases) were left to their own devices to create screening tools.

Mandatory Screening must be undertaken for all workers and "essential visitors" entering the workplace and includes a list of three questions:

1. Do you have any of the following new or worsening symptoms or signs? [The list of "official" symptoms is available here.]
2. Have you travelled outside of Canada in the past 14 days?
3. Have you had close contact with a confirmed or probable case of COVID-19?

If the person answers NO to all questions, they may be permitted to enter the workplace. If the person answers YES to any question, they must be prevented from entering the workplace. Employers are permitted to add to the content of the Mandatory Screening, but cannot take away from it. In particular, the list of symptoms that are screened for must, at a minimum, always include the symptoms listed in the Mandatory Screening.

When the Mandatory Screening was first implemented, there was no written guidance on how the pre-screening tool had to be implemented and employers were again left to their own devices to determine the best way of doing so. However, since the rollout of Mandatory Screening, the Ontario government has updated its guidance on developing a COVID-19 safety plan. As of the date of writing, this guidance now distinguishes between active and passive screening, and states that employers must now *actively* screen every worker. More details regarding active screening can be found in our Osler Update entitled "New (and mandatory) COVID-19 screening tool for workplaces" on osler.com. Employers must be aware that they cannot simply rely on employees to self-assess and determine whether they can come to work. Rather, a representative of the employer must review answers to the Mandatory Screening questions and make an assessment of whether the individual can enter the workplace.

Physical workplace safety measures remain imperative

As always, evaluating and addressing the risks related to COVID-19 transmission in the physical workplace represents one of employers' key obligations. Osler's COVID-19 Workplace Playbook provides an extensive overview of these obligations and steps for addressing COVID-19 related risks in the workplace. At a minimum, employers are required to have specific COVID-19 safety plans in place that are designed to mitigate risks in the context of their workplaces. These plans should ideally be developed in consultation with, and regularly reviewed by, the workplace joint health and safety committee.

Check, check again and then re-check public health guidance and government directives

The importance of public health guidance and government announcements and directives to employment law considerations has increased dramatically since the start of the pandemic. A key takeaway from this year is that the information published by various public health and governmental authorities is apt to change and will do so frequently with little or no notice. In contrast with legislation, the public health advice and guidelines that employers must follow are now often spread across multiple federal, provincial and municipal websites. These websites can and do change from week to week, and the sheer volume of public health messaging can be difficult to track, especially for industries considered to be higher-risk. As such, to the extent that employers are basing decisions relating to their workplaces on public health and government recommendations, it is important to keep a record of that advice (e.g., by saving a copy of the website as it existed on the date of the decision and keeping it on file) in case such decisions need to be justified later.

Key case law developments

In 2020, a number of important case law developments are presenting challenges for employers in Canada. The trend in the jurisprudence continues to be towards strict judicial scrutiny and interpretation of employment contracts and incentive plans and policies. The net effect of these decisions is to drive severance costs higher for businesses and/or increase uncertainty regarding contract enforceability. A selection of the most impactful employment law cases from 2020 are highlighted below.

The trend in the jurisprudence continues to be towards strict judicial scrutiny and interpretation of employment contracts and incentive plans and policies.

Matthews v. Ocean Nutrition Canada Ltd. (Matthews)

The Supreme Court of Canada's decision in *Matthews* centered around a company's long-term incentive plan (LTIP), which stipulated that the plaintiff employee would be entitled to a payout if the company was sold. The LTIP also contained exclusion clauses, which stated that: a) the LTIP did not apply to employees who resigned or were terminated, whether with or without cause; and b) that the LTIP would not be included in the calculation of severance. The employee in question was constructively dismissed and the company was sold within the notice period. The employee claimed that he should have received the LTIP payment notwithstanding the earlier termination of employment and the exclusion clauses.

The Supreme Court of Canada unanimously held that the exclusion clauses in the LTIP did not remove the employee's entitlement to the LTIP payout and that the employee was entitled to damages. To assess whether compensation, such as under an LTIP, would be owing despite the employee's termination, the Court considered

1. whether, but for the termination, the employee was entitled to the bonus or benefit during the reasonable notice period
2. whether the bonus or benefit plan unambiguously alters or removes the employee's common law right to damages within the notice period

On the second branch of this test, the Court embraced a highly technical framework that distinguished between the right to the award/benefit/bonus/payment (the award) itself and the separate right to claim damages in respect of the lost opportunity to earn the amount of the award. As a result, all employers doing business in Canada should revisit their compensation plans, contracts and policies to ensure the operative language addresses the issues presented by this ruling.

More commentary regarding *Matthews* can be found in our our Osler Update entitled "SCC puts employers on notice regarding long-term incentive plans" on osler.com.

Waksdale v. Swegon North America Inc. (Waksdale)

In *Waksdale*, the Ontario Court of Appeal held that termination provisions in an employment contract are indivisible, regardless of how they are organized or where they appear in the written document. As a result, an unenforceable "with cause" provision will render the entire termination clause unenforceable, including an otherwise enforceable "without cause" provision. The Court of Appeal also confirmed that a severability clause purporting to sever the offending provision rather than invalidating the entire clause or agreement will be ineffective to excise the offending part of the termination clause and save the remaining provision.

As in *Matthews*, the Court in *Waksdale* confirmed that courts will look for any technical flaw in termination language in order to award employees higher severance amounts. As a result of *Waksdale*, employers in Ontario should be reviewing and updating all of their termination clauses and standard form offer letters or employment agreements, including their executive agreements.

More commentary regarding *Waksdale* can be found in our Osler Update entitled "The Ontario Court of Appeal's latest decision striking down attempts to control severance cost" on osler.com.

Uber Technologies Inc. v. Heller (Uber)

In a highly anticipated decision, the Supreme Court of Canada in *Uber* held that drivers could proceed with a class action against Uber in the Ontario courts alleging violations of employment standards laws. Uber could not rely on an arbitration clause in its standard form services agreement that would have required the drivers to pursue their claims before an arbitrator in the Netherlands. The majority of the Court determined that the arbitration clause was unconscionable on the basis that: 1) there was an inequality of bargaining power between the parties; and 2) the arbitration clause amounted to an improvident bargain, as it required Mr. Heller to pay up-front administrative fees almost equal to his annual income from Uber and travel to a foreign jurisdiction in order to pursue a dispute.

The Court left undisturbed the Ontario Court of Appeal decision that held that arbitration clauses will be unenforceable if, on their face, they preclude access to the statutory complaints process involving the Ministry of Labour that employees are entitled to benefit from under employment standards legislation. As a result, companies who intend disputes to be handled in a confidential arbitration setting pursuant to an arbitration clause in an employment or independent contractor agreement should be reviewing those agreements to ensure that the language will withstand judicial scrutiny.

More commentary regarding *Uber* can be found in our Osler Update entitled "Supreme Court of Canada rules Uber arbitration clause invalid and a 'classic case of unconscionability'" on osler.com.

Battiston v. Microsoft Canada Inc.

As discussed in our article, A year of upheavals and dashed expectations: Executive compensation developments in 2020, an Ontario Superior Court of Justice decision held that forfeiture of unvested long-term incentive awards on termination of employment without cause was "harsh and oppressive."

The case is on appeal to the Ontario Court of Appeal and, while Osler was not counsel at trial, we are representing Microsoft for the appeal.

Conclusion

Going into 2021, there remains significant uncertainty with respect to both the course of the COVID-19 pandemic and the effect it will have on workplace issues, as well as the impact of recent employment law jurisprudence in Canada. Companies should continue to monitor these and other legal developments related to the workplace in order to ensure that they are effectively managing human resources risks to their businesses.

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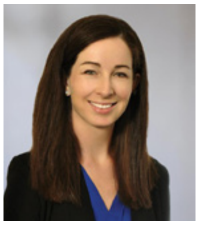

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CAPITAL MARKETS

Reducing the regulatory burden: Positive changes in corporate and securities law

There were a number of significant developments in the corporate and securities landscape in Canada in 2020 arising from regulatory amendments, pending proposals and the impact of the COVID-19 pandemic. These changes will impact a variety of capital markets participants, including reporting issuers, investors and dealers. Notwithstanding the impact of the COVID-19 pandemic on the Canadian economy, regulatory initiatives continued to advance through 2020. In particular, the Canadian Securities Administrators, the umbrella organization of the provincial and territories securities regulatory authorities (the CSA), has continued to implement and propose changes seeking to "reduce the regulatory burden" on capital markets participants.

In Ontario, the Capital Markets Modernization Taskforce (the Taskforce) presented its preliminary consultation report. The report included a number of draft recommendations that attracted a mix of praise and pushback from a variety of market participants. It remains to be seen how the Taskforce will work through the significant differences of opinion on how to enhance Ontario's capital markets among stakeholders in arriving at the Taskforce's final recommendations. In addition, the Taskforce will need balance its focus on the capital markets in Ontario with the current approach of harmonization of securities law through the CSA.

Here is our list of the year's most notable developments. Additional items are included in our Top public M&A legal developments in 2020 article and in our The rules they are a-changin': Corporate governance developments in 2020 article.

Securities law and regulation

1. The impact of COVID-19 on capital markets

Beginning in March of 2020, restrictions on travel, public gatherings and carrying on business were imposed, as the effects of the COVID-19 pandemic started to take hold. In light of the serious potential impact of the pandemic on the Canadian capital markets, the CSA issued a series of notices[1] seeking to provide immediate relief to reporting issuers. These notices addressed a variety of topics, including postponing financial reporting deadlines, extending the required timeline to call and hold annual shareholder meetings under applicable securities laws and extending comment periods for regulatory proposals. Since the COVID-19 pandemic has now persisted for such a long period of time, much of the initial relief provided is no longer relevant or available.

For more information, refer to the following Osler Updates on osler.com on this subject: CSA to provide blanket relief for some regulatory filings due to COVID-19 (March 19), TSX delays deadline for holding annual meetings and provides other blanket relief in response to COVID-19 (March 24), Q1 disclosure in the age of COVID-19 (April 17) and Room to move: delaying continuous disclosure obligations in 2020 (May 8).

2. Capital markets changes on the horizon? The Ontario Capital Markets Modernization Taskforce reports

On July 9, 2020, the Ontario Government's Capital Markets Modernization Taskforce (the Taskforce) published its widely anticipated, preliminary consultation report seeking public feedback on 47 preliminary policy proposals. The Taskforce sought comments to its proposals by September 7, 2020 (the Labour Day holiday). The consultation report included proposals in a variety of areas that could have significant impacts on Ontario's capital markets. Although the Taskforce has not yet published the comment letters it received, a number of commenters have made their letters publicly available. Feedback so far has been mixed, with competing views from issuers, investors and other capital markets

1 See CSA notices issued on March 16, March 18, March 19, March 20, March 23, April 9, April 16, May 1, May 20, May 21, May 29 and October 29.

participants on a number of the proposals. The Taskforce is due to finalize its comments and make a final report to the government by the end of 2020.

For more information, refer to our Osler Update entitled "Osler comments on Capital Markets Modernization Taskforce consultation report" on osler.com regarding our submissions and our comment letter on the Taskforce report.

3. Adoption of an "access equals delivery" model

Among the first proposals published by the CSA in 2020 was a consultation paper regarding the proposed adoption of an "access equals delivery" model for document distribution. Under this model, which currently exists in the United States and other jurisdictions, delivery of documents would be effected by the issuer alerting investors that the relevant document was available on the issuer's website and on the System for Electronic Document Analysis and Retrieval (SEDAR). The consultation paper solicited feedback regarding the potential scope of such a model in Canada. In particular, the paper sought input regarding its use for prospectus offerings and to satisfy continuous disclosure document dissemination requirements (such as financial statements, proxy circulars and annual information forms). The comment period ended March 9, 2020. To date, no further updates have been provided by the CSA.

A copy of Osler's comment letter regarding the consultation paper is available here.

The CSA's Staff Notice establishing a nationally harmonized process for the confidential pre-filing and review of prospectuses was well-received and is now in widespread use.

4. Clearing comments confidentially – Prospectus confidential pre-file review comes to Canada

The CSA's Staff Notice establishing a nationally harmonized process for the confidential pre-filing and review of prospectuses was well-received and is now in widespread use. The Staff Notice brings Canadian practice more in line with the United States, where confidential submissions have been permitted for emerging growth companies since the adoption of the JOBS Act in 2012 and are now permitted more generally. It also extends this practice beyond cross-border initial public offerings, which were previously the only circumstances where Canadian securities regulators permitted prospectuses to be filed and reviewed on a confidential basis.

Confidential pre-files are now permitted for all prospectuses (long-form, short form and shelf), subject to limited exceptions. The process is not available for non-offering prospectuses (other than in connection with a cross-border financing) and prospectuses solely used to qualify the issuance of securities on conversion of convertible securities.

Generally, staff will use their best efforts to provide initial comments within 10 working days, which is the same standard that applies to a review of a publicly filed long-form prospectus. This time period also applies to the confidential review of a short form prospectus, although it may be possible for this period to be shortened in appropriate circumstances.

Staff have noted their expectation that a pre-filed prospectus be of the same form and quality as would be required for a publicly filed preliminary prospectus and that it contain the disclosure (including financial statements) prescribed under securities legislation for the type of prospectus that the issuer intends to use. We expect the use of the confidential pre-file procedures to become standard for Canadian-only IPOs and potentially helpful in a wide variety of other offering scenarios.

5. Non-IFRS (Non-GAAP) disclosure – What can an issuer really say?

Following an initial proposal published in September 2018, the CSA published a second notice and request for comment relating to an updated proposal regarding Non-GAAP and other financial measures. The proposed rule would establish disclosure requirements for issuers that disclose Non-GAAP and other financial measures, replacing Staff Notice 52-306 – *Non-GAAP Financial Measures*. The updated proposal reduces the scope of the proposed rule compared to the initial 2018 proposal and more clearly identifies the types of measures to be subject to the rule.

6. Making ATM distributions easier

"At-the-market" (ATM) distributions have become a popular way to permit periodic capital raising. However, Canadian securities regulation previously required that issuers seeking to undertake an ATM distribution apply for exemptive relief from certain prospectus requirements. That changed in June 2020. The CSA published final amendments to the applicable instruments that streamline requirements for ATM distributions in Canada and eliminate the need for exemptive relief in order to undertake an ATM program in Canada. The amendments became effective August 31, 2020. We anticipate a modest increase in the use of ATM programs by issuers in Canada as a result of the adoption of the final amendments.

For more information, refer to our Osler Update entitled "Amendments to "at-the-market" equity offerings a welcome change" on osler.com.

7. The burden of the BAR reduced

On August 20, 2020, the CSA announced amendments to the significant acquisition and business acquisition report requirements in an effort to reduce the regulatory burden of the existing framework. Effective November 18, 2020, the criteria for determining the significance of an acquisition to reporting issuers (other than venture issuers) will be amended to require that at least two of the three existing significance tests set out in National Instrument 51-102 – *Continuous Disclosure Obligations* be triggered in order for an acquisition to be considered significant. Previously, only one test had to be triggered. The amendments also increase the significance threshold in those tests from 20 per cent to 30 per cent. It is hoped that these changes will eliminate the need for BAR disclosure in many acquisition scenarios.

8. One or two? Review of the SRO framework

On June 25, 2020, the CSA published a consultation paper seeking feedback on the framework for self-regulatory organizations (SROs) in Canada. The current SRO framework requires investment dealers to be members of the Investment Industry Regulatory Organization of Canada (IIROC). Mutual fund dealers, except in Québec, must be members of the Mutual Fund Dealers Association of Canada (MFDA). The CSA sought comments on whether the current framework best serves Canadian investors and the investment industry, in light of the evolution of the financial services industry. Both IIROC and MFDA have commented on the SRO regime in Canada. In February 2020, MFDA issued a special report titled A Proposal for a Modern SRO and in June 2020, IIROC published a paper titled Improving Self-Regulation for Canadians. Both call for changes and echo the concern that the multi-regulatory model has failed to keep pace with the technology-driven transformation of the financial services industry. Comments on the CSA consultation paper were due by the end of October 2020 and it is anticipated that the CSA will move towards a single regulator for both investment dealers and mutual fund dealers.

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9. Approach changes for mutual fund charges

On February 20, 2020, CSA member jurisdictions other than Ontario announced the adoption of rules that would ban deferred sales charges (DSC) on mutual funds effective June 1, 2022. On the same day, the Ontario Securities Commission (OSC) announced proposed restrictions on the use of DSCs in lieu of the ban adopted in other jurisdictions. These restrictions were intended to address some of the concerns associated with DSCs, principally that DSCs give dealers an incentive to sell mutual funds that impose redemption fees if investors sell their holdings before a certain period of time. Comments on the Ontario proposal were due in July 2020 and the OSC has yet to provide an update on the proposal.

Subsequently, on September 17, 2020, all CSA jurisdictions announced the adoption of rules to implement prohibition on the payment of trailing commissions by fund organizations to dealers who do not make a suitability determination, such as order-execution-only dealers.

For more information, refer to our Osler Update entitled "OSC proposes restrictions on use of DSC option in the sale of mutual funds" on osler.com about the Ontario DSC changes.

10. Crowds are okay in 2020? New crowdfunding rules

In early 2020, the CSA proposed new crowdfunding rules that were intended to harmonize and replace a number of local rules in force in certain provinces regarding crowdfunding. The proposed rule nationally harmonizes a crowdfunding regime that permits raising up to $1 million per year in reliance on the exemption. It also increases the individual amounts a purchaser can subscribe for to $2,500 per offering, or $5,000 if the purchaser obtains advice from a registered dealer that the investment is suitable. The comment period expired in July 2020 and the rule has not yet been brought into force. In light of the COVID-19 pandemic, the OSC adopted an interim local rule to adopt the crowdfunding rules currently in place in certain other provinces.

11. The state of play in the Ontario burden reduction initiative

On May 27, 2020, the OSC provided an update regarding its progress on the 107 initiatives outlined in the November 2019 *Reducing Regulatory Burden in Ontario's Capital Markets* report. The update noted that 27% had been completed, 36% were noted as being "on track" with the balance (37%) having been delayed (nine directly as a result of the COVID-19 pandemic).

Corporate Law and Stock Exchange Rules

1. Let's Meet… virtually; virtual shareholder meetings

As the COVID-19 pandemic-related restrictions on public gatherings began to be imposed, it became increasingly clear that it would be challenging to safely hold shareholder meetings in person. Although certain provincial business corporations statutes, such as the Ontario *Business Corporations Act* (OBCA) contemplate electronic meetings, many jurisdictions do not fully provide for the use of virtual-only meetings, given limitations in technology.

Additional information on virtual shareholder meetings is included in our Corporate Governance overview.

2. CBCA diversity disclosure requirements

Beginning on January 1, 2020, corporations governed by the *Canada Business Corporations Act* (CBCA) with publicly traded securities have been required to provide shareholders with information on the corporation's policies and practices related to diversity on the board of directors and within senior management, including the number and percentage of members of the board and of senior management who are women, Aboriginal persons, members of visible minorities and persons with disabilities. These requirements go beyond the disclosure required under Canadian securities rules and apply to all "distributing corporations" governed by the CBCA, including venture issuers (which are not subject to the securities law diversity disclosure requirements). Additional information regarding changes to the CBCA is included in our Corporate Governance overview.

3. I see you – B.C. adopts transparency register requirements

Effective October 1, 2020, amendments to the *Business Corporations Act* (British Columbia) came into force requiring B.C. private companies to prepare and maintain a "transparency register" containing specific details regarding each of the company's "significant individuals". B.C. recently amended the initial requirements to reduce their impact on, among others, private equity funds. The change exempted most limited partners of a limited partnership, unless the limited partner is entitled to receive 25% or more of the profits or assets of the partnership or has at least 25% of the votes in partnership management. This welcome change represented a significantly reduced burden from the initial requirement to list *all* partners. The B.C. requirements are in some ways more onerous in scope than the requirements under the *CBCA* applicable to "individuals with significant control", which came into effect in June 2019.

4. Benefit companies in British Columbia

As of June 2020, British Columbia became the first Canadian jurisdiction to enable "benefit companies", which are for-profit businesses that commit to conducting business in a responsible and sustainable way and promote one or more public benefits. Benefit company legislation is currently on the books in 36 U.S. states. It enables companies to promote social goals while being protected from claims that doing so would breach director fiduciary responsibilities. For more information on benefit companies, please see our The rules they are a-changin': Corporate governance developments in 2020 article.

For more information refer to our Osler Update entitled "B.C.'s new legislation on benefit companies" on osler.com.

5. No longer resident – Alberta and Ontario remove director residency

Joining the ranks of several other provinces and all three territories, in the summer of 2020, Alberta amended its *Business Corporations Act* and *Companies Act* to remove all Canadian residency requirements for corporate directors. In October, Ontario proposed to follow suit in the *Better for People, Smarter for Business Act, 2020*. One of the proposed changes would eliminate the existing director residency requirement for corporations under the OBCA. This change removes significant disincentives for foreign-based businesses to choose Alberta or Ontario to incorporate their Canadian subsidiaries.

For more information regarding the Alberta changes, refer to our Osler Update entitled "Alberta to remove Canadian residency requirements for directors: Reducing the burden for foreign-owned corporations" on osler.com.

One of the proposed changes would eliminate the existing director residency requirement for corporations under the OBCA. This change removes significant disincentives for foreign-based businesses to choose Alberta or Ontario to incorporate their Canadian subsidiaries.

6. The future of corporate governance?

On October 6, 2020, the TMX Group, the operator of the Toronto Stock Exchange, TSX Venture Exchange and Alpha Exchange, together with the Institute of Corporate Directors (ICD) launched an initiative to update corporate governance guidance in Canada by establishing The Committee on the Future of Corporate Governance.

Osler is providing legal support to the TMX and the ICD on the Future of Corporate Governance project. Additional information on the Committee's initiative is included in our The rules they are a-changin': Corporate governance developments in 2020 article.

2021 and beyond

2020 saw many regulatory developments in both corporate and securities law as governments and regulators continued advancing their burden reduction initiatives. The COVID-19 pandemic caused its own flurry of activity seeking to assist issuers comply with their obligations. The pandemic also presented new opportunities for advancements, such as virtual meetings, that may change the landscape of Canadian practice forever. With the Taskforce report due in the near future and burden reduction efforts continuing, we expect that 2021 will provide for another active year in the regulatory landscape.

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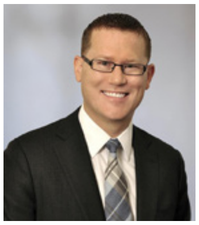

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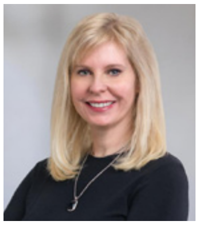

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CAPITAL MARKETS – U.S.

U.S. securities law developments in 2020

In 2020, the Securities and Exchange Commission (SEC) continued to focus on streamlining and modernizing disclosure requirements and expanding access to capital for smaller businesses. The SEC simplified financial disclosure requirements in merger and acquisition transactions and expanded the categories of investors and intermediaries that are able to participate in private placements. The SEC also revisited some of its proxy rules relating to third-party shareholder communications.

SEC expands accredited investor and qualified institutional buyer definitions

In August, the SEC issued final rules expanding the definitions of "accredited investor" in Regulation D under the U.S. Securities Act of 1933 (the U.S. Securities Act) and "qualified institutional buyer" in Rule 144A under the U.S. Securities Act. These are the categories of individuals and entities that the SEC deems to have sufficient knowledge and experience to participate in U.S. private placements without the protections of the SEC's securities registration process. The new rules broaden the investor pool from which Canadian companies will be able to raise capital in U.S. private placements. The rules also resolve certain technical disqualifications (discussed below) that some Canadian institutional investors have faced when assessing their eligibility to participate in private placements limited to qualified institutional buyers.

The amendments to the "accredited investor" definition in Regulation D include the addition of a number of persons and entities

- natural persons who hold professional certifications, designations, status or other credentials from an accredited educational institution that the SEC has designated as qualifying an individual for accredited investor status, such as holders in good standing of Series 7, Series 65 and Series 82 licenses
- "knowledgeable employees" (as defined under the Investment Company Act of 1940 (Investment Company Act)) of private funds, if they are investing in the private fund that is offering the securities
- SEC – and U.S. state-registered investment advisors
- investment advisors exempt from registration under the U.S. Investment Advisers Act of 1940 (Advisers Act)
- limited liability companies with at least US$5 million in assets and not formed for the purpose of acquiring the securities offered
- "family offices" with at least US$5 million in assets under management, not formed for the purpose of acquiring the securities offered and whose investments are directed by a sophisticated person, and their "family clients" (each as defined under the Advisers Act)
- any type of entity not already covered by the definition of accredited investor, not formed for the specific purpose of acquiring the securities offered and that owns "investments" (as defined under the Investment Company Act) in excess of US$5 million

The amendments also provide that natural persons can combine assets or income of "spousal equivalents" (defined as a cohabitant occupying a relationship generally equivalent to a spouse) for purposes of satisfying the joint net worth or income thresholds.

The amendments to the definition of "qualified institutional buyer" in Rule 144A include the addition of a catch-all category for any institution that is not already specifically listed in the existing definition of qualified institutional buyer, but that (a) qualifies as an institutional "accredited investor" in Regulation D and (b) in the aggregate owns and invests on a discretionary basis at least US$100 million of securities of non-affiliated issuers. Importantly, unlike in the "accredited investor" definition in Regulation D, an entity qualifying under this new catch-all category is permitted to be formed as a qualified institutional buyer specifically for the purpose of acquiring the securities offered. Previously, certain Canadian investors owning at least US$100 million of securities of non-affiliated entities were precluded from participating in Rule 144A offerings because their form of organization was not specifically covered in the definition of "qualified institutional buyer." With these changes, many of them are now likely able to use the new catch-all category to become "qualified institutional buyers."

The amendments became effective on December 8, 2020.

SEC simplifies financial disclosures about acquisitions and dispositions of businesses

In May, the SEC adopted amendments to reduce the complexity of financial disclosure requirements in Regulation S-X relating to significant business acquisitions and dispositions involving SEC registrants. A registrant subject to Regulation S-X that acquires a business is generally required to provide separate audited annual and unaudited interim pre-acquisition financial statements of the acquired business if the acquisition would be significant to the registrant. Additionally, registrants are required to provide pro forma financial information reflecting adjustments intended to show how the acquisition or disposition might have affected the registrant's financial statements had the transaction occurred at the start of the relevant financial period.

The amendments include several key aspects:

- The tests used to determine the significance of an acquisition or disposition have been modernized to more closely align with the actual economic significance of the transaction to the registrant. The amendments revise the "investment test" to compare the registrant's investments in and advances to the acquired business to the registrant's aggregate worldwide market value, if available. The amendments also revise the "income test" by adding a revenue component.
- Acquirors are permitted to use pro forma financial information in measuring significance.
- The financial statements of the acquired business are required to cover only the two most recently completed financial years instead of the three most recently completed financial years.
- Pro forma financial information may include management adjustments giving effect to synergies.
- It is no longer necessary to provide separate acquired business financial statements after the target has been consolidated into the registrant's financial statements for nine months or a complete fiscal year, depending on the level of significance.

Although the SEC's requirements for financial disclosures under Regulation S-X do not apply to Canadian registrants using Canada-U.S. Multijurisdictional Disclosure System (MJDS) forms, there are many cases where MJDS forms cannot be used. MJDS does not apply in certain types of merger and acquisition transactions, such as those in which a Canadian registrant acquires a U.S. domestic public company through a merger or a share exchange. In those cases, Regulation S-X will apply.

The final rules will be effective on January 1, 2021, but voluntary compliance will be permitted in advance of the effective date.

In May, the SEC adopted amendments to reduce the complexity of financial disclosure requirements in Regulation S-X relating to significant business acquisitions and dispositions involving SEC registrants.

SEC finalizes amendments to proxy rules applying to proxy advisory firms

In July, the SEC issued final amendments to its proxy rules to regulate certain activities of proxy voting advisory businesses (proxy advisors). Generally, the final rules are less prescriptive and more principles-based than those initially proposed by the SEC in December 2019.

These are the highlights of the final amendments:

- It is now clear that proxy voting recommendations by proxy advisors are "solicitations" that are subject to the SEC's proxy rules (including the prohibition on false or misleading statements).
- The exemptions from the SEC's proxy information and filing requirements are available to proxy advisors only if they
  - include in their voting advice to clients specified disclosure relating to conflicts of interest
  - adopt publicly disclosed policies designed to (i) ensure that registrants that are the subject of proxy voting advice have that advice made available to them at or prior to the time when the advice is disseminated to the proxy advisor's clients; and (ii) provide clients with a mechanism by which they can become aware, in a timely manner before the shareholders meeting, of any written statements by registrants that are the subject of the proxy voting advice

Unlike the December 2019 proposed rules, the final rules do not require proxy advisors to provide registrants with an advance draft of the proposed proxy voting advice for review and comment. The requirements to provide notice to a registrant of the proxy voting advice and to provide a mechanism to clients regarding written statements from the registrant do not apply to contested matters, most mergers and certain asset transactions.

Proxy advisors must comply with the new rules relating to conflicts and notice of advice by December 1, 2021. The SEC's proxy rules do not apply to Canadian registrants that are foreign private issuers under U.S. securities laws. However, the new rules may influence similar rulemaking under consideration in Canada.

SEC modernizes shareholder proposal rules

In September, the SEC adopted amendments modernizing the shareholder proposal rules under Rule 14a-8 of the Securities Exchange Act of 1934 (U.S. Exchange Act). These rules govern the process by which shareholders are able to submit proposals for inclusion in a registrant's proxy statement. The changes are intended to help ensure that shareholders demonstrate a meaningful economic stake or investment interest in a company before being able to use the company's resources to put their proposals before the registrant's other shareholders for consideration.

Highlights from the final rules include

- replacing the current threshold, which requires holding at least US$2,000 or 1% of a registrant's securities for at least one year, with three alternatives requiring continuous ownership of
  - US$2,000 of the registrant's securities for at least three years
  - US$15,000 of the registrant's securities for at least two years, or
  - US$25,000 of the registrant's securities for at least one year
- prohibiting multiple shareholders from aggregating their holdings for purposes of satisfying the amended ownership thresholds set out above
- requiring that a shareholder who elects to use a representative to submit a proposal for inclusion in the proxy statement provide the registrant with (1) documentation making it clear that the representative is authorized to act on the shareholder's behalf; and (2) a meaningful degree of assurance as to the shareholder's identity, role and interest in the proposal
- requiring that each shareholder-proponent state that the shareholder is able to meet with the registrant, either in person or via teleconference, no less than 10 calendar days, nor more than 30 calendar days, after submission of the proposal, and to provide contact information, as well as specific business days and times that the shareholder is available to discuss the proposal with the registrant
- revising the levels of shareholder support a proposal must receive to be eligible for resubmission at the same registrant's future shareholder meetings from 3%, 6% and 10% for matters previously voted on once, twice or three or more times in the last five years, respectively, with thresholds of 5%, 15% and 25%, respectively

The amendments will apply to any proposal submitted for an annual or special meeting to be held on or after January 1, 2022. A transition period will also allow holders meeting specified conditions to continue to rely on the US$2,000 for one year ownership threshold for proposals submitted for an annual or special meeting to be held prior to January 1, 2023.

Most Canadian SEC registrants qualify as foreign private issuers and therefore are not subject to the SEC's shareholder proposal and other proxy rules.

SEC proposes conditional exemption for finders assisting small businesses with capital raising

In October, the SEC proposed a conditional exemption that would allow certain natural persons to participate in limited activities on behalf of issuers without having to register with the SEC as broker-dealers. The proposed exemption is intended to help issuers that may not be large enough to attract the assistance of a registered broker-dealer to have a path to raising capital.

For years, there has been uncertainty about the dividing line between the activities of a finder and those of a broker-dealer required to be registered with the SEC. Under the proposed conditional exemption, the SEC would create two tiers of exempt finders. Tier I finders would only be permitted to provide

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potential investors' contact information to a single issuer in relation to a single offering during a 12-month period and may not have any contact with potential investors. Tier II finders would be permitted to directly solicit investors on behalf of an issuer. In that case, however, those solicitation-related activities would be limited to (i) identifying, screening and contacting potential investors; (ii) distributing issuer offering materials to investors; (iii) discussing issuer information included in any offering materials, but without providing advice as to the valuation or advisability of the investment; and (iv) arranging or participating in meetings with the issuer and investor.

The finders exemption would only be available where

- the issuer is not an SEC reporting company and will conduct the securities offering in reliance on an exemption from registration under the U.S. Securities Act
- the finder does not engage in a general solicitation
- the potential investors are "accredited investors" as defined in Rule 501 of Regulation D under the U.S. Securities Act or the finder reasonably believes the potential investors are accredited investors
- the finder provides services under a written agreement with the issuer that includes a description of the services provided and associated compensation
- the finder is not an associated person of a broker-dealer
- the finder is not subject to "statutory disqualification," as defined under Section 3(a)(39) of the U.S. Exchange Act, at the time of his or her participation

The proposed conditional exemption is not available to finders operating through legal entities, in connection with registered securities offerings or offerings by a SEC reporting issuer, in connection with resales of existing securities or in transactions involving non-accredited investors. The proposed exemption was open for comments until November 12.

Final note

The general trend in U.S. securities regulation over the last several years has been on facilitating access to capital and downsizing the scope and extent of disclosure requirements applying to public companies, particularly smaller companies. With the announced year-end departure of SEC Chairman Jay Clayton, it remains to be seen if that trend will continue.

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GOVERNANCE

The rules they are a-changin': Corporate governance developments in 2020

The unprecedented upheaval in the personal and work lives of Canadians and people worldwide resulting from the COVID-19 pandemic has not slowed down initiatives to reform corporate governance practices in Canada – in fact it may have sped them up. This year has witnessed significant reform of corporate laws in jurisdictions across Canada; the launch of a process in Ontario for securities law reform, including reform of corporate governance practices; new U.S. rules on proxy advisors; and a long-overdue industry-led initiative sponsored by the Institute of Corporate Directors and the TMX Group to update corporate governance best practices in the country.

Pandemic-induced changes to corporate law

The lockdown measures adopted in March to protect public health and safety in Canada were imposed shortly before most companies were to begin holding their annual meetings. This led to the adoption of a wave of measures by federal and provincial governments to facilitate the use of technology to enable corporations to hold their meetings virtually. These measures were also intended to provide additional flexibility to delay the timing for holding issuers' annual meetings in 2020. Further detail on some of these changes may be found in our Reducing the regulatory burden: Positive developments in corporate and securities law in 2020 article.

Virtual meetings

Prior to the declaration by the World Health Organization that COVID-19 was a pandemic, we summarized some of the key considerations to be taken into account when holding virtual meetings in our Osler Update entitled "Let's meet – just not in person: Taking your annual shareholder meeting online (in a coronavirus world)" on osler.com. Jurisdictions with less flexible legislative provisions than Ontario responded with varying degrees of success. They implemented temporary orders or similar measures overriding impediments under their statutes or under corporations' constating documents that were preventing shareholder meetings from being conducted virtually. Although temporary relief in Ontario has been extended to the end of May 2021, relief measures adopted in other jurisdictions are currently scheduled to expire before then and prior to the time when corporations would normally be expected to hold their annual general meetings in 2021.

The pandemic led several (typically larger) issuers to seek court approval under their incorporating statutes to permit the holding of a shareholder meeting exclusively in virtual form. Among the first to obtain the approval was TELUS Corporation, who on March 11, 2020, obtained an order from the British Columbia Supreme Court permitting it to hold its 2020 annual general meeting of shareholders as a virtual-only shareholder meeting. The order was granted pursuant to the authority of a court under section 186 of the British Columbia *Business Corporations Act* (BCBCA) to call a shareholder meeting in the manner that the court directs. Similar provisions exist under the corporate statutes of all other Canadian jurisdictions, except the Nova Scotia *Companies Act*. Among other things, the order deemed shareholders who participate in the virtual-only meeting to be present at the meeting and deemed the meeting to be held at the location of TELUS' registered office. Further information is available in our Osler Update entitled "TELUS Corporation obtains court order to hold virtual-only shareholder meeting" on osler.com.

Virtual meetings in 2020 were overwhelmingly conducted as audio-only meetings. And while there were some delays and hiccups in the execution of the process, those were minor and unsurprising given the sudden increase in the number of corporations meeting virtually compared to prior years. The necessity for conducting annual meetings virtually due to the pandemic caused institutional investors to suspend their criticism of the format for 2020, and many corporations expressed their hope to return to in-person meetings in 2021. Given continuing uncertainty on whether a return to "normal" will be possible in time for the proxy season in 2021, issuers should be planning for a return to the virtual meeting format next year.

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Delayed meeting requirements

Many jurisdictions also afforded corporations the opportunity to delay holding their 2020 annual meeting until later in the year, which helped to alleviate some of the pressure of the proxy season. We outlined some of the relevant considerations in our Osler Update entitled "Room to move: delaying continuous disclosure obligations in 2020" on osler.com.

As Canada faces the prospect of continuing restrictions on public gatherings, whether legislative or practical, it remains to be seen if Canadian jurisdictions will permit similar delays this coming year. Alternatively, they may expect issuers to make arrangements to hold their meetings – virtually or otherwise in compliance with applicable public health guidance – within the normal time periods.

Other corporate law changes

CBCA

Changes to the *Canada Business Corporations Act* (CBCA) mandating diversity disclosure regarding designated groups consisting of women, visible minorities, Aboriginal peoples and persons with a disability came into effect on January 1, 2020. The CBCA was also amended to provide that directors may, in the exercise of their fiduciary duty, consider specified interests, including the interests of shareholders, employees, retirees and pensioners, creditors, consumers and governments, as well as the environment and the long-term interests of the corporation. However, several other amendments have yet to be proclaimed into force, including amendments regarding

- disclosure respecting the well-being of employees, retirees and pensioners
- disclosure respecting compensation clawback arrangements
- mandatory "say on pay" advisory vote requirements

BCBCA – New benefits companies

Effective June 30, 2020, amendments to the BCBCA came into effect permitting the incorporation of benefit companies. Under the BCBCA, a benefit company is a for-profit company that commits, by a "benefit statement" and "benefit provision," to conduct its business in a responsible and sustainable way and promote one or more "public benefits" in accordance with the BCBCA.

In addition to the fiduciary duty to act honestly and in good faith with a view to the best interests of the company applicable to the directors and officers of all companies, directors and officers of benefit companies have two additional responsibilities. First, directors and officers of benefit companies have a duty to act honestly and in good faith with a view to conducting the business in a responsible and sustainable manner while promoting the public benefits specified in the company's articles. Second, directors and officers of benefit companies have a duty to balance the above duty with the fiduciary duty.

These changes will provide another way for for-profit businesses that are committed to conducting business in a responsible and sustainable way to demonstrate their commitment. For more information refer to our Osler Update entitled "B.C.'s new legislation on benefit companies" on osler.com.

Residency requirements

As described in our Corporate and Securities overview, changes to the *Business Corporations Act* (Alberta) have been made, and changes to the *Business Corporations Act* (Ontario) have been proposed, to remove all Canadian residency requirements for corporate directors.

Diversity of boards and management in Canada

Mass protests following the May 25, 2020 killing of George Floyd in Minneapolis re-energized the Black Lives Matter movement and the fight to end anti-Black racism. In Canada, The Canadian Council of Business Leaders Against Anti-Black Systemic Racism was formed and it proposed the BlackNorth Initiative to combat anti-Black systemic racism. The BlackNorth Initiative's stated goal is to actively create opportunities for those in the Black, Indigenous and people of colour (BIPOC) community.

As part of the BlackNorth Initiative, senior Canadian business leaders have been asked to sign a pledge to commit their organization to specific actions and targets aimed at ending anti-Black systemic racism. The pledge includes a commitment to ensuring that members of the Black community represent at least 5% of student hires and 3.5% of board appointments and executive hires by 2025. The pledge also commits the organization to invest at least 3% of corporate donations and sponsorships in the promotion of investment and creation of economic opportunities in the Black community by 2025.

The BlackNorth pledge includes a commitment to ensuring that members of the Black community represent at least 5% of student hires and 3.5% of board appointments and executive hires by 2025.

Our annual review of diversity disclosure practices by Canadian corporations this year examined disclosures respecting women in director and executive officer roles of TSX-listed issuers. In addition, and for the first time, we also examined disclosures by CBCA corporations regarding the representation on the board and in executive officer positions of visible minorities, Aboriginal peoples and persons with a disability.

Although we identified several leading organizations and the practices they disclosed, we also noted that much more work is needed. Overall, our results showed that continued, slow progress is being made by women on corporate boards, although not at executive officer levels. We also found that, based on the disclosure provided under the new CBCA diversity disclosure requirement, the representation of visible minorities at the board and executive officer levels is disproportionately small compared to the representation of these groups in the Canadian population generally. We also identified that the representation of Indigenous people and persons with a disability is almost non-existent.

Our report also provides an overview of recent regulatory and market developments in this area in both Canada and internationally. Since we published the report in October, Institutional Shareholder Services (ISS) has released its policy updates for 2021. From a diversity disclosure perspective, ISS has indicated that from February 2022 it will recommend voting *against* the chair of the nominating committee for issuers included in the S&P/TSX Composite Index if those issuers either (a) do not have at least 30% women directors *or* (b) do not have a board diversity policy that includes a 30% target to be achieved in a reasonable timeframe. The policy for TSX-listed issuers that are not included in the S&P/TSX Composite index will remain substantially unchanged.

Capital Markets Modernization Taskforce consultation report

As described in our Corporate and Securities overview, the Capital Markets Modernization Taskforce (Taskforce) has published their preliminary consultation report. In the consultation report, the Taskforce sought feedback on a number of proposals, including

- streamlining the timing of disclosure by permitting issuers to report financial results semi-annually instead of quarterly
- improving corporate board diversity, including proposals that would require TSX-listed companies to set targets and provide annual data in relation to the representation of women and BIPOC on boards and in executive officer positions, including possible targets of 40% women and 20% BIPOC, and whether to set a 10-year maximum tenure limit for directors, while permitting up to 10% of the board to exceed the 10-year maximum for up to two years
- introducing a regulatory framework for proxy advisory firms (PAFs), by providing issuers with a statutory right to "rebut" PAF reports at no cost and restricting PAFs from providing consulting services to issuers in respect of which PAFs also provide clients with voting recommendations
- empowering the Ontario Securities Commission to provide its views with respect to the exclusion by an issuer of shareholder proposals in proxy materials
- introducing rules to prevent over-voting
- eliminating the distinction between non-objecting beneficial owners and objecting beneficial owners and permitting issuers to contact all of the beneficial owners of their shares by removing the ability of beneficial owners to choose to keep their name and ownership details confidential

SEC final rules on proxy advisory firms

On July 22, 2020, the Securities and Exchange Commission (SEC) issued final amendments to its proxy rules to regulate certain activities of proxy voting advice businesses. The amendments codify the SEC's view that the business of providing proxy voting advice constitutes a solicitation. Additional detail is provided in our U.S. securities law developments in 2020 article.

The Committee to Chart the Future of Corporate Governance in Canada

On October 6, 2020, the TMX Group and the Institute of Corporate Directors announced a new initiative through the formation of The Committee on the Future of Corporate Governance in Canada (the Committee). Co-chaired by the ICD and the TMX, the Committee includes 11 leading directors. Its mandate is to conduct a review of corporate governance practices focused on

- the role of the corporation in society/societal expectations of corporations
- strategy, purpose and risk

- culture, equity, diversity and inclusion
- sustainable and resilient performance
- board and director effectiveness

This is the first industry-led initiative since the report of The TSX Committee on Corporate Governance (Dey Committee) in 1994 and the report of the Joint Committee on Corporate Governance (Saucier Committee) in 2001.

The Committee began its review with a consultation process with experts from groups and organizations with an interest in the governance of Canadian corporations from across the country, as well as internationally. The results of these stakeholder roundtables, as well as research into practices internationally and the experience of the leading directors who comprise the Committee, will form the basis for a report with guidance and recommendations on corporate governance for Canadian corporations. A draft of that report is expected to be issued sometime this winter for public comment. Following receipt of comments, the Committee is expected to release a final report in 2021. Osler is providing legal support to the TMX and the ICD on the Future of Corporate Governance project.

Governance in 2021

The role of public companies in Canada is under scrutiny on many fronts. There are high expectations for boards to provide leadership with respect to diversity and inclusion, the environment and human capital, as well as social issues, while delivering long-term financial returns to investors. Responding to these changes will be a challenge, especially in the current environment, and will demand leadership from Canada's director community.

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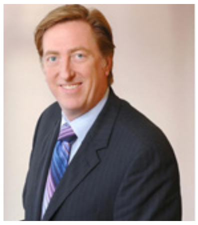

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EXECUTIVE COMPENSATION

A year of upheavals and dashed expectations: Executive compensation developments in 2020

Executive compensation plans were upended in 2020 as a result of the dramatic impact of the COVID-19 pandemic on business plans and the extraordinary measures taken by governments, domestic and foreign, to contain the virus. In addition, employee-friendly Canadian court decisions were handed down in 2020 that are forcing employers to revisit standard compensation practices.

Finalizing compensation decisions for 2020

Most Canadian corporations had set their 2020 short-term incentive performance targets and made their annual long-term incentive grants for the year before the

World Health Organization declared COVID-19 to be a global pandemic on March 11, 2020. Within weeks of that determination, lockdown measures in many parts of the world shattered business plans, broke supply chains, plummeted the world into a recession and resulted in a sudden and dramatic drop in stock prices. As a result,

- some corporations initiated salary and short-term incentive compensation reductions or delayed paying 2019 short-term incentive compensation, conserving cash to weather the storm
- the sudden drop in stock prices caused stock option grants to suddenly fall out-of-the-money. Not only did this remove almost all economic incentive, but the decline also had a discouraging impact on employees at a time when extraordinary efforts would be demanded of them
- it was clear that performance expectations underlying incentive compensation decisions made in early 2020 would have to be revisited

In response, boards could consider repricing outstanding stock options or extending the life of previously granted stock options, as discussed in our Osler Update entitled "Stock option repricing considerations in the COVID-19 era" on osler.com, to address the impact on holders, particularly those unlucky enough to hold options due to expire during the market downturn. However, stock exchange and shareholder approval requirements and tax considerations create significant hurdles to doing so. Proxy advisory firm, Institutional Shareholder Services (ISS), indicated that it will apply its existing case-by-case policy approach to any option repricings. Surrendering options for cash or exchanging them for other types of awards give rise to similar challenges.

Consequently, many issuers began looking at alternative ways to replace or change awards for which the established performance measures were no longer meaningful. Unfortunately, amending the terms of existing equity awards or granting new awards, especially when combined with alterations to current salaries, can result in adverse Canadian and U.S. tax consequences, as discussed in an April 2020 Osler Updated entitled "Unintended Canadian and U.S. tax consequences of changing compensation arrangements during the COVID-19 crisis" on osler.com.

In many cases, issuers elected to defer decisions about compensation adjustments until later in the year. While markets have mostly recovered from the troughs in the spring, business impacts from the COVID-19 pandemic have been varied. For final 2020 compensation determinations, compensation committees will have to balance

- the need to recognize management performance in circumstances where they are under pressure to preserve operations, protect employees, shore up finances and pivot to new technologies and strategies
- considerations relating to workforce reductions and pay cuts, if any, otherwise implemented by the issuer
- signaling of views from proxy advisory firms which indicate a lack of sympathy for performance bonuses or adjustments, except perhaps for demonstrated success on a relative performance basis. By way of example, proxy advisory firm Glass Lewis stated in March that, "[t]he stark reality is that for many workers, including executives, they should not expect to be

worth as much as they were before the crisis, because their free market value as human capital has now changed." ISS also indicated in its Policy Guidance on the Impact of the COVID-19 Pandemic that its benchmark voting policies are not supportive of changes to awards in the middle of a performance period and that any such changes will be evaluated on a case-by-case basis to determine if directors exercised appropriate discretion and provided adequate disclosure of the rationale to shareholders

- considerations of the impact of temporary market swings, which disproportionately affect compensation outcomes that are based on rigid, periodic triggers, as compared with the longer-term perspective of investors who can defer realization until stock markets recover

As business plans finalize for 2021, issuers need to carefully consider incentive measures that will be applied next year.

Changing practices in light of tough decisions

Judicial antipathy to standard treatment of incentive compensation awards reached new heights in 2020. Several recent court cases, including one from the Supreme Court of Canada, have tilted the playing field sharply in favour of employees. Additional detail on these decisions and their potential impact on employers is included in COVID-19 and difficult decisions for employers: Employment challenges in 2020.

- Forfeiture provisions: On July 15, 2020, in *Battiston v. Microsoft Canada Inc.*, the Ontario Superior Court of Justice concluded that forfeiture of unvested long-term incentive awards on termination of employment without cause was "harsh and oppressive," necessitating reasonable measures to make sure the employee was aware of it. The case is currently being appealed to the Ontario Court of Appeal. Osler is acting for Microsoft.
- Damages for loss of long-term incentive compensation: On October 13, 2020, the Supreme Court of Canada in *Matthews v. Ocean Nutrition Canada Limited* held that exclusion clauses in a long-term incentive plan did not remove the employee's entitlement to a bonus payment upon his resignation or termination of employment, with or without cause, and that the employee could still pursue a claim for *damages*. Although the exclusion clause removed the bonus entitlement, the plan terms did not expressly remove the employee's right to claim damages arising from the loss of the award.

In addition, on June 17, 2020, the Ontario Court of Appeal in *Waksdale* invalidated a contractual provision applicable to the termination of the employee without cause because the employment agreement provisions relating to termination for cause contravened the *Employment Standards Act, 2000* (Ontario). More details on that decision can be found in our COVID-19 and difficult decisions for employers: Employment challenges in 2020.

In light of these decisions, employers should re-examine the language in their employment agreements, compensation plans and award agreements. Employers should also review their processes and practices for communicating with employees regarding compensation matters, including about the consequences of cessation of employment on outstanding awards.

Several recent court cases, including one from the Supreme Court of Canada, have tilted the playing field sharply in favour of employees.

Compensation decisions for 2020, and disclosure of those decisions in the proxy circulars in 2021, will be heavily scrutinized on all fronts and require extra care and attention. Compensation decisions for 2021 will be made in a very different business and legal environment from 2020. Thoughtful consideration will be required not only to determine the appropriate pay outcomes and performance measures, but also for their documentation and related disclosure.

Proposed changes to taxation of stock options granted on or after July 1, 2021

In the November 30, 2020 Fall Economic Statement, the federal government resurrected its 2019 proposals to change the taxation of stock options. The tax treatment of options granted by employers that are Canadian-controlled private corporations (CCPC) or other non-CCPC corporations that are “start-ups, emerging or scale up companies” is not affected. Non-CPPC corporations with annual gross revenue not exceeding $500 million would fall into the category of “start-up, emerging or scaled up companies.”

For options granted by other corporations or mutual fund trusts, the ability of the employee to take the 50% tax deduction in respect of the option benefit will be subject to a $200,000 annual vesting cap. The tax treatment of options granted before July 1, 2021 would be unaffected. More details about the proposed changes can be found in our [Fall Economic Statement 2020 Briefing].

While the use of stock options for publicly traded companies has declined over time, they have not been eliminated entirely due to the financial benefit to employees of the favourable tax rate. However, a change in the applicable tax rate may further increase the use of performance-based full value awards.

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EMERGING AND HIGH GROWTH COMPANIES

Canadian technology sector M&A activity accelerates into 2021

As a tumultuous 2020 comes to a close, Canada's technology sector is decidedly on the radar for U.S., international and domestic strategic and financial buyers. The latter half of the year has witnessed a significant increase in technology merger and acquisition (M&A) transactions, with a variety of important trends driving increased activity. In this article, we review the state of the market and the factors contributing to its momentum.

Deal volumes and value

The temporary slowdown in M&A transactional activity during the early months of the COVID-19 pandemic has given way to an increase in closed deals and active processes. Despite a turbulent macroeconomic environment, the North American technology industry continues to demonstrate both its resilience and its reputation as a desirable market in which to invest. As reported by Preqin, after lower reported deal activity in the first half of 2020, deal volume and values rebounded in North America, resulting in total third quarter deal values slightly surpassing pre-pandemic levels for the same period of 2019.

The Canadian experience is similar. According to CVCA Canadian market data, private equity (PE) deal values for the first three quarters of 2020 actually exceeded 2019 totals: C$11.7 billion was invested across 446 deals, compared with C$6.5 billion across 385 deals in 2019.

Macro trends driving Canadian tech M&A

While this M&A activity is made possible in part by the US$1.5 trillion of dry powder mandated to be deployed by PE funds and over US$500 billion in cash on strategic buyer balance sheets (as reported by Pitchbook), important macroeconomic trends are also driving M&A deals in the Canadian tech space.

1. Target company motivations

Whether a target company is motivated to explore M&A opportunities by the need to survive the COVID-19 pandemic or by a desire to capitalize on a hot sector and improving financial fundamentals, conversations with strategic and PE-backed buyers are now front and centre around (virtual) boardroom tables.

Boards of directors and management teams of thriving companies that had previously maintained a “wait and see” attitude towards M&A are now more amenable to inbound expressions of interest. They are also being increasingly proactive in seeking the right deal to capitalize on a market window.

This has led many companies to consider ways to maximize their value through a variety of strategic alternatives. The result has been that many issuers are conducting dual track and multi-track processes, engaging M&A advisors to pursue parallel or multiple strategic paths. Alternatives under consideration include outright sales, buy-side acquisitions and growth equity financing transactions. In many cases, growth equity transactions contain a secondary sale component where founders and early investors obtain some liquidity in the process.

Another parallel track alternative emerged in 2020 for technology companies, namely initial public offerings, with reverse take-overs also gaining traction as an alternate route to going public. The growing appetite for tech IPOs in sectors such as life sciences has created a competitive environment where buyers are required to pay increasing premiums in light of viable strategic alternatives that are available to targets seeking liquidity.

For companies that are struggling, whether due to the COVID-19 pandemic or otherwise, boards of directors appear to be increasingly receptive to M&A discussions stemming from the necessity to restructure operations. At the same time, they are evaluating strategic alternatives in the context of the pandemic. Exploring a dual track process to maximize optionality and value has never been more important for companies in this category.

> According to CVCA Canadian market data, private equity (PE) buyout deal values for the first three quarters of 2020 actually exceeded 2019 totals: C$11.7 billion was invested across 446 deals, compared with C$7 billion across 519 deals in 2019.

2. Stock market performance

North American stock markets encountered significant headwinds early in the COVID-19 pandemic. However, coming out of the summer, markets have defied the economic downturn. Stock market gains have bolstered public company balance sheets and the currency of their stock. Fueled by pressure from shareholders to put excess cash to good use, public companies are seeking to acquire technology-focused companies to expedite and enhance their internal digital transformations. This trend even extends to brick-and-mortar companies, as traditional companies look to innovate and enhance their offerings.

An M&A transaction with a public company may provide the selling shareholders of a private technology company with stock in the public company buyer or other long-term equity-based incentives, in addition to cash. Strong stock market performance has enabled these selling shareholders, which often include employees and management of the target, to share in the upside of future stock appreciation of their acquiror.

3. World-class technology talent

The quality of engineering talent in Canada continues to put Canada on the map as a desirable hub for corporate operations. Canada is well-known for its start-up ecosystems in cities such as Toronto, Waterloo, Ottawa, Montreal and Vancouver, with emerging ecosystems in Calgary, Edmonton, Victoria and Halifax, among others. Universities from coast to coast churn out best-in-class computer programmers and scientists. When coupled with Canada's increasingly favourable immigration policies compared with the United States, the access to and mobility of tech talent in Canada are contributing to the attractiveness of Canadian technology companies to international PE funds and corporate buyers.

Large corporations such as Amazon, Salesforce.com, Microsoft and Google have long made Canada a second home for development hubs. Other buyers have gotten wind of the fact that in an increasingly virtual world, Canada is an enviable destination, and we expect this trend to continue.

It is no longer necessary for companies to be located in Silicon Valley to attract investment and acquisition interest. In fact, given the move by large tech companies such as Twitter to permanent or semi-permanent work-from-home business models, Canada will likely become an even more desirable destination in a post-pandemic world.

Owing to the COVID-19-induced virtual world we are currently inhabiting, M&A transactions are happening completely virtually. In some cases, management teams of the buyer and target may never meet face-to-face. This too has facilitated greater opportunities for cross-border transactions.

4. Canadian cost base

The exchange rate between the U.S. and Canadian dollar continues to make Canadian companies attractive targets to a U.S. purchaser from a cost perspective. Canadian companies have long taken advantage of the currency arbitrage, with their costs largely denominated in Canadian dollars and revenues from customers frequently generated in U.S. dollars.

Additionally, salaries for Canadian technology talent continue to lag behind those offered in the large tech centres in the United States such as San Francisco, Palo Alto, New York and Boston.

Both of these factors have further entrenched Canada's cost advantage from a buyer's perspective.

5. Market sentiment bullish on certain sub-sectors

The COVID-19 pandemic's impact on how we live and work has increased the attractiveness for buyers looking to do rollup transactions to consolidate their respective industries. The focus has been on health tech, biotech, ecommerce, software-as-a-service (SaaS), fintech, artificial intelligence/machine learning, agricultural tech and technologies that enable remote workforces.

Canada has a strong reputation globally in all of these sought-after sectors. The resiliency of these sectors during a period of global economic uncertainty has helped keep Canada on the radar of global PE funds and strategic buyers.

In stark contrast to prior economic downturns (e.g., the 2008 financial crisis and the dotcom bust in 2001-2003), valuations in these sectors are now generally higher than pre-pandemic valuations according to Capital IQ market data.

Although valuations are up overall, the individual dynamics between acquirors and targets have led to valuation gaps in certain negotiations. To bridge this gap, earnouts are creeping into transactions to a greater degree, particularly in the case of mid-market deals and 'acqui-hires' (i.e., acquisitions primarily for talent pools) of early stage ventures. Earnout milestones tend to relate to revenue targets and earnings targets (e.g., EBITDA), as well as customer acquisition and product development and integration thresholds.

6. IPO window is open

The U.S. market has experienced an extended window for initial public offerings, with growing interest in Canadian technology IPOs. PE funds and strategic buyers have recognized that an IPO window has opened up and, seeking to take advantage of this opportunity, the portfolio companies of PE funds and the strategic buyers themselves need to bulk up. In this vein, PE funds are increasingly sponsoring mid-market rollup transactions on behalf of their portfolio companies to achieve critical mass in anticipation of an IPO. Acquiring Canadian technology companies is a popular way to achieve this industry consolidation and reach the necessary critical mass to complete an IPO, a trend that is expected to continue.

The U.S. market has experienced an extended window for initial public offerings, with growing interest in Canadian technology IPOs.

Moreover, U.S. and Canadian companies that have successfully completed an IPO in 2020 frequently plan for growth, in many cases through acquisition, taking advantage of the cash on their balance sheet raised through their IPO.

7. Debt is available and cheap

In the early days of the COVID-19 pandemic, questions arose concerning the availability of debt and whether North American debt markets would contract. In reality, lenders have been resilient and have generally continued to extend credit to companies and PE funds. Record low interest rates have allowed targets to use debt capacity on their balance sheet to complete transactions on a cost-effective, leveraged basis.

8. Canadians are now 'owning the podium'

Foreign buyers have long been aware that Canadian entrepreneurs are capable of building excellent technology. The criticism leveled at Canadian management teams in the past was their propensity to exit too early, before their companies had achieved true scale. Increasingly, Canadian companies are proving that they can also achieve scale, and that Canadian management teams, boards of directors and their investors possess the collective ambition to build world-class 'anchor tenants.'

Following on the heels of Shopify's massively successful NYSE IPO in 2015 and subsequent spectacular revenue growth and stock market performance as a public company, the next generation of Canadian unicorns (companies with billion-dollar valuations) and potential future unicorns has emerged on the scene. Notably, the success is spread across the country. This emerging generation of anchor companies includes Applyboard (Waterloo, Ontario), which reached unicorn status with its 2020 financing round; Wealthsimple (Toronto, Ontario), which crossed the unicorn threshold with its 2020 investment by TCV; Lightspeed POS (Montréal, Québec), which completed a successful cross-border IPO on the NASDAQ and TSX; and Clio (Burnaby, British Columbia), which raised the largest growth equity round in B.C. history in 2019, led by TCV and JMI Equity.

Most recently, Verafin (St. John's, Newfoundland), after eclipsing Clio's financing record in 2019 with a $515-million growth equity round, announced its pending acquisition by NASDAQ for US$2.75 billion, the largest private technology acquisition in Canadian history. Osler acted as counsel in all of the foregoing transactions.

With many more growth-stage technology companies in the mix, the list of current and future Canadian champions continues to expand. Buyers are now on the hunt for the next Canadian unicorn with a view to pre-emptively taking them off the market with an attractive acquisition offer.

Conclusion

All of these factors have positioned the Canadian technology ecosystem as a desirable destination for cross-border acquisition interest. In parallel, Canadian growth-stage tech companies are themselves growing through acquisition. With positive tailwinds thrusting technology companies out of the doldrums of 2020, we expect these factors to continue to fuel M&A activity well into 2021 and beyond.

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MINING

All that glitters – 2020 mining review

Despite all of the uncertainties of the global pandemic (or perhaps because of them), 2020 saw a resurgence in the mining industry. While travel restrictions and due diligence limitations made it difficult to complete large cap multi-asset transactions, a steady strengthening of commodity prices (especially gold) acted as a catalyst for smaller financings and property transactions. Notably, this past year also ushered in the most favourable market conditions for mineral exploration since the end of the last commodity cycle boom, with many (but certainly not all) issuers able to finally raise some much needed capital. Flow-through shares in particular have been popular with investors in light of the loosening of specific obligations associated with incurrence and renunciation obligations. As discoveries become scarcer and many large mines around the world enter the later stages of their mine life, there is renewed focus on mineral exploration. Much of the market attention has been on gold, but financing windows have also emerged for base metal and battery metal projects.

In 2020, improved conditions also enabled a number of mining issuers to complete "go public" transactions through initial public offerings or reverse takeovers. This trend is expected to continue, given the dearth of new issuers over the past five years. With the return of financing prospects and a steady flow of money fueling mineral exploration projects, there is also a renewed focus by regulators on technical disclosure and technical reports. In prior years, when there were fewer transactions and financings, correspondingly fewer technical report triggers were encountered, so many mining issuers now find themselves with dated technical reports. In addition, with higher commodity prices, mining issuers now have greater incentives to update mineral resource and mineral reserve estimates. Managing these processes effectively is important for mining issuers to realize their business plans.

Two key regulatory developments from 2020 are highlighted below.

Confidential prospectus filings

As described in our article Reducing the regulatory burden: Positive developments in corporate and securities law in 2020, the Canadian Securities Administrators (CSA) have adopted a staff notice permitting confidential pre-filing of prospectuses by Canadian issuers.

In the mining space, this follows the 2019 issuance by the Ontario Securities Commission of OSC Staff Notice 43-706, which announced the adoption of a pre-filing technical review program for mining issuers. The Ontario program, which followed a similar pre-filing review program in British Columbia, was intended to reduce execution risk for issuers and investment dealers seeking to launch public offerings under a short-form prospectus by providing a means to correct technical disclosure deficiencies prior to commencing a public offering. Both review programs focused on technical reviews prior to a short-form prospectus offering.

With the adoption of a broader confidential prospectus pre-filing program, mining issuers will now have the ability to have both their prospectuses and related technical reports reviewed in advance of a potential offering. Mining issuers seeking to benefit from the pre-filing program should note that the staff notice provides that generally, staff will use their best efforts to provide initial comments within 10 working days, which is the same standard as for a long-form prospectus filing. For issuers looking to complete an initial public offering, there is limited downside to taking advantage of the program. For reporting issuers, accessing the program requires potentially significant advance planning that may not be possible if a financing transaction is launched on a short timeline to capitalize on market opportunities.

Given the difficulties dealing with technical disclosure issues and technical reports in the middle of an offering, the pre-filing review program allows mining issuers to be proactive in clearing technical disclosure prior to launching an offering. It also enables mining issuers to meaningfully engage with regulators with respect to the currency of previously filed technical reports to support a public offering.

Given the difficulties dealing with technical disclosure issues and technical reports in the middle of an offering, the pre-filing review program allows mining issuers to be proactive in clearing technical disclosure prior to launching an offering.

Resource estimate disclosure expectations

On June 4, 2020, the CSA announced the publication of CSA Staff Notice 43-311, which summarized the results of a review on mineral estimate disclosure in 86 technical reports. The review found that most disclosure in relation to mineral resource estimates (MRE) was satisfactory. The staff notice is intended to provide issuers and qualified persons (QP) with a degree of certainty about how securities regulatory authorities assess disclosure of MRE in technical reports. It provides specific guidance intended to assist issuers to address areas of deficient disclosure identified by the review and potentially reduce the need for regulatory intervention.

The CSA identified the following areas where they found the MRE disclosure to be inadequate:

- Reasonable prospects for eventual economic extraction (Reasonable Prospects): A mineral deposit is not a mineral resource unless it has demonstrated Reasonable Prospects. Some technical reports lacked adequate disclosure with respect to metal recoveries, assumed mining and processing methods and costs, and constraints applied to the MRE to demonstrate that the mineralized material had the potential to be mined and processed economically.
- Data verification: Data used to support an MRE needs to be adequately verified and determined suitable by the QP for use in the MRE. It is common for mineral projects to pass through the hands of several property holders, each generating exploration and drilling data. Using legacy data from former operators is legitimate, but this data needs careful verification that is documented in the technical report.
- Risk factors: Each mineral project has its own set of risks, any of which could affect the MRE. Many technical reports only provided boilerplate disclosure about potential risks and uncertainties that are generic to the mining industry. Failure to set out meaningful known risks specific to the mineral project may make MRE disclosure potentially misleading.
- Sensitivity to cut-off grade: Variations to the cut-off grade to indicate the relative robustness of the MRE can be useful information. However, all estimates resulting from each of the cut-off grade scenarios must meet the test of Reasonable Prospects and the base case or preferred scenario must be highlighted.

In providing the notice, the CSA has indicated that these will be areas of focus going forward. As market conditions improve and more capital comes back into the mining sector, we anticipate more regulatory scrutiny of disclosure of mineral resource estimates. Issuers are advised to carefully review their technical disclosure, discuss it with their QPs and external counsel, and consider the need for improvements to head off any potential regulatory issues.

Given robust commodity prices and positive market sentiment, we expect that 2021 will bring continued activity across the mining sector. Considering their prominence in the Canadian market, gold issuers are likely to drive capital raising and project exploration and development. New discoveries will ultimately be critical in order to sustain long-term strength in the industry and to promote the much needed growth of new companies. At the same time, while 2019 and early 2020 saw a number of M&A transactions, consolidation slowed as a result of the COVID-19 pandemic, although the mining sector was not significantly affected as operating mines and exploration projects managed to continue working. Hopefully the industry will continue this resilience in 2021 and issuers looking to transact will find a way to do so safely.

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CAPITAL MARKETS

Novel hybrid debt issuances by Canadian banks

Hybrid debt is debt with embedded equity features that are added to meet requirements imposed by a regulator, rating agency or some other third party having oversight of an issuer's capital structure. The creation of a new form of hybrid instrument that satisfies the strict capital requirements applicable to Canadian federally-regulated financial institutions meant that 2020 was a milestone year for the development of hybrid debt in Canada. Osler was pleased to play a key role in pioneering the new alternative tier 1 capital note structure.

Regulatory capital requirements for banks

Effective January 1, 2013, the Office of the Superintendent of Financial Institutions (OSFI), the regulator having oversight of capital issued by Canadian banks, adopted an agreed set of rules developed by the Basel Committee on Banking Supervision in response to the 2008 financial crisis. These measures, called Basel III, are intended to strengthen the regulation, supervision and risk management of banks. They impose detailed requirements for the type of capital that may be issued by financial institutions to their investors.

These measures include requirements for so-called additional Tier 1 (AT1) capital. AT1 capital is capital that qualifies as Tier 1 capital for purposes of the Basel III capital adequacy rules, but that is not common equity or non-cumulative perpetual preferred shares. At the same time, OSFI introduced a requirement that each non-common share capital instrument issued by a Canadian bank after January 1, 2013 must contain a feature which requires the instrument to convert into common share equity if the applicable bank ceases to be viable (non-viability contingent capital (NVCC) conversion). Any capital instruments that were outstanding on January 1, 2013 and do not have NVCC features are required to be phased out over 10 years.

As a result of these regulatory capital developments, the market for AT1 capital of Canadian domestic banks decreased and Canadian banks sought to develop new capital instruments that could satisfy the revised AT1 capital requirements.

AT1 Limited Recourse Capital Notes

In July 2020, OSFI ruled that AT1 Limited Recourse Capital Notes, a new form of hybrid debt instrument pioneered by Royal Bank of Canada (RBC) and Osler, qualify as AT1 capital. RBC completed the inaugural offering of this new instrument with a deal size of $1.75 billion.

AT1 Limited Recourse Capital Notes are structured as a subordinated debt instrument issued directly by a bank. In ordinary circumstances, the bank pays, and holders receive, an interest coupon on the notes. In circumstances of financial stress affecting the bank, however, noteholders do not have recourse against the general assets of the bank. They instead have recourse only to a pool of the bank's preferred shares. If these preferred shares are delivered to noteholders, the claims of the noteholders under the subordinated debt are extinguished and they become equity holders in the bank.

As a result of these features, OSFI determined that the AT1 Limited Recourse Capital Notes comply with Basel III guidelines requiring AT1 investors to rank as equity holders of the issuing bank, rather than creditors, in times of financial stress. Under the OSFI ruling, AT1 Limited Recourse Capital Notes may only be issued to institutional investors.

The introduction of the AT1 Limited Recourse Capital Note structure has rapidly changed the market for AT1 capital of Canadian domestic banks. The RBC AT1 hybrid debt offering was quickly followed by offerings by other Canadian banks, including National Bank of Canada and The Bank of Montreal. Since RBC's initial offering of this novel capital instrument in July 2020, nearly $6 billion of AT1 Limited Recourse Capital Notes have been issued by Canadian banks. Other federally regulated financial institutions, such as insurance companies, are expected to follow suit.

The introduction of the AT1 Limited Recourse Capital Note structure has rapidly changed the market for AT1 capital of Canadian domestic banks.

This new form of AT1 capital is also expected to help foster a more global institutional market for Canadian bank AT1 capital than currently exists. Unlike dividends on common shares and preferred shares, where withholding tax is payable, no withholding tax is payable on interest payments on the notes. This makes the structure competitive with instruments issued by Canadian banks' international peers. Market participants expect that over the coming years, Canadian banks will replace their outstanding preferred shares with AT1 Limited Recourse Capital Notes. This will have the effect of shifting the existing domestic, retail investor base for preferred shares to a global institutional investor base for AT1 Limited Recourse Capital Notes.

Osler has long been an innovator in the hybrid debt market. In 2016, Osler developed a form of hybrid note for Canadian energy and services company, Emera Inc. Emera Inc. issued US$1.2 billion of notes as part of an acquisition financing package. They provide 50% equity credit for rating agency purposes and have a deductible coupon that does not attract Canadian withholding tax. These hybrid notes continue to be issued by other Canadian corporations and provided the structural foundation upon which the Basel III-compliant AT1 Limited Recourse Capital Notes were developed by Osler for Canadian financial institutions.

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M&A

Representations and warranties insurance – An increasingly important tool for Canadian dealmakers

In 2020, representations and warranties insurance (RWI) continued to play an increasingly significant role in the Canadian private M&A market. RWI is an insurance policy, usually obtained by a buyer, that replaces all or most of the traditional seller indemnification obligations for losses that arise due to breaches of, or inaccuracies in, seller representations and warranties. As a result, depending upon the structure of the transaction and the policy, a seller is able to significantly reduce or even eliminate its post-closing indemnification obligations. At the same time, a buyer is able to retain the indemnification protection that it would normally seek to have in a traditional M&A deal. RWI is commonplace in the United States and its presence in the Canadian market has been rapidly expanding over the last few years. In this article, we explore the state of the Canadian RWI market in 2020, including the impacts of COVID-19.

RWI use in Canada continues to grow

Use of RWI in Canada has become an increasingly common tool for Canadian dealmakers, a trend that seems to be continuing despite the COVID-19 pandemic. Though RWI is still not as prevalent in Canada as it is in the United States, a bidder in a competitive process in Canada, such as an auction, should expect that a seller is likely to propose RWI in lieu of traditional indemnification provisions. A bidder in search of a competitive advantage should be prepared to either offer or accept RWI in its bid in order to remain competitive. While historically RWI transactions often had a nexus to the United States or to private equity funds or financial investors, recently there has been a proliferation of RWIsupported transactions in Canadian domestic transactions that have included strategic acquirors.

More RWI professionals dedicated to the Canadian market

In 2020, we saw a maturing of the RWI market in Canada. An increased number of RWI insurance brokers and underwriters now have professionals or teams dedicated to the Canadian market. In the case of the largest global insurance brokers and RWI underwriters, many now have teams on the ground in Canada. This increased presence, along with the growing popularity of RWI, has led to greater coverage availability and competition. The result has been increased access to RWI in Canada, and an underwriting process that has become smoother and more efficient, resulting in increasingly standardized RWI policies and greater deal certainty.

Deemed agreement changes have increased

Despite heightened competition amongst RWI underwriters, more scrutiny has been given recently to the contents of the representations and warranties in transaction agreements, including an increase in deemed changes to certain representations and warranties. For example, for the purposes of the RWI policy, underwriters may deem certain words be “read in” to the RWI policy to the extent the underwriters believe such words are standard or typical in such representations and warranties. This might include deeming the words “in writing” to be added after a “receipt of notice” provision or the deemed addition of “knowledge” where the representation or warranty would typically be qualified by knowledge. It is typical for underwriters to raise these concerns early in the underwriting process, which results in fewer surprises for the policy holder when the deal is executed and the policy bound.

Deal-specific exclusions still often arise in the RWI underwriting process, but there are generally fewer exclusions agreed upon at the term sheet stage. These exclusions are typically proposed only after the underwriting call has occurred and the insurer has received more detailed information about the target business and the diligence completed by the buyer.

More seller indemnity coverage remains common in Canada

Consistent with the Canadian M&A market generally, which has traditionally offered more buyer-friendly indemnification terms than the U.S. M&A market, the terms of Canadian RWI deals have not yet converged with those in the United States. It remains common to see Canadian sellers offer indemnification coverage for fundamental representations and tax liabilities beyond the RWI policy limit. In addition, although less common, special indemnities for matters subject to deal-specific exclusions under the RWI policy can be seen. In contrast, it is more common in U.S. transactions for there to be no indemnity protection above the RWI coverage limits.

Effect of COVID-19

While the COVID-19 pandemic slowed the Canadian M&A market in the second quarter of 2020, RWI insurers nevertheless remained ready to underwrite transactions. As M&A activity increased during the remainder of 2020, Canadian underwriters became as busy as ever. Initially, underwriting resulted in broad COVID-19-related exclusions from RWI coverage, but as RWI underwriters became more comfortable with COVID-19 risk and the impacts of COVID-19 on M&A targets, the underwriting approach to COVID-19 coverage became more flexible. While RWI policies will generally contain a COVID-19 related policy exclusion, underwriters have recently been taking a more nuanced and bespoke approach that limits the COVID-19 policy exclusions to areas of heightened underwriting risk for the specific target business.

While RWI policies will generally contain a COVID-19 policy exclusion of some sort, underwriters have recently been taking a more nuanced and bespoke approach that limits the COVID-19 policy exclusions.

Although they are prepared to focus the scope of the exclusion, Canadian underwriters have shown heightened concern over COVID-19 related risk during the interim period between the signing of an agreement and closing the transaction. In these circumstances, underwriters may insist that any limitations on the breadth of a COVID-19 exclusion apply as of the signing date and that a broader COVID-19 exclusion apply as of the closing of the transaction. Sometimes an underwriter will agree that if the effects of COVID-19 on the business during the interim period appear to be minimal, a more limited COVID-19 exclusion can be restored as of the closing.

In addition, policyholders should continue to expect longer and more in-depth bring-down due diligence calls prior to closing as underwriters look to confirm the effect of COVID-19 on the target business during the interim period between signing and closing. If an RWI policy for a transaction signed before the onset of the COVID-19 pandemic in the jurisdiction does not contain a specific COVID-19 exclusion, policyholders should be prepared for the underwriter to take advantage of an opportunity to add a COVID-19 related exclusion to the RWI policy. This is most likely to occur where the COVID-19 risk is deemed material and the insurer is of the view it has leverage because the insured may require an independent waiver or consent (for example, in relation to an amendment to the transaction agreement or an extension of the outside date).

Conclusion

RWI continues to be a significant and growing aspect of the Canadian M&A marketplace and COVID-19 has not changed its utility or importance to deal-making. Canadian dealmakers should be informed about the product and prepared to deploy it as a tool in their transactions to remain competitive in an M&A process.

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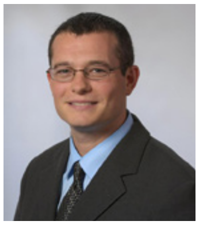

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LITIGATION

Force majeure clauses: Contractual risk allocation and the COVID-19 pandemic

Owing to the COVID-19 pandemic, the *force majeure* clause has entered what will hopefully be its only heyday. *Force majeure* clauses typically operate as risk-allocation provisions that excuse performance where a party becomes unable to perform its contractual obligations due to the occurrence of an event beyond its control.

Virtually ubiquitous boilerplate in the modern commercial agreement, *force majeure* clauses have been often paid little, if any, attention by contracting parties (notwithstanding that a poorly drafted *force majeure* clause can have severe consequences in the event that a party finds itself unable to perform due to an event beyond its control). However, the COVID-19 pandemic is raising issues related to *force majeure* like no event before it. In this article, we provide an overview of certain legal principles related to *force majeure* and consider some issues engaged when interpreting a *force majeure* clause, including in the context of the COVID-19 pandemic.

Introduction to *force majeure*

In the common law jurisdictions of Canada, *force majeure* arises from the terms of a *force majeure* clause in a contract; it is not a free-standing legal doctrine (unlike frustration of contract). If a contract makes no provision for *force majeure*, then the doctrine cannot apply to the contractual relationship. In contrast, the common law doctrine of frustration can apply in the absence of a *force majeure* clause. A *force majeure* clause need not expressly include the words "*force majeure*" to provide the protections of a *force majeure* clause.

A *force majeure* clause typically operates to fully or partially excuse the non-performance of a party's contractual obligations, or to delay the obligation to perform, in circumstances defined (narrowly or broadly) by the contract. Those circumstances must generally be beyond a party's control. In the Supreme Court of Canada's seminal decision on the subject, *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp & Paper Co.*, the court explained that a *force majeure* clause "generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond control of either party, makes performance impossible."

By their nature, the circumstances triggering *force majeure* clauses rarely arise and these clauses are typically drafted to reflect the unusual nature of the underlying conditions. Also, because *force majeure* is a purely contractual issue, disputes regarding the interpretation and application of a *force majeure* clause may be considered in the context of confidential arbitration proceedings rather than in the courts (the authors have represented clients in two major international commercial arbitrations relating to *force majeure* since 2013). As a result, there has been limited judicial consideration of *force majeure* clauses in Canada. However, a number of interpretive principles are nevertheless clear from the case law.

> ...to qualify as an event of *force majeure*, the event in question must usually render performance "impossible"; an event that renders performance merely inconvenient, unprofitable or commercially unviable typically will not suffice.

Interpreting a *force majeure* clause

In assessing the applicability of a *force majeure* clause in a given situation, a court will undertake a detailed examination of the precise contractual language used by the parties. A typical *force majeure* clause will include a list of events (which may be framed exhaustively, or non-exhaustively) and describe how an event must interfere with contractual performance for the clause to be triggered.

As indicated in *Atlantic Paper*, to qualify as an event of *force majeure,* the event in question must usually render performance "impossible"; an event that renders performance merely inconvenient, unprofitable or commercially unviable typically will not suffice. Obligations relating to the payment of money are typically excluded from a *force majeure* clause, so that impecuniosity cannot be relied upon to excuse those obligations. See, for example, an earlier Osler Update entitled "COVID-19's impact on mining" on osler.com relating to the inapplicability of *force majeure* provisions to most project agreements.

Parties seeking to interpret a *force majeure* clause typically start by considering whether the impugned event was specifically enumerated in the contract. However, while the event must unquestionably be a qualifying event under the clause, the central and more difficult inquiry in most instances will be whether performance of one or more of a party's contractual obligations has been rendered *impossible*. In other words, what is a party obligated to do under the contract that it now cannot do?

The issue of whether an event is a "qualifying event" under the *force majeure* clause is generally less contentious, particularly given that many such lists in commercial agreements are non-exhaustive (e.g., "including, but not limited to, earthquakes, fires, floods," etc.). If the clause contains a non-exhaustive list of events and the event at issue is not listed, determining whether that event (which must be beyond a party's control) qualifies as a *force majeure* event typically depends on whether a causal connection can be established between the event at issue and a contractual obligation that cannot be performed.

Of note, in the event of a non-exhaustive list of potentially qualifying events, the principle of *ejusdem generis* – which provides that where general words follow specific words, the general words are confined to the same kind or class of things as the specific words – may still apply to effectively limit the types of events that might qualify.

Force majeure and COVID-19

As a result of the truly unprecedented impact that the COVID-19 pandemic has had on businesses in Canada and around the world, the oft-overlooked *force majeure* clause has become a topic of significant interest among commercial parties and practitioners. Parties to contracts signed prior to the pandemic are now often assessing whether the COVID-19 pandemic qualifies as an event of *force majeure* under their agreements such that they should now be excused from performance. Meanwhile, parties entering into contracts since the beginning of the pandemic are grappling with how to best allocate the risks that a global pandemic – now no longer an unforeseen event – will render them unable to perform their contractual obligations.

Simply put, there is no one answer to the question whether the COVID-19 pandemic constitutes an event of *force majeure*. As with any potential *force majeure* event, the answer will turn on the wording of a party's specific contract, as well as the nature of the obligations prescribed by that contract.

A party seeking to rely on the COVID-19 pandemic, or its effects, as an event of *force majeure* will first have to demonstrate that the pandemic (or its consequences) falls within the applicable definition in the contract. Provided that contractual performance is impeded by the COVID-19 pandemic, clauses that specifically identify "disease," "epidemics" or "pandemics" as events of *force majeure* will likely capture COVID-19, which has been designated by the World Health Organization as a global pandemic. In the absence of such language, the pandemic may nevertheless qualify as an event of *force majeure* if the contractual definition is non-exhaustive and applies generally to any external circumstances outside the parties' control that preclude performance. Additionally, commercial agreements are often quite prescriptive in respect of specific notice and/or mitigation obligations imposed on a party seeking to rely on a *force majeure* clause. Parties invoking, or responding to a party seeking to invoke, a *force majeure* clause, should therefore be mindful of any such obligations.

Even if an affected party can demonstrate that the COVID-19 pandemic is potentially covered by the language of a *force majeure* clause, the central inquiry will then be whether (and, if so, how) the party's contractual performance has been affected. Based on the current state of the law and typical *force majeure* clause language, if COVID-19 has simply made a party's performance less convenient, less profitable or commercially impracticable – for example, by causing financial hardship or insolvency, or causing performance to be wholly unprofitable – that party may not be entitled to invoke *force majeure*. Moreover, an affected party may face difficulties if its contract provides that an event of *force majeure* must "directly" affect performance. In certain instances, the COVID-19 pandemic may only indirectly affect performance – for example, where the direct obstacles to performance are issues such as labour shortages, unavailability of supply, or potentially, laws passed in response to the pandemic. We note that, depending on the language of the contract, these indirect obstacles may, however, qualify as *force majeure* events in their own right.

As of the time of writing, very few decisions have been released by courts in the common law provinces addressing the intersection of COVID-19 and *force majeure*. In the authors' experience, this has been due both to the prevalence of parties reaching temporary (or permanent) commercial resolutions, together with the prevalence (mentioned above) of confidential arbitration provisions in such agreements. Nevertheless, there is no doubt that commercial parties are invoking the COVID-19 pandemic (and its consequences) as events of *force majeure* both confidentially and publicly.

For instance, in June 2020, Nabis Holdings Inc., a Canadian investment company, announced its intention to rely on a *force majeure* clause in an indenture agreement to defer interest payments owing to debenture holders, asserting that "COVID-19 has made raising capital virtually impossible during the global pandemic." Somewhat unusually, the indenture agreement at issue (available on SEDAR) did not carve out inability to pay from the *force majeure* provision. In response, the trustee under the indenture agreement has reportedly commenced legal proceedings, alleging that Nabis breached the terms of the indenture agreement by failing to make the prescribed interest payments.

One of the few published decisions touching on the concept of *force majeure* in the context of the COVID-19 pandemic is *Durham Sports Barn Inc. Bankruptcy Proposal*, which involved a tenant who argued that it should be relieved from paying rent during the period during which it was prevented from operating as a gym due to emergency orders issued by the Ontario government. The Ontario Superior Court disagreed, finding that while the *force majeure* clause in the tenant's lease relieved the landlord from providing quiet enjoyment during the shutdown, it did not relieve the tenant from its obligation to pay rent. The Court declined to follow a recent decision of the Québec Superior Court, which found in favour of a tenant in similar circumstances, because the clause in the Québec case was worded differently and because that case was decided based on a civil law doctrine that does not exist in Ontario. The *Durham* case is consistent with the interpretive principle that courts will focus on the particular wording of the clause in question.

In certain instances, the COVID-19 pandemic may only indirectly affect performance – for example, where the direct obstacles to performance are issues such as labour shortages, unavailability of supply, or potentially, laws passed in response to the pandemic.

It is beyond doubt that the body of case law on the interplay between the COVID-19 pandemic and *force majeure* will continue to expand as pandemic-related cases trickle through the litigation process and we look forward to providing further commentary as it does.

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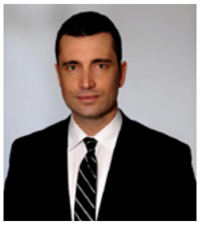

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CAPITAL MARKETS ENFORCEMENT

Evolving capital markets regulatory enforcement

Even prior to the impacts of COVID-19, change was on the horizon for capital markets enforcement in 2020. The year began with continued consideration of significant reforms to modernize the regulatory regime, as well as a heightened focus on market manipulation and abusive trading. With the onset of the pandemic, regulators adapted their enforcement efforts to a virtual world through remote investigations and electronic hearings. There was also an uptake in whistleblowing activity in the work-from-home environment.

Proposed reforms c/o the Capital Markets Modernization Taskforce

As noted in our "Reducing the regulatory burden: Positive changes in corporate and securities law" article, the Capital Markets Modernization Taskforce (the Taskforce) published its widely-anticipated Consultation Report (the Report) on July 9, 2020. If ultimately adopted by the Ontario government, several of the Taskforce's proposals would operate to significantly alter the regulatory landscape for capital markets across Ontario.

From a governance and operations viewpoint, the Taskforce addressed long-standing calls for a separation of the regulatory and adjudicative functions of the Ontario Securities Commission (the OSC or when referring to the tribunal, the Commission) through the creation of a new capital markets adjudicative tribunal as an entirely separate entity from the OSC. This bifurcation would transform the Commission into a "regulatory authority," comparable to the Financial Services Regulatory Authority of Ontario and the model advanced in the Cooperative Capital Markets Regulatory Initiative.

The Report included 12 recommendations relating to changes in capital markets enforcement and two recommendations to support enhanced investor protection. The recommendations proposed enhanced tools for OSC staff that are intended to strengthen OSC staff's ability to police the capital markets while simultaneously promoting fairness to potential respondents. Several recommendations in the Report support an increasingly aggressive stance with regard to regulatory enforcement, such as increasing the maximum administrative monetary penalties to $5 million. Additionally, the Report indicated the Taskforce's interest in adopting a number of initiatives to mirror those recently enacted in British Columbia, such as an expanded investigative authority and broader collection powers.

Notably, on the defence side, the Taskforce recommended changes aimed at liberalizing information sharing within a hyper-confidential investigation process. The Report also introduced revisions to OSC guidelines to allow more time for investigation targets to negotiate a resolution with OSC staff prior to the commencement of proceedings.

The Taskforce further recommended a mechanism by which persons or companies subject to an OSC summons could apply to an OSC adjudicator for clarification or advice relating to the summons or examination. Absent such a process, parties seeking clarification about a summons are forced to seek directions from the courts as the OSC does not contemplate a procedure to provide such clarification. This was most recently demonstrated in the application *In The Matter of B*. In that case, the Commission considered an argument by a party that complying with a summons issued under s. 13 of the *Securities Act* would contravene other obligations that the individual was subject to under an employment agreement. The Commission held that it did not have authority to provide directions on this issue and, consequently, directed the applicant to seek guidance from the court.

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Highlights of enforcement activity

On or about June 23, 2020, the Canadian Securities Administrators (the CSA) released its annual Enforcement Report for the 2019/2020 fiscal year, entitled *Collaborating to Protect Investors and Enforce Securities Law*. While there were fewer enforcement cases than the previous year, the Enforcement Report highlighted the cross-collaboration among CSA members. Notably, there were a total of 91 enforcement referrals between CSA members and 63 instances of CSA members assisting one another in enforcement cases. According to the Enforcement Report, securities regulators concluded 75 enforcement matters, resulting in around $60 million in sanctions. CSA members issued 66 investor alerts, with a particular rise in late March as the COVID-19 pandemic reportedly led to an increase in fraudulent investment schemes and misleading promotions.

Adapting to the virtual world

In light of the COVID-19 pandemic, the OSC adopted a standard practice of proceeding by way of electronic hearings, either through videoconference or teleconference. On August 5, 2020, the OSC published a "Guide to Virtual Hearings Before the OSC Tribunal" to assist parties in proceedings. Adjudicative bodies around the world have adopted similar practices. These changes can raise questions of procedural fairness and judicial economy. For further detail, see also our "Litigating during COVID-19 and other notable litigation developments in 2020" article.

In *Re First Global Data Ltd*, a decision released in September 2020, the Commission held that proceedings will be conducted electronically unless a respondent can prove on persuasive evidence a likelihood of "significant prejudice." In this case, the Commission rejected the respondents' requests that their merits hearing (involving approximately 25 witnesses over 40 hearing days) be heard in person. In its decision, the Commission emphasized the importance of conducting proceedings expeditiously, even during a pandemic. Accordingly, it rejected the respondents' arguments that *only* an in-person hearing would suffice for a complex case where serious allegations were at issue.

Given the experience that regulators and counsel are gaining in adapting to and conducting electronic hearings, coupled with the perceived efficiency of proceeding virtually, it may be that electronic hearings will be more common even after the pandemic has ended.

On April 16, 2020, the Autorité des marchés financiers (AMF), Québec's securities regulatory authority, issued a statement on its website confirming the decision to limit and adapt its investigative activities in light of COVID-19. By way of example, the AMF raised the prospect of its investigations being conducted remotely and in a more targeted manner. Like virtual hearings, it is possible that remote investigations may remain a common tool for regulatory authorities, even after the pandemic.

Rise in whistleblower tips and awards

On April 6, 2020, the OSC announced that it had awarded C$525,000 to a company outsider who used their industry expertise to identify irregularities in the company's disclosure record. In the announcement, the enforcement team at the OSC emphasized the unique role that industry experts can play in identifying and reporting potential wrongdoing. The OSC also confirmed the robust protections that exist within the OSC Whistleblower Program.

In May 2020, the Securities and Exchange Commission (the SEC) reported a surge in whistleblower tips during the COVID-19 pandemic. Specifically, from March to May, the SEC staff triaged more than 4,000 tips, complaints and referrals, representing a 35% increase as compared to the same period last year. Factors that may be contributing to the uptick in whistleblowing are the work-from-home environment, increased privacy offered to whistleblowers and increased unemployment, emboldening former or current employees to come forward.

In September 2020, the SEC voted to adopt significant amendments to the rules governing its whistleblower program, with the aim of providing more clarity to whistleblowers and increasing efficiency and transparency. The SEC whistleblower program has awarded approximately US$676 million to 108 individuals since issuing its first award in 2012, with awards ranging from US$50,000 to US$114 million. SEC Chairman Jay Clayton has stated that the recent amendments will further incentivize tips by "get[ting] more money into the hands of whistleblowers, and at a faster pace." Some notable highlights of the amendments include a presumption of the statutory maximum amount for awards up to US$5 million; allowing awards based on deferred prosecution agreements, non-prosecution agreements or settlements; and increased flexibility in filing requirements. Whistleblower tips under the SEC program have been submitted by individuals located in the United States and 114 foreign countries.

On October 22, 2020, the SEC announced a record award of over US$114 million to an anonymous whistleblower whose tips and assistance led to successful enforcement actions by the SEC. This award far surpasses the US$50 million award paid to an individual whistleblower in June 2020, which, at that time, was the largest in the SEC's history.

Confirming a broad view of securities

On March 16, 2020, in its decision in *Ontario Securities Commission v. Tiffin*, the Ontario Court of Appeal reiterated the broad definition of "security" under the Ontario *Securities Act* (the Act) and affirmed the "catch and exclude" regime established by the Act.

In *Tiffin*, the defendants were charged with three breaches of Ontario securities law in connection with the sale and distribution of promissory notes (the Notes). In response to these charges, the defendants argued that the Notes did not constitute "securities" and, therefore, the Act did not apply. In advancing this argument, they advocated for the application of the U.S. Supreme Court's "family resemblance test" for determining whether particular debt instruments are "securities." This test presumes that a "note" is a "security" unless, based on the examination of certain specified factors, the note bears strong resemblance to one of an enumerated list of instrument types that have been recognized by U.S. courts as not constituting regulated securities.

The Court of Appeal declined to apply the American test. Instead, the Court found that the Act employs a "catch and exclude" scheme, defining key terms broadly and then enumerating specific statutory exemptions. The Court cautioned against judicial "tinkering" with definitions central to complex regulatory schemes.

Tiffin serves as a reminder to parties involved in transactions, including lending transactions, to be cognizant of the potential application of securities laws to their conduct – including the differences in regulatory treatment of certain instruments across jurisdictions.

A change in approach to the Commission's deference?

On July 29, 2020, in the case of *Quadrexx Hedge Capital Management Ltd. v. Ontario Securities Commission*, the Ontario Divisional Court applied a re-articulated "standard of review" framework for appeals arising from decisions of the OSC. The case was an appeal from an OSC determination that the directing minds of the relevant Quadrexx entities had engaged in fraudulent conduct with respect to the distribution of securities. The appellants appealed the decision on the basis that the OSC had both committed palpable and overriding errors and denied them procedural fairness. Specifically, the appellants argued that the OSC made errors on issues of fact, mixed fact and law, and in the application of procedural fairness.

The Court reserved judgment following the argument of the appeal. Pending its decision, the Supreme Court of Canada released its landmark decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*. In *Vavilov*, the Supreme Court of Canada clarified that, when courts are faced with judicial review of an administrative action, the presumed standard is now to be "reasonableness." However, reasonableness may be displaced in various instances, including if the governing legislation provides for an express statutory right of appeal, such as in section 9(1) of the Act.

The Court in *Quadrexx* adopted the revised framework in *Vavilov,* confirming that decisions from the Commission will no longer be subject to review on a "reasonableness" standard. Instead, questions of law will attract a "correctness" standard and questions of fact or mixed fact and law will attract a "palpable or overriding error" standard. Ultimately, the Court dismissed the appeal on the basis that the Commission did not make any errors of fact that rose to the level of palpable or overriding errors and did not deny procedural fairness.

While the *Quadrexx* appeal did not engage any pure questions of law which would have attracted review on a correctness standard, the Court's affirmative stance on the application of *Vavilov* suggests that, moving forward, certain OSC decisions could be subject to greater scrutiny on appeal. Commission rulings on questions of law, which courts might have previously affirmed as "reasonable," may not meet the higher "correctness" standard to which they will now be held.

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OSC targets broad array of market activities

Throughout this past year, securities regulators in Canada have demonstrated a heightened focus on targeting market manipulation and abusive trading.

Prompted by what was described as an increasing presence of "abusive short selling" practices throughout Canada, the OSC and the Investment Industry Regulatory Organization of Canada (IIROC) issued an unusual joint press release on October 1, 2020 encouraging those with valuable information about securities violations to report tips through the OSC's Whistleblower Program. The OSC/IIROC press release was said to be designed to send a message to the Canadian securities market that the OSC is committed to penalizing what it considers to be deceptive and manipulative market behaviour in the Canadian securities landscape.

This focus on greater market conduct regulation follows an announcement by the OSC on July 16, 2020 of a settlement with a Toronto-based cryptoasset trading platform that admitted to having developed and deployed an algorithm to assist in reporting inflated trading activity. This is the first settlement involving alleged manipulative trading on a crypto trading platform. It is also the first case alleging reprisals against a whistleblower under the Act since protections for employee whistleblowers were adopted in 2016. See also our "New opportunities and new challenges for Cryptoasset Trading Platforms" article.

The OSC has also reiterated its position that auditors are not immune from regulatory enforcement. On January 24, 2020, the OSC approved a $4 million settlement agreement with BDO Canada LLP (BDO). Specifically, BDO was penalized for its failure to comply with generally accepted auditing standards in its audit of the 2014-2015 financial statements of two investment funds managed by Crystal Wealth Management Systems Ltd. (Crystal Wealth). Due to BDO's substandard audit, certain fraudulent investments had been improperly recorded in Crystal Wealth's audited financial statements. The considerable penalty imposed by the OSC on BDO signifies its commitment to holding corporate gatekeepers accountable where companies make misrepresentations in the course of accessing, or maintaining a presence in, the public markets.

In response to what is seen as harmful and aggressive short selling activities, the Taskforce has recommended a prohibition on short selling in connection with prospectus offerings and private placements, as well as a prohibition on making misleading or untrue statements about public companies to deter and combat "short and distort" and "pump and dump" schemes.

The next year will likely be one of reform in the enforcement area. With heightened emphasis on burden reduction and regulatory harmonization (for example, the proposed amendments for a modern self-regulatory organization structure as discussed in our "Reducing the regulatory burden: Positive developments in corporate and securities law in 2020" article, post COVID-19 normalization, and consideration of the Taskforce recommendations in Ontario (which will no doubt have a pan-Canadian impact), 2021 will likely involve further introspection, assessment and action.

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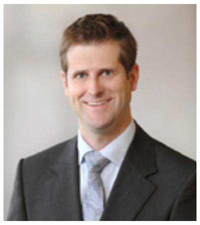

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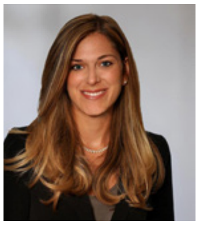

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INSOLVENCY

Notable developments in insolvency law: Flexible tools for challenging times

Along with a tense election south of the border, 2020 brought COVID-19 and its attendant devastating loss of life and far-ranging economic implications, both positive and negative. The world now looks to 2021 with significant uncertainty with respect to what comes next. Certain sectors of the economy, in particular, may be irreparably damaged. Many people are anticipating that restructuring and insolvency law will loom large in 2021 and beyond, and that creative solutions will be required to address the myriad issues that financially distressed businesses face. We have distilled some notable themes in restructuring law that we believe will continue to apply and evolve in both the near and long term.

Debt restructurings under the CBCA: A flexible tool to address market disruption

For over-leveraged companies looking to avoid the time, costs and reputational implications associated with an insolvency filing, a "balance sheet restructuring" under the *Canada Business Corporations Act* (CBCA) or a provincial equivalent provides a valuable alternative. CBCA debt restructurings continue to gain popularity as flexible tools for reducing total indebtedness and preserving going-concern value, although they are usually not the right choice where a company needs operational restructuring (i.e., to address supplier, customer, employee, pension or environmental issues).

This year, several notable proceedings advanced or refined the law that applies to CBCA restructuring transactions. In all three examples, stakeholders voted on the corporate plan of arrangement against the backdrop of the debtor's stated intention to file under the *Companies Creditors' Arrangement Act* (CCAA) to complete the same recapitalization transaction if the CBCA recapitalization failed. In a CCAA proceeding, certain stakeholders – principally, shareholders and so-called "equity" claimants whose claims derive from their status as shareholder – would receive no recovery if creditors, including the holders of debt securities, were not being fully repaid. In the three cases below, the benefits of the particular plan under the CBCA were therefore evaluated, in part, against this likely alternative outcome.

Just Energy

In 2020, Just Energy Group Inc. (Just Energy), an energy retailer business with operations in both Canada and the U.S., completed a CBCA restructuring. This case is a welcome addition to the line of cases in which the courts have adopted a flexible approach to the CBCA to assist a near-insolvent corporation in rehabilitating its balance sheet. Osler acted for Just Energy.

CBCA debt restructurings continue to gain popularity as flexible tools for reducing total indebtedness and preserving going-concern value.

The Just Energy restructuring plan involved the exchange by senior debt holders of a portion of their debt for a combination of debt and equity in a newly capitalized corporation. The existing holdings of both common and preferred shareholders were also exchanged for equity in the new corporation, though these interests were significantly diluted by the equity issued to the debt holders. The plan was approved without objection from these stakeholders.

The Just Energy final order granted broad releases in favour of Just Energy, including in relation to all holders of "equity claims," i.e. persons with litigation claims against the debtor arising from losses experienced by virtue of their status as shareholder. The plan limited recovery for certain of such "equity" claims to the proceeds of the company's insurance policies that provided securities claim coverage. Those claims arose from several securities class proceedings against Just Energy in which the plaintiffs claimed significant damages for loss of share value as a result of financial irregularities and the company's subsequent corrective disclosure.

The Just Energy recapitalization occurred over a mere three-month period from the date that the preliminary interim order (July 2020) was granted by the Ontario Superior Court of Justice to the date the transaction closed (September 28, 2020). This expedited time period demonstrates the potential efficiency of a CBCA debt restructuring in appropriate circumstances, as compared to a filing under the CCAA or the *Bankruptcy and Insolvency Act* (BIA).

Calfrac

While the CBCA restructuring of Calfrac Well Services Ltd. (Calfrac) remains ongoing as of the time of writing, we have already gleaned some important lessons from this proceeding.

As in Just Energy, the Calfrac recapitalization involved an exchange of senior unsecured debt securities for equity. Existing common shareholders were entitled to elect to receive cash plus warrants for their common shares, or to retain their shares and receive warrants. This recovery for shareholders was more favourable than would be available in a CCAA filing. The arrangement did not affect the senior secured debt.

Calfrac also conducted a new notes offering to partially refinance indebtedness outstanding under the company's credit facilities, to satisfy the cash component of the recovery for shareholders, as well as to provide working capital.

Unlike in Just Energy, the fairness and reasonableness of the final order was contested. The company had received a take-over offer for its shares from Wilks Brothers LLC, a potential rival which already held approximately 20% of the Calfrac shares and which had sought a strategic partnership prior to the CBCA filing. Wilks Brothers objected at the final order hearing. It had previously unsuccessfully sought to vary the interim order and was not successful in its appeal from that decision.

The board, on the advice of the special committee, did not recommend acceptance of the Wilks Brothers offer by shareholders on the grounds that the arrangement transaction was the superior proposal. The take-over offer, in contrast, required the waiver of the statutory minimum condition for take-over bids and did not address the company's obligations under its senior unsecured notes ranking in priority to the shareholders. Both factors were determined to be serious barriers to completion. The Alberta Court of Queen's Bench approved the CBCA plan on October 30, 2020, on the basis that it was fair and reasonable, in accordance with the applicable test.

Wilks Brothers appealed the final order, challenging the finding of fairness and reasonableness, as well as the waiver provision in the plan. The appeal was heard by the Alberta Court of Appeal on November 25, 2020. The Court of Appeal dismissed the appeal and issued reasons on December 1, 2020, which among other things highlighted that courts highly value the facilitative nature of the CBCA and that counsel should keep the purpose of the CBCA front of mind when structuring these transactions.

iAnthus

A case that seems to go against the more facilitative trends in the CBCA restructuring cases is the arrangement involving iAnthus Capital Holdings Inc. (iAnthus). The British Columbia Supreme Court initially refused to grant a final order approving the proposed recapitalization of iAnthus. The principal objection of the Court related to the scope of the third-party releases contained in the plan of arrangement. In this respect, the B.C. Court took a narrower approach to the permitted scope of such releases than the courts in other similar restructurings under the CBCA. An important distinction in this case is that the plan was proposed under the provisions of the British Columbia *Business Corporations Act* (BCBCA), which is less commonly used for such restructurings than the CBCA.

The BCBCA plan, as initially proposed, contained a broad release that would have immunized iAnthus and others from, among other things, claims advanced in certain securities class actions that pre-dated the strategic review and the BCBCA proceeding. However, there was no provision for channelling recovery for such claims into applicable insurance policies.

In lengthy reasons, the Court concluded that the arrangement was fair and reasonable, apart from the breadth of the release, which would have barred claims of historical shareholders that preceded the plan of arrangement. The Court was of the view that the BCBCA did not permit a release that would protect the company against claims from third parties unconnected to the plan.

Following this setback, the company revised the plan to narrow the scope of the release and returned to Court seeking approval of the amended plan. Over the continued objections of two stakeholders, the Court nonetheless approved the revised plan.

The Court rejected the argument that the revised plan had to be resubmitted to shareholders for their approval. The Court also clarified its earlier reasons, indicating that it had not concluded that all provisions affecting the rights of third parties were not permitted under the BCBCA. Consistent with prior BCBCA case law, the Court indicated that an order under the BCBCA affecting third parties can be approved where it is ancillary to and necessary to implement the plan of arrangement. This softening of the original position should help preserve flexibility in future corporate statute debt restructurings.

The Court was satisfied that the terms of the revised release were sufficiently connected and ancillary to the plan that the persons bound by the release all benefitted from the plan. The revised plan was therefore approved. At the time of writing, we understand that certain of the objectors may be considering an appeal.

Whether the narrower approach adopted by the Court to the powers under the BCBCA to grant a broad third-party release will have relevance outside British Columbia or in circumstances where third-party recovery is channelled to an insurance policy remains to be seen. It is hoped that Courts under the CBCA will continue to adopt a more pragmatic approach – particularly where the result of a failed corporate arrangement will only serve to drive the company into a more costly, time-consuming insolvency filing, to the detriment of all stakeholders, and shareholders in particular

Working around the anti-deprivation rule

Businesses increasingly ask how they can protect themselves from the fallout of their contractual counterparties' insolvencies. With increased uncertainties for many businesses, the COVID-19 pandemic has heightened these concerns. At the same time, the Supreme Court of Canada (SCC) has now further narrowed an already limited suite of protections for the non-insolvent contractual counterparty.

In *Chandos Construction Ltd. v. Deloitte Restructuring Inc.*, released in October 2020, the SCC confirmed that the common law anti-deprivation rule applies in Canada. The rule invalidates contractual provisions that, based on an insolvency trigger such as a bankruptcy filing or a receivership, operate to remove value from the insolvent party's estate that would otherwise be available to creditors. This includes, for example, a clause that requires one party to pay an amount to the other party as a result of that party's insolvency. The application of this rule is now demanding further creativity from contracting parties who were already experiencing pressure to protect themselves against a counterparty insolvency in the uncertain environment created by the COVID-19 pandemic.

At issue in *Chandos* was a clause in a stipulated price construction subcontract that provided for the forfeiture by the subcontractor, Capital Steel, of 10% of the subcontract price to the contractor, Chandos, on the insolvency, bankruptcy, receivership, winding up or other distribution of assets of Capital Steel. This amount was stated to be a fee "for the inconvenience of completing the work using alternate means and/or for monitoring the work during the warranty period." Capital Steel's trustee in bankruptcy argued that the forfeiture was invalid either under the anti-deprivation rule or the rule against contractual penalties. The majority of the SCC agreed, based solely on the anti-deprivation rule.

In *Chandos Construction Ltd. v. Deloitte Restructuring Inc.*, released in October 2020, the SCC confirmed that the common law anti-deprivation rule applies in Canada.

Justice Rowe, writing for the majority, held that the anti-deprivation rule is violated where (a) a contractual clause is triggered by an event of insolvency or bankruptcy; and (b) the effect of the clause is to remove value from the insolvent's estate. The majority rejected the idea that a bona fide commercial purpose could save otherwise invalid clauses – for example, on these facts, the potentially genuine commercial concern that the increased costs might be incurred by Chandos as a result of Capital Steel's insolvency.

After *Chandos*, what can contracting parties do to protect against a counterparty's insolvency? According to Justice Rowe, certain types of protective clauses may not violate the rule – namely, clauses that eliminate property from the estate, but do not eliminate value, or that are triggered by an event other than insolvency or bankruptcy. Similarly, there is no violation of the rule in contractual protections that involve taking or enforcing security or requiring insurance or a third-party guarantee. However, the decision provides little guidance about the scope of these exceptions. The types of protective measures that can be adopted to address a counterparty insolvency without violating the anti-deprivation rule remain to be worked out by contracting parties and (perhaps) further tested by the courts.

Leave to appeal a CCAA decision is hard to get

In the CCAA restructuring of Delphi Energy Corp. (Delphi), the Alberta Court of Appeal has provided useful, recent confirmation of the very high bar that a complainant must meet in seeking leave to appeal from an order made by the supervising judge approving a CCAA plan of arrangement as fair and reasonable. Contested CCAA sanction hearings are uncommon and appellate courts therefore rarely have the opportunity to provide meaningful guidance with respect to issues raised at this final stage of a CCAA proceeding. Osler acted for Delphi.

In *Re Delphi Energy Corp. and Delphi Energy (Alberta) Limited,* the Alberta Court of Queen's Bench approved a plan of compromise and arrangement that had received the statutorily required levels of approval from affected creditors. The Alberta Court of Appeal subsequently denied leave to appeal from this order in separate applications from two stakeholders. The Court of Appeal confirmed prior law providing that an appeal court will not lightly disturb a determination that a plan of compromise and arrangement is fair and reasonable, given the delicate balancing exercise required in making this finding. The Court of Appeal also noted that any delay represented by the proposed appeal would almost certainly imperil the going-concern restructuring of Delphi.

In *Trican Well Service Ltd. v. Delphi Energy Corp.,* the Court of Appeal dismissed an application for leave to appeal brought by certain trade creditors. These creditors alleged that their unsecured claims had been improperly classified for voting purposes in the same class as the so-called "convenience" class creditors, thereby overwhelming their voting power. They also argued that the classification improperly subordinated their builders' lien rights to the interests of other debtholders. The "convenience" class creditors had unsecured claims valued at $5,000 or less, as compared to the trade creditors who were owed several million dollars. Under the plan, the "convenience class" claims were paid in full and these creditors were deemed to vote in favour of the plan. The objecting creditors could have opted into the convenience class, but chose not to, on the basis that they sought recovery of more than the $5,000 limit.

Although convenience classes have been frequently used in CCAA plans, there are very few, if any, examples of cases in which the appropriateness of such a mechanism has been raised before an appellate court. In concluding that this ground of appeal had no likelihood of success, the Court of Appeal held that, if leave to appeal were granted, the conclusion of the CCAA judge that creditor classification under the plan was appropriate would receive a very high degree of deference. The Court of Appeal confirmed the principle that classification should be based on commonality – not identity – of interest, and that fragmentation of classes should not be used to confer veto power on one stakeholder group.

The Court of Appeal also concluded that there was no reasonable prospect for the objecting creditors to establish that the plan improperly compromised their claims against Delphi's directors. Section 5.1(2) of the CCAA precludes a debtor from compromising certain types of claims against directors – principally those that are based on allegations of misrepresentation or wrongful or oppressive conduct. The Court of Appeal held that the plan mechanism whereby claims against Delphi's directors were limited to the proceeds of the debtor's insurance policies was not a compromise of the claims against the directors at all. The insurance limits were more than sufficient to cover those claims, even if they were entirely successful. This ground of appeal therefore also had no hope of success.

The second application, *Repsol Canada Energy Partnership v Delphi Energy Corp.,* involved a leave to appeal motion from a creditor holding certain indemnity claims against the debtor. In denying leave to appeal, the Alberta Court of Appeal confirmed that claims originating in pre-filing obligations but coming due during the post-filing period can be compromised under a CCAA plan.

"Reverse" vesting orders are a viable restructuring mechanism

Reverse vesting orders are one of the newer, more exciting developments in restructuring law this year, having only been in use for a short period and picking up steam quickly. We are aware of only half a dozen or so cases featuring reverse vesting orders. Most have occurred over the past 18 months. The popularity of this new tool continues to rise, particularly in highly-regulated industries such as mining and cannabis.

A traditional vesting order transfers the assets of the debtor corporation to a purchaser, leaving liabilities behind. A "reverse" vesting order (RVO) transfers the debtor's liabilities to a new "residual corporation," while the assets and any assumed liabilities remain in the debtor corporation. The debtor generally continues to operate as a going concern, with the support of new investors or investments. The new residual corporation can, if appropriate, develop a plan under the CCAA to compromise the remaining liabilities.

The popularity of reverse vesting orders continues to rise, particularly in highly regulated industries such as mining and cannabis.

Both traditional vesting orders and RVOs are frequently implemented at the end of a court-approved sale or investment solicitation process (SISP). The advantages of an RVO are generally twofold. Complex assets – for example, permits, approvals or key agreements, such as agreements with Indigenous peoples – can be challenging to transfer successfully to a third-party purchaser as a result of regulatory limitations or consent requirements. Moreover, an RVO can preserve tax attributes that would be lost in a more traditional asset sale. The RVO therefore provides a potentially less cumbersome mechanism for allowing a debtor company to preserve going-concern operations, including for the benefit of employees and other vulnerable stakeholders. Notably, RVOs carry additional structuring complexities that may make them less attractive where these factors are absent.

RVOs have been used in a number of recent CCAA restructurings, including in the CCAA proceedings of Comark Holdings Inc. et al, (Ontario, 2020), Wayland Group Corp et al, (Ontario, 2020) and Stornoway Diamond Corporation et al (Quebec, 2019). Osler acted for the debtors in the Comark and Wayland matters, and for the monitor in Stornoway.

Until the Québec Superior Court's decision in *Arrangement relatif à Nemaska Lithium inc.*, these transactions had been completed on consent. In *Nemaska*, the Court approved an RVO transaction structured as a credit bid by the debtors' secured creditors over the strenuous objections of one stakeholder.

The Court recognized that the proposed transaction was both complex and innovative, holding that flexibility is required in finding solutions to the issues facing an insolvent debtor. The Court was satisfied that a fair process had been followed and that sufficient efforts had been made to obtain the best offer. The only alternative to the proposed RVO was liquidation, which would be catastrophic for all stakeholders.

The objecting stakeholder (a shareholder and creditor of Nemaska) argued that section 36 of the CCAA only permits a vesting order to "vest out" encumbrances on the debtor's assets in the context of a sale or disposition of assets to a third-party purchaser. The Court disagreed, holding that there is no such limitation.

Since the proposed transaction was beneficial to the debtor's stakeholders, there was no reason that the Court could not apply section 36(6) of the CCAA to effectively discharge the liabilities or other encumbrances that might otherwise attach to the debtor's assets by means of the RVO.

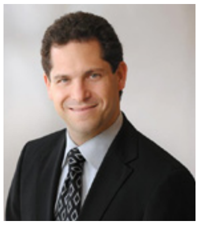
Leave to appeal to the Québec Court of Appeal was subsequently denied. Although the Court of Appeal considered that the basis for granting the RVO and the potential objections could be of interest to the insolvency profession, the Court refused to allow the RVO to be appealed. The objecting stakeholder's application appeared to be motivated primarily by tactical considerations. Moreover, any delay resulting from the appeal would likely jeopardize the restructuring.

The decisions in *Nemaska* provide welcome comfort to debtors – particularly those operating in highly-regulated sectors – who seek to take advantage of the benefits this structure offers. The specific advantages of an RVO were important to Nemaska, as a lithium mining company conducting business in Northern Québec pursuant to numerous permits and approvals, as well as agreements negotiated with the nearby Cree First Nation.

Conclusion

Courts are clearly grappling with the need to ensure that businesses in financial difficulties have the flexible tools available to restructure successfully for the benefit of all of their stakeholders. At the same time, principles of fairness must be respected, despite the extreme pressure experienced by insolvent companies to preserve value for all concerned and the attempts by particular stakeholders to protect their interests. As the economic consequences of COVID-19 continue to be felt, we expect that the ingenuity of parties, their counsel, the courts and perhaps the legislatures will be put to the test.

AUTHORS



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LITIGATION

Key developments in white-collar defence

This year was marked by uncertainty and increased risk for businesses as a result of the COVID-19 pandemic. While white-collar enforcement activity in Canada remained limited in 2020, regulatory efforts to reform and enhance enforcement tools, as well as focus on money laundering and compliance issues arising from the COVID-19 pandemic, continued throughout the year. As regulators catch up to the effects of the pandemic, Canadian companies should expect increased enforcement in relation to white-collar offences over the next year.

Impact of COVID-19

The COVID-19 pandemic has increased risks for businesses now operating within an uncertain context. Vast sums and extensive resources have been expended to mitigate the health, economic and social impacts of COVID-19. For example, organizations like the World Bank and the International Monetary Fund have pledged billions in emergency aid, alongside the programs of national governments. This flood of money, often without the necessary oversight, is leading to a surge in white-collar crimes globally.

Examples of these offences include: corruption allegations from health insurance corporations; embezzlement of funds earmarked for the fight against COVID-19; procurement failures and grafts, including overpriced ventilators;

civil servants accepting bribes; counterfeit stimulus cheques being used to buy luxury goods; and public contracts being entered into with alleged fraudsters. Transparency International has identified over US$1 billion lost as a result of corruption and malfeasance – a sum that would have been sufficient to purchase approximately 50,000 ventilators. The G20 held an anti-corruption ministerial meeting on October 22, 2020 to discuss a global response.

Transparency International has summarized and broken down the prominent corruption and malfeasance cases regionally in this table:

Region	Cases Analyzed	Total (USD)
Africa	4	7,982,630
Europe	7	555,302,400
Latin America	5	273,198,110
North America	1	1,300,000
Asia	2	288,171,000
Total all regions:	**19**	**1,125,954,140**

Canadian businesses must prepare accordingly. As is being seen in other countries, bad actors may seek to exploit the pandemic. Although regulators in Canada have eased certain requirements such as filing deadlines, law enforcement agencies and regulators continue to hold wrongdoers accountable for transgressions. In this environment, businesses will likely face increasing regulatory scrutiny.

Some of the pandemic-related risks currently facing businesses include:

- Businesses are subject to increased compliance risks as a result of emergency measures and other legal obligations in connection with the COVID-19 pandemic, including closure of and restrictions on non-essential businesses, prohibitions on practices such as price-gouging, and the imposition of various changing health and safety measures, including physical distancing.
- Businesses facing material supply chain challenges will be under increasing pressure to maintain or expand supply chains. Supply chain interruptions increase the risk that businesses may be victims of fraud and demand additional regulatory compliance.
- Businesses adjusting to operating in the context of the pandemic may find themselves engaged in government interactions outside their normal course, including with respect to novel regulatory requirements and requirements to operate in unfamiliar markets as a result of supply chain disruptions. This may, in some jurisdictions, increase the risk of interactions that expose businesses to corruption and demands for bribes.

- Businesses engaged in M&A activity resulting from the economic fallout of the pandemic may face increased risk through corporate successor liability. Ensuring appropriate due diligence is undertaken regarding the target's operations will be important in assessing and mitigating risk.

It is therefore crucial for businesses operating in the context of the pandemic to remain prudent and ensure that they are taking appropriate measures to address the pandemic-related risks, in addition to those facing their own businesses in the normal course, which may be exacerbated as a result of COVID-19.

Enforcement activity

Snapshot of enforcement activity involving corruption

The most recent significant enforcement activity in Canada came in late 2019, with the much-awaited outcome in the high-profile case involving SNC-Lavalin Group Inc. The allegations against SNC-Lavalin pertained to activities in Libya from 2001 to 2011. Charges from the RCMP included one count of bribing a foreign public official under section 3(1)(b) of the *Corruption of Foreign Public Officials Act* (the CFPOA) and one count of fraud under s. 380(1) of the *Criminal Code*. On December 18, 2019, a division of SNC-Lavalin Group Inc. pleaded guilty to fraud with a negotiated penalty of $280 million in fines and three years' probation, resolving the criminal case against the Montréal-based engineering firm.

In addition, on December 15, 2019, former SNC-Lavalin executive Sami Bebawi was convicted by a jury on five separate counts relating to fraud, corruption of foreign officials and laundering the proceeds of crime in relation to these events. Mr. Bebawi was sentenced on January 10, 2020 to eight and a half years in prison in connection with the scheme. This ended the last of the criminal charges brought against the company and its former employees.

Both penalties represented significant increases relative to those previously imposed for similar offences in Canada. The negotiated monetary penalty for SNC-Lavalin of $280 million was the largest financial penalty levied against a corporation for fraud under the *Criminal Code* and is significantly larger than any corporate fine levied for similar offences under the CFPOA. The eight-and-a-half-year sentence for Bebawi, and the Crown's request for a sentence of four and a half years for the corruption offence, represent an increase as compared to the three-year sentences generally imposed for similar offences by individuals.

On November 12, 2020, the Royal Canadian Mounted Police charged Damodar Arapakota, a former executive of IMEX Systems Inc., under section 3(1) of the CFPOA for allegedly bribing a public official from Botswana, following self-reporting of the allegations by the company.

Canada continued to receive criticism in 2020 for its limited enforcement activity, in particular in relation to corruption. Canada dropped four places, from 8th to 12th, in Transparency International's Corruption Perceptions Index (CPI), the annual ranking of countries in relation to perceived public sector corruption. The CPI, in which Canada fell from its position in the top 10 for the first time since 2005, cited Canada's growing reputation as an easy place to launder money.

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In particular, the Transparency International report cited two different government-commissioned reports in British Columbia (the 2019 Maloney Report and the 2018 German Report) detailing the extent of money laundering in real estate, casinos and luxury goods. The report also cited controversy surrounding the federal government's decision not to invite SNC-Lavalin to negotiate a deferred prosecution agreement. Similarly, Transparency International's most recent Exporting Corruption report maintained that Canada has retained its reputation of having "limited enforcement" with regard to penalizing bribery of foreign public officials while operating abroad.

Ontario's Serious Fraud Office

The Government of Ontario's Serious Fraud Office (SFO), established in mid-2019, has commenced enforcement activity. Most notably, following a fraud investigation by the SFO, Charles Debono was deported from the Dominican Republic and arrested on arrival in Canada by the Ontario Provincial Police (OPP). Debono has been charged with several criminal offences, including fraud, money laundering, bribery and forgery in connection with an alleged $56 million Ponzi scheme originating in 2012.

The investigation was commenced by the OPP and then transferred to the newly established SFO. The SFO has identified approximately 515 victims with losses totaling more than $24 million. How this matter unfolds will be instructive about what can be expected from the SFO going forward.

The SFO's establishment represented a heightened focus on white-collar enforcement in the province. It was a step forward in provincial enforcement, given the criminal (and thus federal) nature of anti-corruption legislation in Canada, which is generally enforced by the RCMP. The Unité permanente anticorruption in Québec has enjoyed relative success in a similar vein.

We continue to expect that the SFO's establishment will lead to increased enforcement in Ontario in the future. The Debono investigation may well be a sign of things to come.

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Status of remediation agreements

As of this year, Canada has yet to make effective use of its remediation agreements, which were introduced in 2018. Under the Canadian regime, a remediation agreement can only be entered into for economic offences. Notably, the guilty plea entered by SNC-Lavalin followed unsuccessful attempts by the company to enter into a remediation agreement with the Public Prosecution Service of Canada.

To date, no remediation agreements have been announced in Canada. Nonetheless, remediation agreements remain an important tool in enforcement authorities' toolkits and should serve to facilitate greater enforcement in the future.

Money laundering

Public focus on white-collar issues in Canada has been significantly directed towards money laundering in recent years. In response to the aforementioned [Maloney Report] in 2019 and [German Report] in 2018 detailing the extent of the money laundering problem in British Columbia, the establishment of the Commission of Inquiry into Money Laundering in British Columbia (the Cullen Commission) was announced in May 2019 and its work continued into 2020. The Commission is led by B.C. Supreme Court Justice Allen Cullen and its mandate is to inquire into and report on money laundering in B.C. Specifically, the Cullen Commission is tasked with determining where and how money laundering is taking place and why it has been allowed to happen, as well as whether and how it can be prevented.

The Cullen Commission's hearings are ongoing and are proceeding by videoconference as a result of the pandemic. Companies should anticipate regulatory changes or new enforcement mechanisms with respect to money laundering once the recommendations of the Commission are released.

Canada may also see renewed attention to anti-money laundering issues as a result of the recent leak of suspicious activity reports collected by the U.S. Financial Crimes Enforcement Network (FinCEN). Previous leaks of information, including the Panama Papers, have shed light and renewed attention on money laundering in Canada in the past.

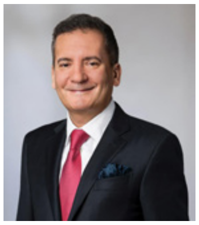
Given the added risks to businesses arising from the COVID-19 pandemic, effective compliance for businesses should be paramount.

Expectations for enforcement

Given the added risks to businesses arising from the COVID-19 pandemic, effective compliance for businesses should be paramount. Canada will likely take its lead from other jurisdictions. Such jurisdictions include the United States, which in 2020 released a second edition of its Resource Guide to the U.S. Foreign Corrupt Practices Act. In the U.K., updated guidance regarding its deferred prosecution regime was also recently released.

We anticipate increased enforcement in 2021 with respect to corruption, money laundering and other white-collar crimes.

AUTHORS



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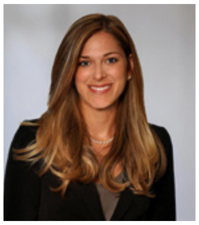

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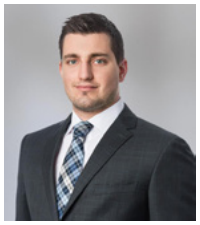

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FINANCIAL SERVICES

Flexibility in the financial market in response to major changes

This year, financial market participants have been subject to many unprecedented changes that have forced them to show a great deal of flexibility. This article highlights two of these events: the cessation of LIBOR and the impact of the COVID-19 pandemic.

The cessation of LIBOR has been anticipated for a number of years and there have been many discussions regarding the potential impact of its termination. However, very little changed in practice prior to 2020, despite the complexity involved for business in adapting to this change. LIBOR is widely used on a global basis in thousands of credit agreements and borrowing arrangements in respect of trillions of dollars of borrowings. Implementing a change of this nature requires widescale agreement across the industry regarding appropriate replacement rates. Equally, a carefully planned approach to implementation of the change is essential.

The laissez-faire attitude towards the LIBOR change leading up to 2020 has given way to a strong push by governmental organizations and market leaders to crystallize a path forward. In 2020, market participants are finally embracing the changes necessary for an orderly transition to a fallback rate and the transition to an alternative reference rate is gaining some traction. Given the sheer volume of LIBOR-based agreements, these are welcome developments, given that a failure to negotiate and implement an alternate structure, or a fallback structure, prior to LIBOR's cessation in 2021 could have had disastrous consequences for lenders, borrowers and other market participants.

Unlike the cessation of LIBOR, the COVID-19 pandemic took the world by surprise. It had – and continues to have – the potential to create instability and disruption in the credit market. Many businesses were negatively impacted by the pandemic and, as a result, needed to turn to their lenders for flexibility under their credit agreements.

Cessation of LIBOR

The London Interbank Offered Rate (most commonly referred to as LIBOR) is the most widely used interest rate in the world. It is produced in seven tenors (overnight/spot next, one week, one month, two months, three months, six months and 12 months) across five different currencies (including USD, which is the main focus of this article).

LIBOR is generally expected to come to an end by December 31, 2021. As of that date, the Financial Conduct Authority (the FCA), the body that regulates LIBOR, will no longer require panel banks to submit the quotes that LIBOR is based on, thereby rendering LIBOR unusable. In November 2020, ICE Benchmark Administration Limited (IBA), the administrator of LIBOR, announced a plan to begin consultations on its intention to cease the publication of (1) all tenors of GBP LIBOR, EUR LIBOR, CHF LIBOR and JPY LIBOR on December 31, 2020, (2) one week and two month USD LIBOR on December 31, 2020, and (3) all other USD LIBOR tenors on June 30, 2023. The consultations will close by the end of January 2021.

LIBOR is the underlying reference rate for trillions of dollars in borrowings over a wide range of financial instruments and transactions worldwide. This includes corporate loans, bonds, derivatives, futures, mortgages and other financial products. As such, lenders, borrowers and other participants in the global financial markets are faced with the challenge of transitioning away from most LIBOR settings in a little over a year. So far there has been no suggestion that the COVID-19 pandemic will delay LIBOR's end.

In 2020, market participants are finally embracing the changes necessary for an orderly transition to a fallback rate and the transition to an alternative reference rate is gaining some traction.

SOFR – the replacement rate

The leading rate expected to replace the U.S. dollar LIBOR rate for many financial products is the secured overnight financing rate (SOFR). SOFR is an overnight rate for repurchase transactions that are secured by U.S. treasuries. There are several different SOFR variants, including forward-looking term SOFR, daily simple SOFR in arrears and daily compounded SOFR in arrears.

Forward-looking term SOFR has a term structure similar to LIBOR and is determined prior to the start of the interest period. To be effective as an alternate to LIBOR, a SOFR futures market would need to be developed. Daily SOFR in arrears uses daily SOFR rates published during the relevant interest period. Unlike forward-looking rates, the rate for the entire interest period would not be known at the beginning of the interest period. Daily simple SOFR and daily compounded SOFR are differentiated based on whether interest accrues on a simple interest basis or a compound interest basis. SOFR is published on a daily basis by the Federal Reserve Bank of New York.

There are a variety of structural differences between LIBOR and SOFR, including that LIBOR is available in multiple tenors while SOFR is an overnight rate, and that LIBOR incorporates a bank credit risk premium. The two rates also have historical spread differentials. As a result, certain adjustments will need to be applied to SOFR to address these differences as well as the historical spread differential between the rates. Additionally, market participants using SOFR will need to determine whether they will use a simple average or a compound average and whether daily SOFRs are to be observed and averaged in advance or in arrears.

It is not yet clear which specific SOFR rate will be adopted for loans. The leading contenders appear to be forward-looking term SOFR and the daily simple SOFR in arrears. For swaps, the International Swaps and Derivatives Association (ISDA) has announced that it will use term-adjusted SOFR, compounded in arrears.

Recommended fallback language

The Alternative Reference Rates Committee (ARRC) is a committee convened by the Federal Reserve Board and the New York Fed to help ensure a successful transition from USD LIBOR to SOFR. In the spring of 2019, ARRC published recommended fallback language to be included in syndicated and bilateral loan agreements. ARRC's proposed language includes two alternative methods that can be reflected in the applicable agreement as a fallback for the transition from LIBOR. This includes both a "hardwired approach" and an "amendment approach."

The hardwired approach contemplates that the parties will include predetermined terms to transition the loan facility to a successor rate and the spread adjustment. That transition would either occur upon a trigger event that would be agreed to, or earlier due to opt-in. The amendment approach contemplates the parties agreeing to amend the loan agreement upon certain trigger events occurring or upon early opt-in by the parties. ARRC has continuously encouraged the use of the hardwired approach over the amendment approach. In the "ARRC Recommended Best Practices for Completing the Transition from LIBOR," ARRC recommended that all business loans include hardwired language by the end of the third quarter of 2020.

In June 2020, ARRC published revised fallback language, which no longer included the amendment approach. Despite ARRC's insistence that parties should use the hardwired approach, uptake has been slow. This is largely because participants are hesitant to lock-in SOFR when it has not yet been determined to be the definitive market standard. Conversely, the amendment approach has been broadly adopted. ARRC has noted its concern that if all market participants use the amendment approach, it may not be feasible to amend thousands of loans (and many other financial products) in a short period of time upon the cessation of LIBOR.

ARRC also published hardwired fallback language for floating rate notes (FRNs) in April 2019. This hardwired language has been adopted more quickly than in the loan market. This is not surprising given that FRNs are difficult to amend as a result of noteholder consent requirements.

Transitioning to SOFR

A few resources are available to market participants to make it easier to transition to the hardwired approach.

ISDA has been considering the impacts of the cessation of key interbank offered rates (IBORs) for a few years, and has published a supplement to the 2006 ISDA Definitions (the Supplement) and a related protocol (the Protocol) to address the fallback rates for such IBORs (including LIBOR) in derivatives contracts. The Supplement and Protocol will take effect on January 25, 2021. Thereafter, all new derivatives referencing the 2006 ISDA Definitions will automatically include the updated fallbacks for covered IBORs. The changes will apply to legacy derivatives as well if both counterparties have adhered to the protocol or have agreed on similar bilateral amendments. At this stage, more than 1500 entities have adhered to the Protocol.

The Loan Syndications and Trading Association (LSTA) recently published a concept credit agreement as an educational tool to support the use of hardwired fallback language and to ease the transition to new originations of SOFR-referenced loans. The concept credit agreement describes a term loan referencing daily simple SOFR or daily compounded SOFR. The LSTA notes that the concept credit agreement does not purport to represent or set any standard market practice. As simple SOFR loans have not yet been executed, there is currently no market practice to reflect. Instead, the concept document uses familiar alternate base rate-style provisions and incorporates ARRC conventions as an example of a SOFR loan. The LSTA has indicated that it intends to develop concept credit agreements reflecting other SOFR methodologies as well.

Proposed legislative solution

On March 6, 2020, ARRC released a legislative proposal for New York State to address the discontinuation of LIBOR with a view to mitigating a number of issues that will arise as a result of the cessation. This proposed legislation would, among other things, (1) prohibit a party from refusing to perform its contractual obligations or declaring a breach of contract as a result of the discontinuance of LIBOR or the use of the statute’s recommended benchmark replacement; (2) definitively establish that the recommended benchmark replacement is a commercially reasonable substitute for and a commercially substantial equivalent to LIBOR; and (3) provide a safe harbour from litigation for the use of the recommended benchmark replacement.

For contracts that are silent on a LIBOR fallback rate, or that contain fallback provisions that refer to a LIBOR-based rate (such as the last-quoted LIBOR), the legislation requires the use of the recommended benchmark replacement. Where contracts provide for agent or lender discretion to determine the fallback rate, the safe harbour from litigation is meant to encourage adoption of the recommended benchmark replacement. Contracts that have fallback provisions to a non-LIBOR based rate (such as the prime lending rate) would not be affected by the legislation.

LIBOR's end

Although the end of 2021 is a year away, the discontinuation of LIBOR will approach quickly, likely faster than most people realize. It might even be necessary to transition away from LIBOR before it is discontinued if LIBOR ceases to be available at an earlier date. It is critical that market participants begin to implement their transition plans so that they have sufficient time to achieve an orderly replacement of LIBOR, whether through a hardwired approach, a fallback amendment or otherwise. Failing to do so could have significant implications for borrowers. Given the sheer volume of agreements and borrowings with LIBOR-based interest rates, we expect 2021 to be a very busy year as deadlines approach and changes must be implemented. As for new contracts, banks have been encouraged by various regulators to stop using USD LIBOR as soon as practicable, but in any event by the end of 2021.

Osler is the only Canadian law firm that is a member of the ISDA Americas and Europe Benchmarking Working Group, and is the host of the Canadian Legal IBOR Committee for a group of Canadian banks. In that capacity, Osler has been advising numerous banks and other financial market participants with respect to enterprise-wide LIBOR fallback risk assessment, planning and implementation solutions.

Impacts of COVID-19 on credit facilities

As a result of the COVID-19 pandemic, borrowers have faced and are facing a number of challenges relating to their existing credit facilities. These challenges include (1) the inability to meet certain financial covenants and financial reporting requirements; (2) the risk of breaching certain contractual obligations; and (3) the potential for a Material Adverse Effect (MAE).

To date, lenders have generally been quite flexible in response to these issues. Many lenders have entered into amendments to credit agreements and granted waivers for certain covenants and requirements impacted by the pandemic. For example, in some deals, lenders have agreed to accommodate borrowers by adjusting financial ratio requirements, such as allowing COVID-19 related expenses to be added back to EBIDTA and extending reporting deadlines. Lenders have also generally not taken an aggressive interpretation of MAE provisions in loan agreements. It would not have been practical for lenders to enforce their rights on all impacted facilities that could have been triggered by an MAE default during the pandemic.

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As a trade-off for their leniency, lenders have imposed certain additional restrictions. These include (a) anti-cash hoarding provisions; (b) tighter restrictions on asset sales, dividends, distributions and acquisitions; and (c) additional reporting requirements. Lenders should continue to ensure that any carve-outs, waivers, consents and other moderations provided to their borrowers are temporary and fact-specific.

Conclusion

The difficulties that market participants have faced this year will continue to evolve in 2021. Market participants will need to focus on the heavy lifting required to implement the transition away from LIBOR. Borrowers and lenders will need to continue to communicate with each other to find mutually-beneficial solutions to COVID-19 related issues. Although this is likely to be challenging, market participants have shown great resilience and have worked hard throughout 2020 to equip themselves with the tools to handle these challenges.

It remains to be seen how the overall market will respond to these concerns and the uncertain market landscape. In particular, it will be interesting to see whether ARRC's legislative proposal to address the LIBOR transition is adopted in the U.S. and whether Canada will follow suit with a similar regime.

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FINANCIAL SERVICES REGULATORY

Financial services regulation in 2020: Convergence, disruption and acceleration

An unpredictable and volatile year, 2020 can be divided into three distinct phases: pre-COVID-19 pandemic; the initial COVID-19 phase which was marked by short-term emergency measures; and finally a measured resumption of more traditional regulatory function, activity and policy reform. However, this last phase is by no means a return to normal, as the COVID-19 pandemic continues to influence and disrupt the financial services world and impact its regulation.

Convergence and integration

We expected 2020 to be shaped by the modernization initiatives previously announced across the financial services sector. Both the Financial Services Regulatory Authority of Ontario (FSRA) and the British Columbia Financial Services Authority (BCFSA), two relatively new provincial financial services regulatory bodies with similar mandates, announced priorities for 2020 that included regulatory effectiveness and regulatory cooperation and harmonization across Canada (see the plans for each of these organizations here: FSRA and BCFSA).

We were also closely following the trend towards regulatory convergence as financial products and the financial ecosystem itself started to meld. This was driven primarily by increased consumer demand for more holistic advice and consistent standards across financial products and services, such as the measures to introduce financial advisor/financial planner title reform in Ontario and Saskatchewan.

Mortgage syndication was an area of expected common regulatory focus for 2020. Prior to the pandemic, the Canadian Securities Administrators (CSA) were preparing to implement regulatory changes to harmonize the regulation of syndicated mortgages across Canada. These changes included amendments to National Instruments 45-106 and 31-103 that would remove the prospectus and registration exemptions for the distribution of syndicated mortgages, introduce additional requirements to the offering memorandum prospectus exemptions and amend the private issuer prospectus exemption to remove its availability for the distribution of syndicated mortgages. At the same time, in Ontario, FSRA announced that oversight of non-qualified syndicated mortgages would be transferred from FSRA to the Ontario Securities Commission (OSC), while FSRA would retain oversight over less complex arrangements that did not necessitate significant investor disclosure and oversight by a body such as the OSC. Other developments included the anticipated transfer of mortgage broker oversight in Québec to the Autorité des marchés financiers (AMF), which occurred on May 1, and in British Columbia, the creation of a single real estate regulator within the BCFSA.

At the federal level, we were following two key consumer-centric technology related initiatives: open banking and payments modernization, as well as watching for additional developments in relation to the federal financial consumer protection framework. We were also expecting increased activity by the Financial Consumer Agency of Canada (FCAC) in light of its new enforcement powers, which came into force on April 30, 2020. In addition, we anticipated the resumption of enforcement action by the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) as its 2019 Compliance Framework was implemented.

Finally, the Office of the Superintendent of Financial Institutions (OSFI) had announced pending policy consultations focused on, among other things, proportionality of requirements for small and medium-sized deposit-taking institutions, the transition of anti-money laundering (AML) oversight to FINTRAC, reinsurance practices, changes to the stress test for uninsured mortgages and implementation of a new uninsured mortgage benchmark rate.

Disruption

In March, COVID-19 put these policy reforms on temporary hold as regulators pivoted to focus on short-term, emergency measures. These included temporary relief measures, such as extensions of filing deadlines, accommodation for remote activities, cessation of routine examinations and the implementation of measures to ensure institutional resiliency.

The original timeline for implementation of many regulatory initiatives was delayed or suspended, including

- the transfer of the non-qualified syndicated mortgages regime from FSRA to the OSC was postponed from July 2020 to January 1, 2021
- open banking consultations were delayed until fall 2020
- on March 13, OSFI suspended consultations on all policy and guidance projects
- the implementation of the Investment Industry Regulatory Organization of Canada's (IIROC) plain language rulebook, which had been scheduled for June 1, 2020, was postponed until December 31, 2021

Refocused acceleration and burden reduction

As the business and regulatory environment began to normalize, regulatory reform initiatives recommenced in the summer. The focus of these reforms has, however, been redirected or amplified by the COVID-19 experience.

At the federal level, OSFI announced the resumption of its policy reforms, noting that its forward plan was different from the plan OSFI would have put forward in the absence of COVID-19. OSFI's new guidance priorities recognize the need to be responsive to the overall risk environment in the new and different "business-as-usual" environment. At the same time, OSFI is aware of the material operational constraints of its regulated institutions.

Technology and cyber risk have become the focus of regulatory consultations at many levels. This is not surprising since financial institutions, most of whom had already been actively engaged in digitization projects, were required to rapidly accelerate such initiatives as the COVID-19 pandemic triggered a record shift to online banking.

In September, OSFI published a discussion paper on technology risks, focusing on cyber security, third-party risks, artificial intelligence, data and more. The BCFSA has also announced that it will be issuing an advisory in the upcoming months that will seek feedback on a set of draft principles to address key risks to data and information systems from unauthorized/illegal access or impaired network systems.

Fair treatment of consumers continues to be in the spotlight. On September 15, 2020, FSRA announced two key areas of assessment in the life and health insurance sector for 2020-2021: the implementation of Fair Treatment of Customers principles across distribution channels, in collaboration with the Canadian Council of Insurance regulators and its member regulators, and a review of the relationship between insurance companies and managing general agencies. Interestingly, FSRA did not indicate any specific focus on the electronic sales channel, but distribution channels more generally are a key area of review.

Regulators continue to focus on burden reduction and recognize the need for regulatory collaboration to advance that objective. This theme was emerging

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prior to COVID-19. Heightened operational constraints resulting from the pandemic have now put this into greater focus as institutions have less capacity to respond to regulatory requests. There are several examples of such burden reduction:

- June 2020: The CSA released a consultation paper that reviewed the current regulatory framework for IIROC and the Mutual Fund Dealers Association of Canada (MFDA). The consultation paper conveyed a willingness to re-examine the self-regulatory organization (SRO) framework, an objective consistent with the CSA's focus on client-focused reforms and the reduction of regulatory burden. This continues the push for convergence in this sector, first articulated in an October 2019 report from the C.D. Howe Institute, and subsequent commentary from both the MFDA (February 2020) and IIROC (June 2020). Both call for changes and echo the concern that the multi-regulatory model has failed to keep pace with the technology-driven transformation of the financial services industry. These themes were picked up by the Task Force for the Modernization of Capital Markets in its July 2020 report.
- October 2020: OSFI and FSRA announced plans to establish a committee to collaborate on defined contribution pension plans. The committee will review the approaches of both regulators to supervising defined contribution plans and, where possible, identify opportunities for regulatory harmonization.
- October 2020: OSFI launched a consultation relating to amendments to OSFI Guideline E-13 (Regulatory Compliance Management) and Guideline B-8 (Deterring & Detecting Money Laundering and Terrorist Financing). This consultation is in connection with the new OSFI/FINTRAC collaboration which will separate the AML/ATF regulatory oversight function among the two regulators in an effort to reduce regulatory burden.
- October 2020: FSRA published its proposed 2021-2022 Statement of Priorities and Budget for public consultation. Among other things, the draft focuses on improving regulatory efficiency and effectiveness to better serve the public interest.

As we navigate through the second phase of the pandemic, we anticipate that the COVID-19 crisis will continue to shape and disrupt the financial services sector and its regulation.

What to expect in 2021

As we navigate through the second phase of the pandemic, we anticipate that the COVID-19 crisis will continue to shape and disrupt the financial services sector and its regulation. Among other things, we are watching for

- further regulatory collaboration among regulators such as OSFI, FSRA and BSFSA
- advances in e-commerce, such as temporary measures facilitating remote registration, signing and witnessing of documents becoming permanent; increased adoption of non-face-to-face identity verification methods by traditional financial institutions in accordance with the FINTRAC requirements; other provinces adopting amendments to their personal property security statutes to facilitate the use of electronic chattel paper, following the lead of Ontario and Saskatchewan

- continued regulatory focus on non-financial risk management, including technology and cybersecurity risk
- further developments towards open banking. Consultations are expected to resume virtually at the end of November and continue through December 2020. In addition, the industry is forging ahead, including with initiatives such as the Financial Data Exchange
- the increased enforcement action that we have been expecting from the FCAC and FINTRAC. Although this heightened activity has not yet occurred, we expect it will as we head into 2021. The FCAC has perhaps been unwilling to exercise its new enforcement powers during the pandemic, but such forbearance is unlikely to last. Meanwhile, FINTRAC has announced that it is resuming its regular desk examinations and published notice of two administrative monetary penalties that were imposed earlier in the year
- more focus on payments modernization initiatives, given that cashless payment use is on the rise. Payments Canada is in the process of implementing a new real-time payments infrastructure (referred to as a Real-Time-Rail or RTR) that will create a system capable of delivering funds in less than 60 seconds, through real-time exchange of payment messages and real-time clearing and settlement. Implementation of the RTR is currently scheduled for 2022, but there may be industry pressure to meet or exceed this timeline, given the digitization acceleration resulting from the pandemic
- credit union reform. Coming out of FSRA's modernization initiatives, the *Credit Unions and Caisses Populaires Act, 2020* was introduced on November 5, 2020
- further significant developments in the crypto-asset space, following the regulatory advances made in 2020, including oversight of dealers in virtual currency by FINTRAC as of June 1, 2020, and the launch of Canada's first regulated crypto trading platform under the CSA's regulatory sandbox. We expect more in 2021
- implementation of Ontario's *Financial Professionals Title Protection Act, 2019* that prohibits the use of the "financial planner" and "financial advisor" titles by individuals unless they have obtained the required credentials, following the outcome of the recent consultation that closed in November 2020. Saskatchewan is likely to follow suit

This is by no means an exhaustive list. While change has been the new normal for several years in the financial services regulatory space, COVID-19 has accelerated the pace. The year ahead promises to be interesting and we will continue to monitor these and other developments.

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CRYPTOCURRENCY

New opportunities and new challenges for cryptoasset trading platforms

Three trends have emerged this year that will continue to shape the evolution of cryptoasset trading platforms (Platforms) doing business in Canada. First, the Canadian Securities Administrators (CSA) have asserted jurisdiction over Platforms, which are the primary intermediaries through which retail customers purchase and hold bitcoin and other cryptoassets. Second, retail cryptoasset investment products have become available, allowing investors to obtain investment exposure to bitcoin and Ether without going through Platforms. Third, there has been an explosion in the use of decentralized finance (DeFi) protocols. These protocols provide sophisticated cryptoasset market participants with a means of transacting without any intermediaries at all, creating new challenges for Canadian and foreign regulators in the process.

New rules for Canadian cryptoasset trading platforms

The introduction of new regulatory requirements for cryptoasset trading platforms that offer services to Canadians was a key development this year. In January 2020, the CSA released a new Staff Notice regarding the application of securities laws to Platforms. As described in our Osler Update entitled "CSA issues guidance that securities legislation likely applies to custodial cryptoasset trading platforms" on osler.com, under this guidance Platforms that do not immediately transfer ownership, possession and control of all purchased cryptoassets to their customers are likely dealing in derivatives or securities. They are, therefore, subject to regulation as dealers or marketplaces under Canadian securities and/or derivatives laws.

Since the publication of the Staff Notice in January 2020, Canadian Platforms that maintain custody of cryptoassets on behalf of their customers have been working with their respective principal securities regulators to agree upon terms for registration under existing securities and derivative laws. This approach is intended to allow flexibility for Platforms to innovate while addressing the CSA's key investor protection concerns around custody and market integrity.

In July 2020, the Ontario Securities Commission entered into a settlement agreement with Coinsquare Inc., one of Canada's largest Platforms, in connection with allegations involving artificial trading volumes. At the time of the settlement, Coinsquare had been working toward securities dealer registration.

In addition, as of June 1, 2020, long-awaited amendments to regulations under Canada's anti-money laundering laws took effect. These amendments require domestic and foreign Platforms that offer their services to Canadians to register as "dealers in virtual currency." "Virtual currency transactions" are now included in the reporting obligations that apply to all financial entities. Please see our Osler Update on osler.com entitled "Anti-money laundering rules for cryptocurrency dealers finalized by Canadian government" on these amendments, as well as our "Financial services regulation in 2020: Convergence, disruption and acceleration" article.

There are also indications that CSA members are engaging with, and potentially taking enforcement action against, foreign Platforms available to Canadians. In August 2020, BitMEX, a major cryptocurrency derivatives Platform incorporated in the Seychelles, announced that it would restrict access by Ontario residents to its Platform, stating that the "restrictions are mandated by the Ontario Securities Commission." Shortly after this announcement, the U.S. Department of Justice and the Commodity Futures Trading Commission initiated criminal and civil proceedings against BitMEX and its principals for, among other things, allegedly evading anti-money laundering laws. These actions highlight the willingness of both Canadian and U.S. regulators to reach outside their borders to require compliance by foreign Platforms dealing with customers within their jurisdictions.

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The arrival of retail cryptoasset investment products

New, regulated products for Canadian retail investors seeking to invest in cryptoassets have emerged in the past year. In April 2020, the initial public offering of The Bitcoin Fund (TSX:QBTC) was completed. The Bitcoin Fund thereby became the first publicly-traded cryptoasset investment fund in the world after the fund's manager, 3iQ Corp., won a contested hearing before the OSC in 2019 (described in our Osler Update entitled "OSC clears path for publicly traded bitcoin investment fund" on osler.com). As of November 30, 2020, the net asset value of QBTC is approximately US$320 million. In October 2020, 3iQ filed a prospectus for The Ether Fund, which replicates the structure of QBTC, but holds Ether instead of bitcoin. These funds allow retail investors to invest in cryptoassets through investment dealers that are regulated by the Investment Industry Regulatory Organization of Canada and to hold the investments in their tax-deferred registered accounts.

In August 2020, the CSA registered Wealthsimple Digital Assets (WDA) as a restricted securities dealer (in Québec, WDA is registered as a derivatives dealer). WDA is the first regulated cryptoasset Platform in Canada, allowing customers to trade and hold bitcoin and Ether using the Wealthsimple Trade application. To address investor protection concerns, the CSA has capped an individual's annual investments in cryptoassets through WDA at C$30,000, a restriction that may change as the regulatory framework evolves.

The rise of decentralized finance

During the summer of 2020, there was rapid growth of DeFi protocols, namely, smart contracts running autonomously on blockchains, primarily Ethereum, that facilitate trading, lending and other transactions involving cryptoassets, all without an intermediary. In many cases, the developers of these protocols have relinquished all control over the smart contracts and the cryptoassets transacted through them. At the same time, these developers are seeking to establish decentralized governance by distributing blockchain tokens to users of the protocol that allow tokenholders to vote on changes to the protocol.

Over the course of 2020, the value of cryptoassets held or transacted through these protocols grew into the billions of dollars. In early September 2020, the decentralized Uniswap trading protocol built on the Ethereum network had cryptoasset trading volumes approaching US$1 billion per day, rivaling some of the largest centralized Platforms. Although volumes have declined since this peak, DeFi protocols remain a challenge to the dominance of custodial Platforms in trading and lending of cryptoassets.

DeFi protocols also pose profound challenges for regulators. The trades, loans and other transactions that occur over DeFi protocols may include the types of transactions that the CSA seeks to regulate, but there is no intermediary that can be regulated. Meanwhile, the parties to the transactions are globally dispersed and transact pseudonymously, identifiable only by blockchain addresses that cannot be easily traced to real-world identities. Perhaps most concerning for regulators, security vulnerabilities and software bugs in DeFi protocols have led to investor losses. The investor protection risks of DeFi protocols are therefore similar to those of custodial Platforms, but they are more difficult to regulate due to the absence of an identifiable intermediary.

Looking ahead to 2021

We anticipate the coming year will see further changes in the Canadian cryptoasset marketplace. More Platforms are expected to follow WDA in securing registrations under Canadian securities laws. When evaluating Platforms for registration, the CSA's primary regulatory focus continues to be on custody and protection of customer assets. Platforms seeking to register as securities dealers or marketplaces should also expect to comply with risk and conflict of interest disclosure, financial reporting and market conduct rules and obtain insurance, to the extent possible, or exemptive relief from the insurance requirements applicable to registrants. Canadian Platforms are working with regulators to adopt best practices for protecting investors, which is expected to professionalize the nascent industry.

When evaluating Platforms for registration, the CSA's primary regulatory focus continues to be on custody and protection of customer assets.

At the same time, increased regulation is expected to drive consolidation in the Canadian market. Some Platforms may find regulatory costs are disproportionate to the size of the market, particularly when Canadian retail investors can obtain exposure to cryptoassets through mainstream investment products.

We also expect that the Canada Revenue Agency will continue to pursue customer information from Canadian Platforms with a view to identifying cryptoasset investors or traders who may not have accurately reported cryptoasset-related income.

Finally, increased regulation and professionalization of Platforms and cryptoasset products may stimulate institutional investor interest in cryptoassets. Some Canadian institutional investors showed interest in 2017 and early 2018 as prices and returns skyrocketed. However, this interest waned as the initial coin offering bubble popped and Platforms like QuadrigaCX were revealed to be little more than Ponzi schemes. But now that cryptoasset markets have bounced back, several high profile public companies have made sizable investments in bitcoin. Global financial intermediaries like Fidelity and PayPal are allowing U.S. customers to trade in cryptoassets. We expect that institutional investors and traditional financial services firms may consider participating in the growing cryptoasset market, likely on a small scale to start.

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COMPETITION

Enhanced foreign investment scrutiny and a busy year for the Competition Bureau

The Canadian government's approach to reviews of foreign investment and competition matters is in large part unchanged as a result of the ongoing COVID-19 pandemic. While the federal government issued a policy statement regarding increased scrutiny of certain foreign investments and temporarily extended the timelines for discretionary national security reviews, these changes are relatively restrained as compared to actions taken elsewhere. Similarly, the Competition Bureau (the Bureau) continues to emphasize active enforcement of the *Competition Act* notwithstanding COVID-19, issuing updated guidance in a number of areas, including mergers and competitor collaborations, as well as demonstrating an ongoing focus on enforcement in the digital economy.

Investment Canada Act and foreign investment in light of COVID-19

While the Canadian government took steps in 2020 to adjust its approach to foreign investment in Canada in light of COVID-19, such steps have been relatively restrained. In marked contrast to Australia where monetary screening thresholds for foreign investment were dramatically dropped to zero and review timeframes were extended, the Canadian government did not lower applicable thresholds for mandatory review or expand the scope of investments subject to mandatory review.

Instead, the emphasis of the Canadian government to date has been on communicating its approach to foreign investment. On April 18, 2020, the government issued a policy statement advising that certain foreign investments will be subject to enhanced scrutiny under the *Investment Canada Act* during the COVID-19 pandemic in order to "protect the health and safety of all Canadians and to stabilize our economy." Specific investments mentioned were those related to public health and critical goods and services, and investments by state-owned investors. The policy statement also raised a potential concern about opportunistic investment. Nonetheless, the only statutory change to the *Investment Canada Act* review process has been the temporary extension of timelines for discretionary review of investments that may be injurious to national security. For more information, refer to our Osler Update entitled "Canadian government temporarily extends national security review timelines" on osler.com.

Competition Act enforcement during the pandemic and beyond

The Bureau, like other international enforcement authorities, has emphasized in its public communications that the *Competition Act* will be actively enforced during COVID-19. The Bureau has continued its emphasis on enforcement in the digital economy, as well as conducting *Competition Act* merger reviews. It has also provided updated guidance on competitor collaborations.

The Bureau, like other international enforcement authorities, has emphasized in its public communications that the *Competition Act* will be actively enforced during COVID-19.

Merger review of failing firms

The Bureau has recognized that, while competition law principles must continue to be applied to all *Competition Act* merger reviews, the Bureau must be prepared to conduct merger reviews involving companies facing economic challenges in a timely manner.

Under the *Competition Act*, the fact that a target business is likely failing does not provide a defence for an otherwise anti-competitive merger. Rather, the loss of competition is not attributed to the merger if imminent failure is probable and if, in the absence of the merger, the firm's assets are likely to exit the market because no competitive alternatives exist. Although the Bureau has not changed its longstanding approach to merger review in the case of a firm in financial distress, the Bureau recently published a detailed summary of its review of American Iron & Metal Company Inc.'s (AIM) acquisition of Total Metal Recovery (TMR) Inc. The summary provides current guidance on the key elements of the Bureau's approach to failing firm claims, as well as expected timelines.

In February 2020, the Bureau closed a three-month review of AIM's non-notifiable acquisition of TMR. Prior to the merger, AIM and TMR were the two largest scrap metal processors in the province of Québec. Despite the resulting reduction in competition from the merger, the Bureau declined to take further action on the basis that TMR was a failing firm whose assets were likely to exit the market in the absence of the merger.

To evaluate TMR's viability, the Bureau engaged a financial expert to assess TMR's financials. Based on this assessment, it was apparent that TMR was insolvent and had a high likelihood of a bankruptcy filing in the immediate future. Once it determined that TMR was likely to fail, the Bureau examined the likelihood of various counterfactual scenarios (i.e., a restructuring, an acquisition by a competitively preferable purchaser or a liquidation) and the likely competition that would exist in such scenarios. The Bureau determined that attempts to restructure TMR would not have prevented its failure, nor enabled it to survive as a meaningful competitor. Similarly, the Bureau determined that liquidation of TMR's individual assets would not have been a determining factor in facilitating entry of a new competitor and was not likely to result in a materially higher level of competition than if the merger did not occur. Finally, the Bureau determined that, while a thorough search for potential alternative purchasers had been conducted, no such purchaser existed. For further details, refer to our Osler Update entitled "Canadian competition law merger enforcement: (almost) business as usual" on osler.com.

Assessment of efficiencies in merger review

A unique aspect of the Canadian *Competition Act* merger review regime is the efficiencies defence. Under the *Competition Act*, the Competition Tribunal may not make a remedial order where it finds that a merger is likely to bring about gains in efficiency that will be greater than, and will offset, the anti-competitive effects of the merger and that the efficiency gains would not likely be attained if an order were made.

The process for the Bureau's consideration of the potential applicability of the efficiencies defence within the statutory timelines applicable to the merger review process has often been an issue for merging parties and the Bureau. In April 2020, the Bureau released a position statement regarding its 2019 review of Canadian National Railway Company's (CN) proposed acquisition of certain intermodal shipping assets of H&R Transport Limited (H&R). In its review, the Bureau, for the first time, applied its model timing agreement for mergers involving efficiencies claims. The Bureau's model provides a detailed process and timeline for its review and determination of efficiencies claims without resorting to litigation. Osler represented H&R in this matter.

The Bureau found that CN's acquisition of H&R was likely to result in a substantial lessening or prevention of competition for the supply of full truckload refrigerated intermodal services across eight origin-destination pairs. However, the merging parties asked the Bureau to consider whether the efficiencies defence applied to the transaction. The Bureau considered the efficiencies claimed by CN, which related to the elimination of overhead costs and duplicative facilities, IT systems and software licences. While the Bureau disagreed with the quantification of efficiencies claimed by CN, it concluded that the efficiency gains from the transaction outweighed its anti-competitive effects and therefore did not challenge the transaction. For further details, refer to our Osler Update entitled "Canadian competition law merger enforcement: (almost) business as usual" on osler.com.

Continued focus on competition law advocacy and enforcement in the digital economy

In early 2020, the Bureau released its four-year Strategic Vision which set out the Bureau's objective to be a "world-leading competition agency, one that is at the forefront of the digital economy." In July, the Bureau assumed the position of Presidency of the International Consumer Protection and Enforcement Network for a one-year term and intends to focus its tenure on issues of consumer trust in digital markets. Through October and November of this year, the Bureau hosted its first annual Digital Enforcement Summit, which was intended to allow the Bureau and its international counterparts to share best practices and explore new tools and strategies for tackling emerging enforcement issues in the digital era.

The Bureau has continued to be active in investigating competition in the digital economy. Most recently, in August, the Bureau sought input from market participants to assist with its abuse of dominance investigation into conduct by Amazon. Specifically, the Bureau's investigation focuses on Amazon policies that may impact third-party sellers' willingness to offer their products for sale at a lower price on other retail channels or may impede the ability of third-party sellers to succeed on Amazon's marketplace without advertising on Amazon's website or using its fulfilment service. The Bureau is also looking into strategies Amazon may use to influence consumers to purchase Amazon products over those offered by competing sellers.

In early 2020, the Bureau released its four-year Strategic Vision which set out the Bureau's objective to be a "world-leading competition agency, one that is at the forefront of the digital economy."

Competitor collaboration during the COVID-19 pandemic

In a policy statement released on April 8, 2020, the Commissioner acknowledged the extraordinary circumstances of the COVID-19 pandemic and advised businesses that the Bureau would be unlikely to challenge good faith efforts at competitor collaboration that were aimed at responding to the crisis and meeting the essential needs of Canadians. The Commissioner also opened a channel for businesses to obtain informal guidance from the Bureau's Cartels Directorate on proposed competitor collaborations. This guidance followed on the heels of similar statements of enforcement flexibility by other international antitrust regulators.

In his statement, the Commissioner recognized that businesses might need to establish collaborative buying groups or share supply chain resources to deliver essential goods to Canadians, and the Bureau did not want its existing enforcement policy to "chill" prompt and effective responses that might be required to help Canadians.

As a statement of enforcement intent, the Bureau's guidance does not change Canada's existing criminal prohibitions on anti-competitive agreements relating to pricing, market allocation or output restrictions. Moreover, it does not bind the Public Prosecution Service of Canada, the authority responsible for enforcing Canada's criminal competition law. Nor does it insulate businesses from the possibility of private lawsuits seeking damages.

On a related note, on July 29, 2020, the Bureau released for public consultation an update to the 2009 Competitor Collaboration Guidelines. These Guidelines are important as they set out the Bureau's enforcement approach to collaborations between competitors or potential competitors under both the criminal cartel and civil agreement provisions of the *Competition Act*. There are very few changes proposed by the Bureau. However, the changes do reflect the Bureau's experience with certain issues such as hub-and-spoke conspiracies and non-competes, as well as its approach to assessing the extent to which artificial intelligence or algorithms may be employed to facilitate collusion. The consultation period has closed, and we expect the Bureau to release final updated guidelines in the new year.

Competition Bureau confirms approach to no-poaching and wage-fixing agreements between competitors

On November 27, 2020, the Bureau issued a statement confirming that no-poaching, wage-fixing, and other buy-side agreements between competitors are subject to review under the civil provisions of the *Competition Act* only, and the Bureau will not assess these agreements under the criminal conspiracy provisions of the *Competition Act*.

Following the enactment 10 years ago of a dual track process for the assessment of agreements between competitors under the *Competition Act*, it was generally understood (based on the statutory language in the *Competition Act*) that agreements between competitors in the purchasing of products, as distinct from the supply of products, would not be addressed under the criminal conspiracy provisions of the *Competition Act*. Rather, such agreements would be subject to review only under the civil reviewable practices provisions. However, stakeholders in Canada's legal and business communities sought confirmation of the approach to upstream agreements between competitors in Canada after the U.S. Department of Justice and Federal Trade Commission issued guidance in 2016 that made it clear that naked no-poaching or wage-fixing agreements that are unrelated to or unnecessary for a larger legitimate collaboration between the employers would be pursued as a criminal matter.

The Bureau has now provided such confirmation. The Bureau's position is clear: it will not investigate no-poaching agreements and wage-fixing agreements under the criminal conspiracy provisions of the *Competition Act*; rather, such agreements will be assessed under the civil competitor agreement provisions of the *Competition Act*. While the Bureau's enforcement policy is not binding on courts, the Bureau explicitly indicated that, in reaching this conclusion, it consulted with the Canadian Department of Justice and the Public Prosecution Service of Canada.

The remedies available under the civil competitor agreement provisions of section 90.1 are very limited and do not include the potential for administrative monetary penalties. Importantly and, unlike in relation to the criminal conspiracy provisions, section 90.1 does not provide private parties a statutory right to commence private actions for damages for harm suffered as a result of the agreement.

Buy-side agreements for the purchase of products and services continue to be subject to challenge in other non-criminal forums. As noted, the Bureau has indicated that it may scrutinize such agreements under the civil provisions in section 90.1 of the *Competition Act* and take enforcement action if warranted. The Bureau is in the process of updating the Competitor Collaboration Guidelines and has stated that it intends to outline its enforcement approach to buy-side agreements in greater detail in the updated guidelines. Businesses therefore must remain aware that they continue to be subject to potential civil liability under section 90.1 of the *Competition Act* if they enter into a no-poaching or wage-fixing agreement with a competitor that is likely to result in a substantial lessening or prevention of competition. Even though enforcement action may not result in the imposition of criminal sanctions or an administrative monetary penalty, civil investigations can be costly and disruptive. In addition, while the Bureau statement provides strong evidence of the non-application of the criminal provision to these types of agreements, the Bureau's guidance is not binding on private plaintiffs who may still choose to commence a private action for damages based on an alleged violation of the criminal provisions of the *Competition Act*.

Continued emphasis on advocacy

The Commissioner has continued to be very active in fulfilling his mandate to advocate for policies at all levels of government that support vibrant, competitive markets, in addition to participating in numerous public hearings and consultations regarding the telecommunications markets, Canada's monetary policy framework, the digital agenda and the health care sector. On August 20, 2020, the Bureau launched the Competition Assessment Toolkit (Toolkit) for policymakers. The Toolkit is designed to assist regulators and policymakers at all levels of government to tailor law and policies appropriately to maximize the benefits of competition to the economy. The Toolkit offers a five-step process for policymakers to assess the impact of new and existing regulation and policies on competition.

As emphasized by the Commissioner in a recent speech, going forward we should expect the Bureau to focused on "making competition more central to Canada's economic affairs" in order to "reap the rewards of healthy competition in our economy: a more productive, dynamic and resilient economy that empowers consumers."

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TRADE

CUSMA comes into force and Biden is elected President: Calmer seas ahead for U.S.-Canada trade?

After a rocky 2019, global trade faced another challenging year in 2020 with the COVID-19 pandemic and continued aggressive trade actions by the United States.

The largest change to Canada's global trading relationships occurred close to home, with the implementation of the Canada-U.S.-Mexico Agreement (CUSMA), the successor to the North American Free Trade Agreement (NAFTA). However, the stability many had hoped CUSMA would bring to Canada-U.S. trade was short lived. Only a few months after the implementation of CUSMA, the Trump administration levied tariffs on certain Canadian aluminum goods due to alleged surges in imports, and Canada announced potential countermeasures in retaliation. Though the United States ultimately suspended the tariffs before the application of Canadian countermeasures, there remains some risk that they could be reapplied in the wake of the U.S. election (though a Biden presidency would materially reduce this risk). With all of this happening alongside a global pandemic that disrupted supply chains and introduced new "protectionist" attitudes, 2020 proved to be an eventful year in cross-border trade.

Implementation of CUSMA

On July 1, 2020, about two and a half years after the Trump administration instigated the renegotiation of NAFTA, CUSMA came into effect, introducing several important changes. We previously reviewed a number of these changes (as well as what has not changed) in our trade brief, highlighting some of the following significant provisions:

- substantial changes to the rules-of-origin for automobiles, including a new specific content requirement whereby a certain portion of the value of the vehicle must be from parts that are produced in plants where the average hourly wage for workers is at least US$16 per hour;
- tariff-rate quotas that allow for dairy products from the United States to enter Canada duty-free at volumes equivalent to about 3.5% of the Canadian dairy market; and
- the exclusion of Canada from the chapters on investor-state dispute settlement and government procurement, which means that Canadian investors in the United States and Mexico and American and Mexican investors in Canada do not benefit from the provisions in these chapters. This change, however, does not affect the ability of the Canadian government to bring a state-to-state action.

One little-remarked development could present an opportunity for U.S. retailers: namely, the changes to the *de minimis* thresholds for importing goods into Canada. This is the threshold above which importers are required to pay taxes and/or customs duties on imported goods. Prior to the implementation of CUSMA, Canada's threshold was quite low, with taxes and customs duties applying to all goods with a value in excess of $20. However, as part of the negotiations for the agreement, Canada agreed to increase this threshold substantially. In relation to goods imported from the United States and Mexico, taxes are applied where the value exceeds $40, and customs duties are applied where the value exceeds $150. Goods imported from other countries are still subject to the $20 threshold. This is a comparatively sizeable jump, though the change was not as large as requested by the U.S. government. As an increasing portion of Canadian consumers purchase their goods online, this change could be advantageous to e-commerce businesses who fulfill orders from the United States or Mexico to lower the cost of their products to Canadian purchasers and thereby increase their cross-border sales.

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U.S. tariffs on Canadian aluminum

Another major development in U.S.-Canada trade was the implementation by the Trump administration in August of tariffs on certain Canadian aluminum exports to the United States. These were then unilaterally suspended hours before the Canadian government formally implemented its announced countermeasures. The United States, when announcing the tariffs, claimed that Canadian exports of these goods had surged beyond historical levels which, pursuant to the Joint Statement signed by the United States and Canada in May 2019 after a year-long dispute on steel and aluminum, justified the imposition of the special tariffs.

Though the U.S. government did cease the application of the tariffs in September, the U.S. Trade Representative (USTR) indicated that they could be reapplied if Canadian monthly imports for these aluminum goods are greater than the USTR's expected volumes for that month. As we discussed in our trade brief on this development, it is highly likely that U.S. imports of these goods from Canada will exceed the USTR's estimates. At the time of writing, it is unclear whether the United States will go through with the reimplementation of the tariffs. As discussed below, with the declaration of Joe Biden as President-elect, we believe the United States is less likely to do so. Nevertheless, some risk remains, as the door for reimplementation remains open. If the United States does reapply this tariff, it is expected that Canada will respond with countermeasures, which could have an impact on Canadian businesses who import aluminum or aluminum containing goods from the United States.

Impact of the U.S. election and COVID-19

Casting a long shadow over global trade this year has been the COVID-19 pandemic and the implications of the U.S. election.

The COVID-19 pandemic strained global trade and supply chains, forcing companies to rapidly adjust to changing circumstances as the pandemic made its way across the world. It has also shone a spotlight on the global supply chains that support many of the goods that are required to combat the pandemic. The Trump administration's call for 3M to prevent the export of U.S.-made N95 masks to Canada, which the United States eventually backed away from, caused significant concern in Canada. It encouraged the Canadian government to find and support potential domestic producers of key goods, such as masks and ventilators. It seems likely that the Canadian government, and other governments around the world, are monitoring critical goods, personal protective equipment and other medical supplies. They are no doubt examining whether more domestic support may be needed to ensure that export restrictions by foreign governments do not affect Canada's ability to respond to global health crises, including the ongoing COVID-19 pandemic.

Given the aggressive actions taken by the Trump administration on international trade as part of the push to reduce U.S. trade deficits and bring some lost manufacturing jobs back to the United States, the result of the U.S. presidential election could also have an impact on the state of global trade going forward. Biden has indicated that he would not pursue the national security-based tariffs that have been a hallmark of the Trump administration and the basis for the steel and aluminum tariffs that have been applied on Canadian exports (including the ones noted above).

Biden has also previously indicated he would be open to joining the Comprehensive and Progressive Trans-Pacific Partnership (subject to it being renegotiated), which could adjust the Canada-U.S. trading framework that is currently largely based on CUSMA. Among other things, such a move could potentially reintroduce investor-state dispute settlement and enhanced government procurement obligations.

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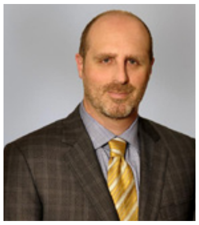
Biden has also previously expressed opposition to the Keystone XL pipeline and could revoke the presidential permit issued by President Trump for the project, jeopardizing its completion.

With respect to China, Biden seems more likely to work with traditional allies to collectively target any abusive trade practices engaged in by China, as opposed to the more unilateral action that the Trump administration has preferred.

Though it is by no means certain that a change in leadership would significantly improve trade ties, the inauguration of Joe Biden as President could usher in a return to a more stable trading relationship between Canada and its largest trading partner. A Biden administration would, however, still be likely to take a close look at the international frameworks that regulate global trade and push for changes where it feels Americans are being unfairly disadvantaged, particularly with respect to China. Given our exposure to the American market, there is little doubt that these actions will affect Canadian companies.

AUTHORS



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CONSTRUCTION

Economic recovery stimulates the Canadian construction and infrastructure sector

In response to the economic impacts of the COVID-19 pandemic, governments across the globe have committed to significant spending measures to stimulate recovery. Apart from wage subsidy programs, Canada's strategic focus to date, at the federal, provincial and territorial levels, has been to encourage private and public sector investment and development of shovel-worthy and shovel-ready infrastructure projects across the country. While policy announcements will continue across the country through the end of the year and beyond, the following is a high-level overview of federal and selected provincial initiatives as of October 2020.

Federal

The federal government's *Investing in Canada Infrastructure Program*, which was in effect prior to the onset of COVID-19, provides over $33 billion in funding to provinces and territories through bilateral agreements with Infrastructure Canada for the following four targeted streams: public transit; green infrastructure; community, culture and recreation infrastructure; and rural and northern communities infrastructure. To accelerate the pace of infrastructure upgrades to counter the effects of the pandemic, the government also created the temporary COVID-19 Resilience stream and the COVID-19 Flexibilities transfer program.

The COVID-19 Resilience stream provides over $3 billion in funding for projects with eligible costs under $10 million. Construction for these projects, which include health infrastructure, schools and active transportation infrastructure, must start before September 30, 2021 and be completed by the end of 2021 (or by the end of 2022 for territories and remote communities). The COVID-19 Flexibilities program allows provinces and territories to transfer remaining funding from existing streams to fund projects under the COVID-19 Resilience stream and broadens the types of eligible infrastructure under those streams for a limited time, to include, for example, energy efficiency and reliability projects and mobile and cellular projects in northern communities.

Under the federal government's Economic Response Plan, Western Canada will receive $1.7 billion to clean orphan and inactive wells. Funding is allocated based on the number of wells in each province, with $1 billion going to Alberta, $400 million to Saskatchewan and $120 million to British Columbia.

Finally, with an increasing number of high-profile mandates across Canada, including clean power, green infrastructure, broadband and transportation, the Canada Infrastructure Bank (CIB) has a $10 billion growth mandate. It is poised to continue partnering with all levels of government while also retaining flexibility to consider unsolicited project proposals from the private sector. CIB's mandate is designed to contribute directly to economic stimulus and it has the capacity to assist in a variety of ways, from providing transaction advisory services to investing in equity, debt or other instruments. The CIB's project portfolio is available on its website and includes the Alberta Irrigation Project (Alberta), GO Expansion – On Corridor Project (Ontario) and the Taltson Hydroelectricity Expansion Project (Northwest Territories).

The COVID-19 Flexibilities program allows provinces and territories to transfer remaining funding from existing streams to fund projects under the COVID-19 Resilience stream and broadens the types of eligible infrastructure under those streams

British Columbia

In September 2020, the British Columbia government also implemented B.C.'s Economic Recovery Plan, Stronger BC for Everyone, in which they committed to spending $1.5 billion on economic recovery to respond to immediate needs in the province. The plan includes investing more than $400 million in community infrastructure. Also, both the federal and provincial governments have made additional commitments to the British Columbia Infrastructure Program with extra funding of $100.6 million towards community, culture and recreation infrastructure, $58.7 million towards rural and northern communities infrastructure and $47 million towards green infrastructure. The province will contribute an additional $90 million to the Connecting British Columbia program that targets communications and connectivity infrastructure.

Alberta

In June 2020, the government of Alberta launched Alberta's Recovery Plan, which includes spending more than $10 billion on core infrastructure projects that will immediately create thousands of jobs in the province. Some key elements include: $6.9 billion for capital projects, $600 million for large scale infrastructure projects, $150 million for water infrastructure, $500 million in further funding for municipalities and $1.5 billion for the Keystone XL pipeline. To prioritize long-term infrastructure investments, the government also proposed the introduction of the *Alberta Infrastructure Act* and the development of a new 20-year Strategic Capital Plan. Together these will create transparency in relation to government capital spending and ensure future infrastructure needs are anticipated.

Québec

In March 2020, the Québec government announced $11 billion in funding towards various infrastructure projects, including schools, roads and public transportation. This funding will be included in the Québec Infrastructure Plan, an initiative for which the government has provided a 10-year investment plan for the infrastructure sector (2020-2030). Further, in May 2020, the Québec government announced that it would spend up to nearly $3 billion in infrastructure projects to boost the economy in response to the COVID-19 pandemic.

In September 2020, Québec tabled Bill 66, *An Act respecting the acceleration of certain infrastructure projects*, which seeks the acceleration of major infrastructure projects in Québec to help the economy benefit more quickly from the resulting infrastructure and to mitigate the effects of the COVID-19 pandemic. Bill 66 designates 181 large-scale infrastructure projects in Québec, which include the construction of major roads and bridges, hospitals, schools and public transit systems. The Bill allows such projects to benefit from a number of acceleration measures in relation to expropriation, environment, land use planning and public contracts.

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In October 2020, Québec announced that CDPQ Infra, a division of the Caisse de dépôt et de placement du Québec, was mandated to carry out a study on the optimal solution for the implementation of mass transit on the south shore of Montréal. CDPQ Infra is currently building the Réseau express métropolitain, a 67-kilometre automated light rail system linking the south and north shores of Montréal, downtown, the western portion of the island of Montréal and the Trudeau International Airport.

Ontario

In July 2020, Ontario government passed a trilogy of stimulus-related measures – the *COVID-19 Economic Recovery Act, 2020* (the Recovery Act), the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* (the Reopening Act) and the *Building Transit Faster Act, 2020* (the Transit Act).

The Recovery Act itself is an omnibus statute that accelerates economic recovery by using infrastructure as a key driver. It enacts a new *Transit-Oriented Communities Act*, 2020, and amends key legislation such as the *Environmental*

Assessment Act, the *Planning Act*, the *Occupational Health and Safety Act* and the *Building Code Act*. The Reopening Act gives continuity to the emergency orders issued during COVID-19, and provides rules for businesses to open safely. Finally, the Transit Act expedites the delivery of four significant transit projects in the Greater Toronto Area.

In August 2020, Ontario announced that for 2021-22, the government will be providing $30 million to support the [Connecting Links Program] to build, repair or replace local roads and bridges. Further, the Ontario government, through the [Safe Restart Agreement] with the federal government, will be providing up to $4 billion in phased assistance to its municipalities to protect the health and well-being of communities, while continuing to deliver critical public services, such as public transit and shelters.

Conclusion

Across Canada, governments of the largest provinces have prioritized infrastructure investment to stimulate economic recovery from COVID-19, with a focus on shovel-worthy projects consistent with government objectives. In addition, each of Saskatchewan, Manitoba, Nova Scotia, PEI, New Brunswick, Newfoundland and Labrador, and the territories have detailed capital and infrastructure plans, funding announcements and partnerships under the federal funding programs, and further announcements are expected well into 2021. As a result, there are significant investment and development opportunities in Canada for the private and the public sectors.

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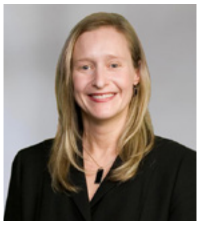

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ENERGY

Pursuing renewable projects in Alberta in 2021: 5 things you need to know

Alberta is the fastest growing jurisdiction in Canada from the perspective of renewable power development. This is a result of, among other things, the strength of Alberta's wind and solar resources, its unique deregulated wholesale electrical generation market, government incentives provided under the market-based *Technology Innovation and Emissions Reduction* (TIER) regime and the abundance of electricity offtakers.

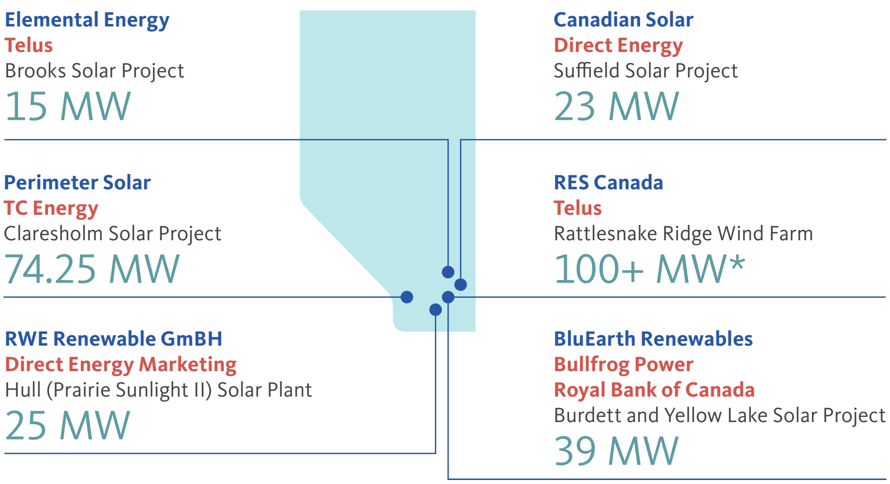
Renewable developers, offtakers and other market participants should be aware of the following five key developments in 2020.

1. Growth in demand for Power Purchase Agreements (PPAs) from private offtakers

Market activity for private PPAs in Alberta has increased materially in recent years, mainly as an environmental, social and corporate governance (ESG) strategy used by numerous significant offtakers. The PPA market has continued to be active throughout 2020, despite reduced power consumption and a depressed forward power price curve resulting from the COVID-19 pandemic.

Figure 1 below shows a select number of publicly announced private PPA transactions in Alberta, with offtakers including TELUS, Direct Energy (2019 and 2020), TC Energy Corporation and Bullfrog Power / Royal Bank of Canada. Note that the existence and details of private, bilateral PPA transactions are often undisclosed.

FIGURE 1
PUBLICLY AVAILABLE PRIVATE PPA ACTIVITY 2017-2020



*Press releases report a PPA for the "majority" of 117.6 MW capacity

Alberta's deregulated electricity market has resulted in particularly volatile power prices. Without a PPA, a generator must sell electricity at the highly variable Alberta pool price and find a purchaser for environmental attributes, such as carbon emission offsets (which also vary in price). Not having a PPA makes it difficult to secure project financing to develop a project in a volatile market-price environment and in the absence of subsidies or other regulatory incentives. The strong and growing demand for the purchase of renewable power in Alberta by corporate offtakers via PPAs is expected to drive growth in renewable power generation and translate into significant growth for the sector.

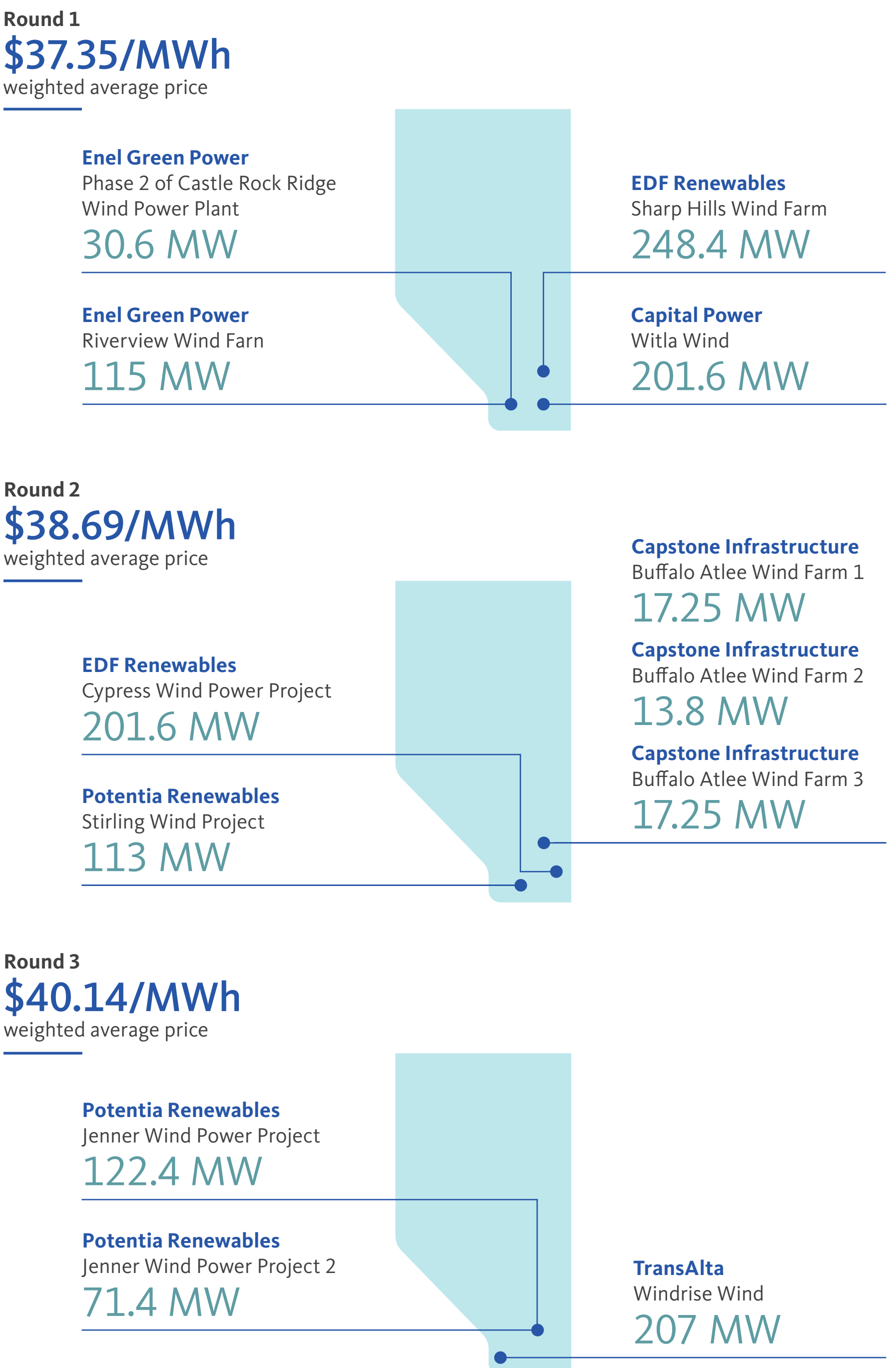
2. Government procurements: Nice to have, but not necessary

Recent government procurement programs have accelerated renewable project development in Alberta. Government offtakers are particularly attractive for off-balance sheet-financed projects. Such projects allow developers to reliably source project level debt financing on the back of a long-term offtake contract with a creditworthy governmental counterparty.

In 2017 and 2018, the Alberta Renewable Electricity Program (REP) awarded PPAs for 12 renewable wind projects (Figures 2, 3 and 4), representing a total of 1,359 MW of incremental nameplate generation capacity for the province. These projects were selected from a total of 59 projects for which bids were submitted (as reported by the Alberta Electric System Operator (AESO)).

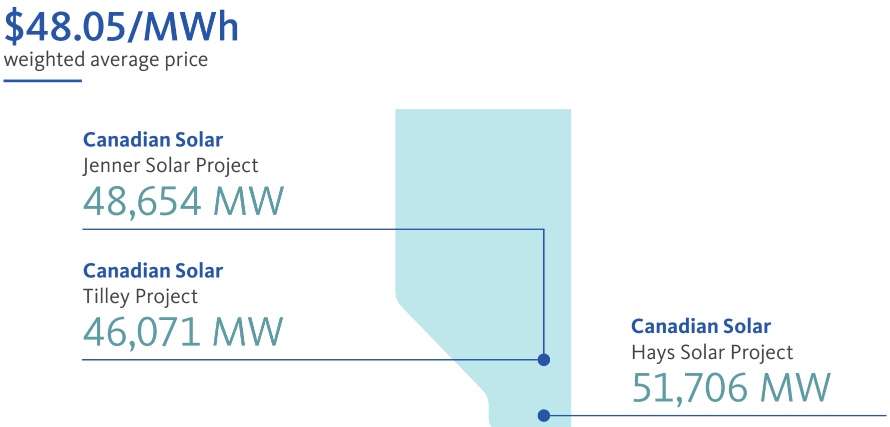
FIGURE 2

REP GOVERNMENT OF ALBERTA PROCUREMENT RESULTS – ROUNDS 1, 2 AND 3



Alberta Infrastructure also ran a solar procurement in 2018 that resulted in the awarding of three 20-year contracts for 146,431 MWh annually (Figure 3)

FIGURE 3
PUBLICLY AVAILABLE PRIVATE PPA ACTIVITY 2017-2020



While the REP was discontinued in 2019, its results provide benchmark pricing and terms, which are otherwise generally lacking in the private PPA market.

Following the success of the REP, the Government of Canada issued a request for information in April 2020 and has indicated its intention to procure one or more 20-year PPAs for 200,000 to 280,000 MWh of Alberta renewable power annually. For more information, please refer to our Osler Update entitled "Opportunity knocks: Federal government launches Alberta-specific wind and solar procurement process" on osler.com.

While government procurements have contributed to the growth of renewable generation in Alberta, Alberta's renewable energy sector is not dependent on such programs for continued growth. Rather, demand is expected to continue as a result of renewable energy generation costs becoming increasingly competitive with other sources of electrical generation on the provincial grid and different types of investors looking to add renewable energy assets to their portfolios to achieve their ESG objectives. For instance, in 2020, Copenhagen Infrastructure Partners invested in the Travers Solar project in southern Alberta. This project will be Canada's largest solar project and one of Alberta's largest producers of environmental attributes under the TIER regime. The project's investors are prepared to develop the solar plant based solely on merchant revenues. Osler advises the project's original developer, Greengate Power Corporation, regarding the Travers Solar project.

While government procurements have contributed to the growth of renewable generation in Alberta, Alberta's renewable energy sector is not dependent on such programs for continued growth.

3. Regulatory uncertainties and related financial risks

Alberta's unique open market framework presents opportunities and challenges for developers. The commitment by the Alberta government to continue with an energy-only market and to support market-based solutions provided clarity to developers. However, there remains uncertainty with respect to certain key details of Alberta's regulatory framework.

At the end of 2020, Alberta regulators continue to review several matters:

- **Self-supply:** Self-supply refers to a facility's ability to generate its own power for its own use and to sell excess power to the grid. This arrangement has been growing in popularity due to high grid-connection costs and reduced mid-scale generation costs. After finding that self-supply was contrary to Alberta law, the Alberta Utilities Commission (AUC) submitted a discussion paper to the Department of Energy (DOE) on self-supply considerations in 2019. If the DOE decides to permit self-supply, it could represent a meaningful opportunity for renewable power producers looking to partner with large consumers through on-site generation.
- **AESO tariff:** The AESO is consulting on proposed changes to bulk and regional tariff design through to 2021, which is expected to culminate in a formal application to the AUC for tariff changes. Market participants expect outcomes to clarify generators' costs for accessing the grid and have the potential to materially impact (either improve or worsen) overall project economics relative to the status quo.
- **Distribution system inquiry:** The AUC inquiry into how Alberta's distribution system should adapt to market change concluded in July 2020 and the AUC's report is anticipated by the end of 2020. Among other issues, the AUC inquired into how distribution service rate structures should be modified to ensure that price signals encourage electric distribution facility owners, consumers, producers, prosumers and alternative technology providers to use the grid and related resources in an efficient and cost-effective way. The eventual outcomes of this initiative, which could drive regulatory, policy and legislative changes, could have material impacts on renewable projects, many of which seek to connect to the distribution system.

Regulators have acknowledged these key issues and are seeking to resolve them with stakeholder input, but certainty is not expected for many months, if not years. In the interim, parties would benefit from clear government direction on priorities identified through regulatory forums (e.g., self-supply).

4. Federal carbon legislation under review

The constitutionality of the Canadian *Greenhouse Gas Pollution Pricing Act* (GGPA) is currently before the Supreme Court of Canada (SCC). The SCC heard arguments in September 2020 and reserved judgment. On average, SCC judgment is rendered six months after a hearing, so a decision is possible early in 2021.

During oral arguments before the SCC, the federal government asserted that the legislation is a valid exercise of federal jurisdiction under the national concern branch of the Peace, Order and Good Government clause of the *Constitution Act, 1867*. Without minimum national standards relating to greenhouse gases, actions by one province could adversely impact neighbouring provinces. It further asserted that the levies under the GGPA are valid regulatory charges.

Conversely, the opposing provinces asserted that the legislation is unconstitutional, and that the broad scope of matters regulated under the GGPA encompass a myriad of provincial heads of power. Further, the provinces argue that GGPA carbon levies are neither valid regulatory charges, as there is insufficient nexus between the charge and the regulatory scheme, nor a valid tax, as it has not been passed by Parliament as required by section 53 of the *Constitution Act, 1867*.

If the GGPA is held to be unconstitutional, the effects of this finding would be mitigated by the fact that provinces currently have their own regimes for regulating carbon emissions or have agreed to comply with the federal government's requirements, notwithstanding the constitutional challenge. For instance, on November 3, 2020, the Minister of Alberta Environment and Parks, Jason Nixon, signed a Ministerial Order increasing the carbon price under Alberta's large emitter regime from $30.00/tonne to $40.00/tonne for 2021, in line with federal requirements. Carbon offset markets are therefore likely to continue to be relevant to offtakers and developers.

At the same time, offtakers and developers rely on carbon pricing certainty for PPA pricing, so constitutional challenges relating to that pricing do create a degree of uncertainty in the PPA market, particularly in future years when the provincial regimes deviate from the carbon pricing requirements in the GGPA.

5. Impacts of COVID-19 pandemic

The ongoing COVID-19 pandemic has caused significant disruption to the electricity sector and Alberta's economy in general. The AESO expects lower electricity demand for the rest of 2020, 2021 and perhaps beyond, with long-term dampening effects on power prices. COVID-19 has increased default, credit and capital-related risks for generators and offtakers alike and brought supply chain disruption and other challenges to project developers. It has also delayed regulatory processes such as those outlined above, with prolonged uncertainty potentially impacting project economics.

The absence of stop-work orders in Alberta throughout the pandemic has somewhat mitigated its impact on industrial activity and the electricity sector. Since March 2020, construction has been permitted on any project that can abide by prescribed guidelines.

Epidemics, states of emergency and other government action often qualify as events of *force majeure* which excuse performance under a contract or other obligation. Force majeure may provide extensions of time to achieve milestones and/or payment of compensation and permit one or both parties to terminate the PPA without liability if there is a prolonged event, depending on the terms of the PPA.

A change in law provision may be invoked if there has been a change in law that falls within the definition in the contract, such as government actions like lockdowns or forced closures. Cost impacts may be allocated between the parties through a lump sum payment or adjustment to the fixed power price, and one or both parties may be permitted to terminate the PPA without liability if there is a fundamental change in law.

Notwithstanding the novel circumstances in 2020, Alberta's renewable power market continues to provide considerable opportunities for both developers and offtakers.

Conclusion

Notwithstanding the novel circumstances in 2020, Alberta's renewable power market continues to provide considerable opportunities for both developers and offtakers. The expansion in private sector PPA activity, government procurement opportunities and anticipated regulatory clarity stand as bellwethers for growth in 2021 and beyond.

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CLIMATE

Federal and provincial battles continue over climate change regulation

The year 2020 featured significant legal developments in Canadian climate change regulation, characterized by (a) continued changes to the approach to climate change regulation, particularly with respect to the management of greenhouse gas (GHG) emissions; (b) ongoing legal challenges by various provinces to the federal government's *Greenhouse Gas Pollution Pricing Act* (GHG Pricing Act); and (c) a challenge to the federal *Impact Assessment Act* (IAA), another recently enacted federal environmental statute. Each of these areas demonstrates the continued jostling by the provinces to take the lead with respect to the division of legislative powers between the federal Parliament and the Canadian provinces in the sphere of energy and environmental law.

As a result, there remains a lack of alignment – and continued uncertainty – with regard to the scope of federal constitutional authority to regulate climate change and the environment. The anticipated release of the Supreme Court of Canada's decision in 2021 on the constitutionality of the federal GHG Pricing Act could provide much-needed clarity.

The continued evolution of federal and provincial climate change regulation

Canada's current approach to curbing climate change includes the implementation of a national strategy at the federal level, while still allowing for provincial initiatives that meet or exceed federal standards.

On the national front, Canada continues to work towards the realization of the plan set out in the 2016 Pan-Canadian Framework on Clean Growth and Climate Change. The federal government has introduced various legislative and policy measures to implement this framework plan, including the GHG Pricing Act to price carbon emissions, GHG reporting requirements for large emitters, plans to phase out coal-fired electricity generation by 2030 and the Strategic Assessment of Climate Change (SACC). The SACC is a notable measure finalized in 2020 that imposes additional climate change and GHG planning requirements on resource projects assessed under the federal IAA. In September 2020, Canada also announced a new Climate Action and Awareness Fund (CAAF), which will invest $206 million over five years to support Canadian-made projects to reduce GHG emissions in Canada.

The federal GHG Pricing Act is one measure that has continued to attract significant attention throughout 2020 – from both supporters and critics. Under the GHG Pricing Act, the federal government imposed a Canada-wide minimum price on carbon emissions through two mechanisms:

1. a fuel charge of $30/tonne (for 2020) that will continue to increase annually to reach $50/tonne in 2022
2. an output-based pricing (OBP) system, which is a cap-and-trade carbon pricing regime that applies to facilities if their emissions exceed 50,000 tonnes per year or more of carbon dioxide equivalents. Smaller facilities can also voluntarily opt into the system

The federal pricing system applies in provinces that do not implement their own carbon tax or cap-and-trade system that meets the minimum federal pricing and emissions reduction standards.

In November 2020, Canada's Environment Minister tabled climate accountability legislation to formally commit Canada to its target of net-zero

GHG emissions by 2050. If passed by Parliament, Bill C-12, *An Act Respecting Transparency and Accountability in Canada's Efforts to Achieve Net-Zero Greenhouse Gas Emissions by the Year 2050* (Bill C-12) would require that national targets for the reduction of greenhouse gas emissions in Canada be set by the Environment Minister for 2030, 2035, 2040 and 2045, with the objective of attaining net-zero emissions by 2050. To reach those targets, emission reduction plans will need to be established and progress reports submitted to Parliament. The Bill would also establish an advisory body to advise on, among other things, measures and sectoral strategies to achieve net-zero emissions by 2050. The Minister of Finance would also be required to prepare an annual report respecting key measures that the federal public administration has taken to manage its financial risks and opportunities related to climate change.

Bill C-12 does not currently include a mechanism that legally binds the federal government to reach the targets, nor any enforcement "teeth" to hold Canada (or others) to account if those targets are not met. Rather, if the Environment Minister concludes that Canada has not achieved its target for a milestone year, or by 2050, the Minister must explain the reasons why Canada failed to meet the target and what actions Canada is taking to address that failure.

It is anticipated that some provinces may seek to challenge Canada's constitutional authority to pass such legislation, as they have in relation to the GHG Pricing Act (discussed below).

We understand that the introduction of Bill C-12 was delayed due to the pandemic and that it may be the first in a series of federal measures in the short term that will focus on meeting Canada's commitments under the Paris Agreement. Such further initiatives could include (a) new standards for cleaner-burning fuels; (b) sector-by-sector consultations to set reduction targets; and (c) incentives to increase the use of clean energy and develop the market for electric vehicles.

The provincial regulatory landscape in relation to climate change and GHG emissions reduction continues to shift on an almost monthly basis. Currently, some provinces have their own systems for carbon pricing that match or exceed the federal minimum. Others have in place either the federal fuel charge or the OBP system, or both. As of the date of writing, the federal fuel charge applies in Alberta, Saskatchewan, Manitoba, Ontario, Nunavut and Yukon.

The federal government has also recently announced its acceptance of certain provincial programs as an alternative to the federal OBP. For instance, on September 21, 2020, the federal government accepted (a) Ontario's Emissions Performance Standards program for large industrial facilities, and (b) New Brunswick's carbon pollution pricing system, both as alternatives to the federal OBP system. At the same time, aspects of the federal scheme are subject to ongoing court challenges, as discussed below.

Osler's infographic provides a summary of the current status of emissions legislation across Canada.

Bill C-12 does not currently include a mechanism that legally binds the federal government to reach the targets, nor any enforcement "teeth" to hold Canada (or others) to account if those targets are not met.

Provincial court challenges to federal GHG emissions legislation

By late 2020, three appellate courts – the Saskatchewan Court of Appeal (SKCA), the Ontario Court of Appeal (ONCA) and the Alberta Court of Appeal (ABCA) – had all issued decisions on the constitutional validity of the GHG Pricing Act.

In 2019, a majority of the SKCA (3-2) and a majority of the ONCA (4-1) both released their advisory opinions upholding the constitutionality of the GHG Pricing Act on the basis that it is a valid exercise of federal Parliament's power to legislate on the basis of "national concern." In contrast, in 2020, a majority of the ABCA (4-1) held that Parts I and II of the GHG Pricing Act are unconstitutional in their entirety.

In all three challenges, an army of intervenors joined in the battle to delineate the scope of federal and provincial powers relating to climate change regulation.

These intervenors included other provincial governments, municipalities, Indigenous groups, environmental organizations, non-governmental organizations and various industry groups.

The Supreme Court of Canada (SCC) heard the appeals in relation to these three challenges on September 22 and 23, 2020, but has yet to release its decision. When released, the SCC decision will ultimately determine whether the federal government is overstepping its authority in regulating climate change through the GHG Pricing Act. In the process, it is hoped that the SCC will provide meaningful guidance for future environmental regulation.

SKCA and ONCA uphold federal GHG Pricing Act

The majority of the SKCA determined that Parliament's power to legislate with respect to matters of national concern under its so-called "Peace, Order and Good Government" (POGG) power served as a valid constitutional basis for the GHG Pricing Act.

As in Saskatchewan, the majority of the ONCA also upheld the constitutionality of the GHG Pricing Act on the basis it was a valid exercise of Parliament's power to legislate under the national concern branch of the POGG power. The majority held that, while the environment was, broadly speaking, an area of shared constitutional responsibility between the provinces and the federal government, "minimum national standards to reduce GHG emissions" were within the federal government's constitutional power to regulate in the national interest.

> In all three provincial court challenges, an army of intervenors joined in the battle to delineate the scope of federal and provincial powers relating to climate change regulation.

ABCA goes its own way

The ABCA determined that the GHG Pricing Act is unconstitutional. The ABCA majority's decision provides an important departure from the reasoning followed by the majorities of the ONCA and SKCA, particularly in relation to its focus on sections 92A and 109 of the *Constitution Act, 1867*, and its conclusion that the subject matter of the GHG Pricing Act does not fall under any heads of power assigned to federal Parliament.

Rather, the majority of the ABCA

- determined that the GHG Pricing Act falls squarely within several heads of provincial power, including, among others, (i) the development and management of natural resources in the province (s. 92A); (ii) the proprietary rights of the provinces as owners of their natural resources (s. 109); (iii) property and civil rights within the province (s. 92(13)); (iv) management of public lands belonging to the province (s. 92(5)); and (v) direct taxation within the province in relation to the consumption of products that cause pollution such as gasoline (s. 92(2))
- emphasized the importance of exclusive provincial powers over non-renewable resources and electricity generation, enshrined in section 92A of the *Constitution Act*, noting that this provincial power "… represents a clear, deliberate negotiated amendment to the Constitution designed and intended to confirm exclusive provincial jurisdiction over the *development* and *management* of a province's non-renewable natural resources, electricity generation and related provincial industries"

- held that the national concern doctrine or POGG power "has no application to matters within the provinces' exclusive jurisdiction" and expressly rejected the proposition that the national concern doctrine "opens the door to the federal government's appropriating every other head of provincial power"

The SCC hearings

At the two-day hearing in September 2020 before the SCC, the provinces put forward strong positions arising from their view that Canada's climate change regulatory regime is paternalistic and usurps the provinces' right to impose their own policies:

- Saskatchewan "What is specifically at stake is whether the federal government has jurisdiction to unilaterally impose its chosen policy to regulate sources of GHG emissions on the provinces. [The GHG Pricing Act] functions as if the federal government is legislating in place of a province itself."
- New Brunswick "Environmental protection must be achieved in accordance with the Constitution, not in spite of it. … what the Courts of Appeal have done – upset the balance of power in our constitutional democracy."
- Ontario "The provinces are fully capable of regulating greenhouse gas emissions themselves, have already done so, and continue to do so."
- Alberta "This constitutes a far reaching and radical alteration of the balance of legislative powers in Canada, subordinating the provinces' sovereign legislative role in our federal system to the control and direction of the federal government. The result is that the provinces are deprived of the power to address matters within their exclusive jurisdiction in the manner that best meets their individual economic, social, and environmental circumstances, as is required in our federal system."
- Manitoba "No one disputes that climate change and the reduction of greenhouse gas (GHG) emissions are of paramount importance. The issue is whether Parliament has exclusive jurisdiction to impose its preferred policy choice on the provinces."
- Québec (unofficial translation) "A simple affirmation of the national importance of a subject should not be sufficient to undermine the Canadian constitutional structure. … [as] almost all human activities are likely to emit GHGs, the granting of a 'new' federal jurisdiction over the reduction of GHG emissions would result in granting the federal Parliament omnipresence in all fields of relevant provincial activity … The provinces are perfectly capable of regulating GHG emissions … there is no inability to act on the part of the provinces, neither in law nor in fact: each province has the jurisdictional competence to act according to its priorities and its reality."

Only the federal Parliament and British Columbia, as the lone provincial outlier, argued in support of the constitutionality of the GHG Pricing Act:

- The federal government "Establishing minimum national standards integral to reducing nationwide GHG emissions is a matter of national concern that only Parliament can address. To deny Parliament jurisdiction to address this matter would leave a gaping hole in the Constitution: we would be a country incapable of enforcing the measures necessary to address an existential threat."

At the SCC hearings, the provinces put forward strong positions arising from their view that Canada's climate change regulatory regime is paternalistic and usurps the provinces' right to impose their own policies.

- British Columbia “The troubling question raised by these references is whether our system of federalism is an obstacle to addressing the existential threat of global climate change. Are we the only major emitting country in the world whose constitution renders it impossible to make national commitments to reduce greenhouse gases?”

The reaction of the SCC to these and other arguments will be of significant interest to all stakeholders, and in particular businesses seeking to understand how Canada’s climate change regime will impact their operations.

Provincial reference case challenging the federal Impact Assessment Act

In August 2019, the IAA came into force. It replaced the *Canadian Environmental Assessment Act, 2012* and established an altered process (as compared to the former legislation) for gathering information and making decisions about the impacts of designated projects on areas of federal responsibility. Shortly afterwards, the Lieutenant Governor in Council of Alberta filed a reference with the ABCA with respect to the constitutional validity of the federally enacted IAA.

While the SCC upheld an earlier iteration of the federal environmental assessment regime in 1992, Alberta believes that the federal government has now overstepped its powers with the introduction of the IAA. In its factum filed with the ABCA, the Alberta government described the IAA as a “Trojan horse” that the federal government had enacted “on the pretext of some narrow grounds of federal jurisdiction, to conduct a far-ranging inquiry into matters that are exclusively within provincial jurisdiction.”

Since the commencement of the IAA Reference, the ABCA’s focus in 2020 has been on procedural matters in the case. The ABCA has yet to hear the arguments on the merits.

We expect the SCC’s decision regarding the GHG Pricing Act reference will be released before the ABCA decides the IAA Reference. The SCC’s decision on the GHG Pricing Act will have implications well beyond carbon pricing, and will likely have a significant impact on whether the challenged provisions of the IAA will ultimately be upheld. In turn, the outcome of the IAA Reference is likely to help clarify and delineate the scope of both federal and provincial jurisdiction to regulate the environment.

As these cases are resolved, stakeholders will be watching to see if greater stability and certainty will result in relation to environmental regulation, which can only assist businesses in understanding their compliance obligations, enabling them to plan accordingly. Regardless, 2021 will be pivotal in determining the extent of the power of the federal government to regulate in the area of climate change and of environmental matters more broadly.

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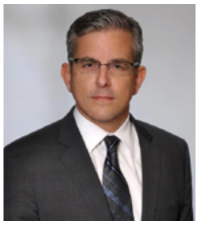

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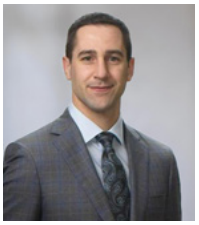

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REAL ESTATE

“Location, location, location” replaced by “COVID, COVID, COVID”

The fairly robust performance of the Canadian real estate market in 2019 continued into 2020 … and then the COVID-19 pandemic hit. COVID-19 impacted each sector of the real estate market differently, each for different reasons. While retail real estate was severely and detrimentally affected, industrial real estate appears relatively unscathed. The jury is still out regarding the effect of COVID-19 on the office sector.

Retail real estate

Hardest hit was the retail sector. Retail real estate was already showing signs of softening before the arrival of COVID-19 due to a slowing of new entrants into the Canadian market and a continuing migration by shoppers to e-commerce. COVID-19 dramatically and almost instantly hurt the retail real estate sector, as governments ordered retail centres across Canada to close in March. Some provinces allowed them to re-open in May, others not until July. These closures had a number of significant and immediate impacts:

- Tenants immediately looked for rent relief to offset the sudden termination of their revenue. They soon learned that "business interruption insurance" likely would not apply, that their leases were not terminable for frustration and that even if the COVID-19 pandemic was an event of *force majeure*, their leases might still require that rent be paid regardless of the economic hardship they were experiencing. Litigation has started to make its way through the courts around rent obligations, as discussed below.
- Landlords initially demanded that rent be paid in accordance with the lease terms. However, once the tsunami of rent relief requests and rent defaults arrived, and the magnitude of disruption in the retail industry became clear, landlords changed their collective minds and short-term rent deferral agreements became the norm.
- The Canadian government was initially slow to act, but eventually implemented the Canadian Emergency Commercial Rent Assistance program (CECRA), which was met with fairly poor reviews. CECRA provided targeted assistance only to small to medium sized tenants who had lost at least 70% of their revenue due to COVID-19. The program required a landlord to voluntarily apply for a forgivable loan of up to 50% of the gross rent owed by the tenant for the period in question (initially March to July, which was subsequently extended to September). CERCA also required the tenant to pay 25% of the gross rent owing and the landlord had to forgive 25% of the gross rent for that same period. Accordingly, take-up of this cumbersome program was slow, although it did eventually gain traction. In October, the government announced the Canadian Emergency Rent Subsidy program (CERS) to replace CECRA. Unfortunately, few details of this new rent relief program were available at the time of writing.
- While the above measures alleviated some of the negative impacts of the COVID-19 pandemic, a significant number of retail tenants were nevertheless forced to seek relief by filing under the *Companies' Creditors Arrangement Act* (CCAA) or the *Bankruptcy and Insolvency Act* (BIA). Through these processes, tenants sought to either disclaim some or all of their leases or to renegotiate their rent (or both), while landlords negotiated to keep as many stores open as possible to save their retail real estate.
- Against this backdrop, consumers who had been prevented from shopping in person due to closures simply flocked to e-commerce. This significantly accelerated the migration away from bricks and mortar retail and further exacerbated the negative impacts of the COVID-19 pandemic on retail real estate.

In the retail arena we are starting to see some legal implications for commercial leasing arising from the COVID-19 pandemic.

Finally, in the retail arena we are starting to see some legal implications for commercial leasing arising from the COVID-19 pandemic. A recent decision in Québec held that the tenant under a commercial lease was entitled to rent relief, not because of *force majeure* and not because of any contractual remedy in its lease. Instead, the Court held that the landlord had breached the covenant of quiet enjoyment because the tenant had been unable to access the premises due to the government-ordered closures. This decision is now under appeal. See our Osler Update entitled "COVID-19 pandemic: A first perspective from the Québec Courts discussing the availability of the *force majeure* defence in a real estate context" on osler.com.

Similarly, certain tenants have filed proceedings against their landlords, alleging that their retail properties were not managed in a "first-class" manner that would make retail customers feel comfortable shopping in person notwithstanding the COVID-19 pandemic. These tenants argue that such measures would have prevented in-person sales from falling as dramatically as they did.

Despite these setbacks, most major retail centres in Canada remain owned by large pension funds, public REITS or other well-funded and well-run entities. Accordingly, our expectation is that most of these centres will survive and will simply implement improvements that they were likely already planning, but at a faster rate. Watch for more amenities to be added (e.g., restaurants, medical offices, co-working space and gyms) and perhaps also new residential components, all in an effort to maintain a customer base for their retail tenants.

Industrial real estate

At the opposite end of the spectrum, industrial real estate seems to have been relatively unscathed by the COVID-19 pandemic. Availability rates continued to decline over the course of 2020 and, correspondingly, rental rates continued to climb. In fact, COVID-19 may have improved the demand for industrial space:

- The accelerated shift to e-commerce has increased demand for warehouse space for retailers and logistics providers, especially in and near urban centres.
- Supply chain logistics have also been affected as 30-day "just in time" inventory levels are being replaced by 90-day "just in case" inventory levels in response to panic buying behaviour that occurred early on in the pandemic. This has further increased demand for warehouse space.

At the opposite end of the spectrum, industrial real estate seems to have been relatively unscathed by the COVID-19 pandemic.

Office sector

COVID-19's impact on the office sector is harder to discern. It appears that the overwhelming majority of office workers have been able to adapt to "work from home," so there has been less immediate negative impact to office tenants and therefore the office sector. Unlike the retail sector, we have not seen widespread desperate pleas for rent relief from office tenants or widespread rent assistance agreements from office landlords. To date there have not been any rent relief programs from government for the office sector. However, the impacts on this sector may simply be delayed. Vacancy rates prior to the pandemic were at historical lows in most urban centres in Canada, with the exception of Calgary, and large blocks of office space were increasingly difficult to find. However, this is now changing.

- Vacancy rates have more than doubled during the COVID-19 pandemic, both for direct leased space and also sublet space, in less than eight months.
- The climbing vacancy rate in the sublet market is clearly an indication that a growing number of office tenants are downsizing. It is unclear whether this is because their business is suffering or because they realize that they can shrink their office footprint by implementing and continuing to promote a work-from-home policy. The COVID-19 pandemic has also led to the idea that having multiple smaller satellite offices (the "hub and spoke" concept) may be a safer model. This model allows groups of employees to drive to different

local offices, which appears less risky than having an entire workforce travel, presumably mostly by public transit, to one major office every day, which presents greater risks of potential exposure to COVID-19.

If vacancy rates continue to rise, this could eventually pressure rental rates to fall. However, a continued growth of population in urban centres and perhaps a move to more social distancing/decreased density in offices could offset these negative impacts.

Transacting in real estate

COVID-19 also had immediate impacts on completing transactions as well as the types of transactions pursued. Early in the pandemic, transaction flow quickly slowed before eventually returning to normal levels. Many borrowers initially drew down on their operating credit lines to ensure they had enough liquidity. Similarly, we saw more clients arranging both additional secured and unsecured loan facilities to increase available cash.

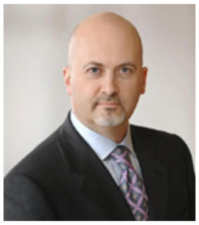
COVID-19 also presented unique challenges in actually closing transactions. In certain asset classes (e.g., retirement homes and multi-residential properties), property tours were either prohibited or significantly limited, thereby greatly upsetting usual diligence practices. Several deals simply could not proceed until the purchaser or lender could physically attend and inspect the property. Accordingly, it became common to extend diligence periods to the extent COVID-19 limited the buyer's ability to conduct normal diligence. And of course, foreign buyers were also required to negotiate their way through border restrictions and required 14-day quarantine periods before being able to tour a property.

Due to backlogs and a reduced workforce delaying the issuance of CMHC-insured financing and other loans, we also saw an increase in bridge financings and vendor take-back financing being required to close transactions.

On a positive note, we learned that even very complicated multi-property deals spanning multiple jurisdictions, involving multiple vendors and multiple lenders with several law firms, could be successfully completed on a remote basis. Never has an investment in good technology been more critical.

This has been an interesting year in the commercial real estate industry and the impacts of COVID-19 are likely to reverberate for some time.

AUTHOR



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TAX

COVID-19 tax measures and proposed international tax reform

Two significant tax developments in 2020 were Canada's measures in response to COVID-19 and Canada's participation with the OECD's pursuit of international tax reform.

COVID-19 measures included relief from various tax administration and litigation deadlines and new financial support programs. Canada has used its tax system as an effective means to deliver economic support to various sectors of the economy impacted by the pandemic – with the result that Canada is forecasted to have its largest deficit since WWII. Significant budget deficits from COVID-19 spending will put pressure on Canada to raise additional revenue in the future.

The proposed international tax reform spearheaded by the OECD is one possible avenue for doing so. The OECD proposals would expand the taxing rights of market jurisdictions (Pillar One) and impose a global minimum tax on multinational enterprises (Pillar Two). If adopted, these measures would fundamentally change Canada's existing international tax framework.

Canada's response to COVID-19 – administrative and financial relief

In response to the ongoing COVID-19 pandemic, the Canada Revenue Agency (CRA) provided procedural administrative relief by deferring most deadlines for filing and paying 2019 income taxes and instalments, as well as temporarily extending deadlines for filing notices of objection. Relief from interest and penalties that would normally accrue during the extensions was automatically granted. Deadlines for GST/HST (but not payroll) remittances were also deferred. The CRA suspended collection action on new debts and indicated a willingness to accept flexible payment arrangements for existing debts.

Limited substantive administrative relief was provided. The CRA issued temporary guidance (which expired on September 30 and has not been updated) on residency, permanent establishment and other international issues affected by COVID-19. The relief applied to individuals, corporations resident in countries that have tax treaties with Canada and otherwise on a case-by-case basis. Generally, affected taxpayers would not be considered to be resident in Canada, or to be carrying on business or have a permanent establishment in Canada, solely because of pandemic-related travel and mobility restrictions. The CRA also provided certain relief from cross-border withholding and remittance requirements where a waiver or clearance certificate would have otherwise been required. On the domestic side, the CRA indicated that $500 reimbursements to employees for equipment needed to work from home would not be a taxable benefit.

COVID-19 measures included relief from various tax administration and litigation deadlines and new financial support programs.

COVID-19 wreaked havoc with tax litigation. The Tax Court was closed from March until July. Procedural deadlines in Court proceedings, including limitation periods, were extended by federal legislation and Court orders. The resulting backlog of hearings led to increased support from the Court for parties to settle, including a new fast-track settlement conference initiative.

A variety of pandemic-related benefits were established beginning in March. For individuals, the Canada Emergency Response Benefit (CERB) consisted of a $2,000 per month benefit that was generally available to laid-off individuals who earned at least $5,000 in the prior year. CERB has now been replaced by the Canada Recovery Benefit (CRB). Employers were able to apply for the Canada Emergency Wage Subsidy (CEWS), which subsidized up to 75% of wages of businesses experiencing decreased revenues. Employers could also apply for a refund of certain payroll remittances. Eligibility requirements for CEWS are complex and the program was significantly revised in the summer. CERB and CEWS payments are taxable income. Many other targeted benefits were established, including for small businesses, students, caregivers and individuals who are sick or required to self-isolate.

Proposed measures to tax digital and consumer-facing businesses and global minimum tax

Canada has been an active participant in the multi-year OECD/G20 Base Erosion and Profit Shifting (BEPS) project, which targets tax-planning strategies that shift profits to low tax jurisdictions.

The BEPS reports released in 2015 were aimed at improving the coherence, substance and transparency of the international tax system. The BEPS project also created a multilateral instrument (MLI) in 2016 to implement treaty measures. To date, the MLI has been signed by 94 countries (and ratified by 53 of them). The MLI entered into force in Canada at the end of 2019 for most of Canada's treaties – although for some capital gains it will not be effective until January 1, 2021.[1]

As many countries were not satisfied with the results of the BEPS project, the OECD introduced a two-pillar approach to international tax reform in 2019 to address the digital economy and unresolved BEPS issues.

The Pillar One proposals of the BEPS project represent a fundamental change to the international tax system by allocating new taxing rights to market jurisdictions (where customers are located) over automated digital companies and certain consumer-facing businesses. While various outstanding technical and political issues remain, certain industry-specific exemptions are contemplated, as well as a consolidated minimum revenue threshold of €750 million for multinational enterprises (MNEs).

The new taxing right is intentionally unconstrained by existing tax principles requiring a physical presence in the jurisdiction and would reallocate an estimated $100 billion of corporate income tax on residual profits away from residence jurisdictions to source/market jurisdictions.

The proposals face political headwinds from the United States which has suggested that the rules be applied on an opt-in basis – the United States is no doubt concerned about the potential impact on a number of U.S. digital giants. Conversely, the European Union has generally been very supportive of the proposals. A number of E.U. countries have separately introduced stand-alone domestic digital taxes (with more threatening to do so absent a consensus on Pillar One).

The Pillar Two proposals introduce a global minimum tax to MNE groups with total consolidated group revenue of at least €750 million.

If the effective tax rate of an MNE group in a certain jurisdiction is below the agreed minimum rate, a top-up tax will generally be collected from group members in other jurisdictions under either an "income inclusion rule" (IIR) or an "undertaxed payments rule" (UTPR). The calculations use financial accounting results as the starting point and take into account losses incurred in

1 The MLI may enter into effect at a later date with countries where the MLI has yet to come into effect. In addition, the MLI will not affect Canada's tax treaties with the United States (which has not signed the MLI), or Germany and Switzerland (with which Canada has announced bilateral treaty negotiations).

other periods or by other entities in the same jurisdiction, "excess" local taxes paid and a formulaic carveout for substantive activities in the local jurisdiction.

Top-up taxes would be collected under the IIR from parent entities resident in jurisdictions that adopt Pillar Two. The UTPR acts as a backstop by allocating any remaining top-up taxes to other group members based on deductible payments made by them to the low-tax entity and their net intra-group expenditures.

The Pillar Two proposals also include exceptions for tax-exempt entities and investment funds, and a treaty-based "subject to tax rule" which can apply a top-up withholding tax on certain types of payments between connected persons.

For more details on the Pillar One and Two proposals, please see our Osler Update entitled "OECD releases blueprint reports on international tax reform (Pillar One and Pillar Two) and launches public consultation" on osler.com.

Significant progress on the technical details regarding both Pillar One and Pillar Two have been made, but many details remain to be resolved and extensive changes to domestic legislation and treaties will also be required. The OECD hopes that the outstanding political and technical issues will be resolved by mid-2021.

Significant progress on the technical details regarding both Pillar One and Pillar Two have been made, but many details remain to be resolved and extensive changes to domestic legislation and treaties will also be required.

Rather than waiting for global consensus, many countries have introduced unilateral digital tax measures (with the United States imposing or threatening trade tariffs in response). In its 2019 election platform, the Liberal Party advocated a 3% tax on Canadian revenues from certain advertising and digital intermediation services with worldwide revenues of at least $1 billion and Canadian revenues of more than $40 million. Although the 2020 Federal Budget was delayed due to COVID-19, the government's 2020 Throne Speech signaled that making digital giants pay their fair share of tax was a priority. It remains to be seen whether Canada will move ahead prior to seeing how the current OECD negotiations and threatened tariff wars pan out.

We anticipate that Canada will look to introduce new domestic and international tax measures in 2021 and beyond – particularly since our current Liberal minority government is being supported by the left-leaning NDP party. It will be important to follow these measures closely, as they could have a significant impact on domestic and cross-border investments in Canada.

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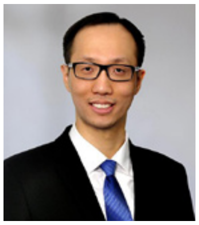

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TAX

From treaty shopping to FAPI and transfer pricing: Notable international tax cases

Three decisions of the Federal Court of Appeal (FCA) released during the COVID-19 pandemic have caused renewed interest in certain fundamental aspects of Canada's international tax system. Two of these decisions will be before the Supreme Court of Canada (SCC) in 2021. As a result, these aspects of the tax system will be the subject of review and guidance from Canada's highest court next year.

In *Canada v. Alta Energy Luxembourg S.A.R.L.* (2020 FCA 43), the FCA concluded that the general anti-avoidance rule (GAAR) in the Income Tax Act (Tax Act) did not apply where the taxpayer, a Luxembourg-resident company, relied on the tax convention between Canada and Luxembourg to exempt a capital gain from Canadian income tax. In *Canada v. Loblaw Financial Holdings Inc.* (2020 FCA 79), the FCA concluded that the income earned by a Barbados subsidiary of the Canadian taxpayer was not foreign accrual property income (FAPI) and therefore was not taxable in Canada. Finally, in *Canada v. Cameco Corporation* (2020 FCA 112), the FCA determined that the taxpayer's transactions with its Swiss subsidiary were on arm's length terms and, therefore, compliant with Canada's transfer pricing rules and their underlying policy.

The Crown has obtained leave to appeal both *Alta Energy* and *Loblaw* to the SCC. While the Crown is also seeking leave to appeal the FCA decision in *Cameco* to the SCC, it remains to be seen whether leave will be granted in a third tax case.

GAAR and tax treaties: *Canada v. Alta Energy Luxembourg S.A.R.L.*

In *Alta Energy,* the shares of the taxpayer (a Luxembourg company) were held by a limited partnership, the members of which were generally not Luxembourg residents. The taxpayer held shares in a Canadian company (Canco), which it acquired through a restructuring. Canco, in turn, held a working interest in Canadian resource properties (oil and gas leases in Alberta), on which it carried on exploration and production activities. When the taxpayer sold the shares of Canco, it realized a capital gain of over $380 million and took the position that this gain was exempt from tax in Canada.

Article 13(4)(a) of the Canada-Luxembourg income tax convention (the Can-Lux Treaty) entitles Canada to tax a resident of Luxembourg on gains arising from the alienation of shares if the value of such shares is derived principally from immovable property situated in Canada. The term "immovable property" expressly excludes property in which the business of the corporation is carried on.

The Tax Court of Canada (TCC) found that the taxpayer was a resident of Luxembourg and that the Canco shares derived their value principally from immovable property in which its oil and gas exploration and production business was carried on. The TCC also concluded that the GAAR did not apply to deny the applicable treaty benefits. The Crown's appeal to the FCA related only to the GAAR.

On appeal, the FCA held that the object and purpose of the relevant provisions, including Article 13(4) of the Can-Lux Treaty, were fully reflected in the plain language of these provisions. The FCA also rejected the Crown's position that Article 13(4) effectively requires the taxpayer to have strong economic or commercial ties to Luxembourg, since the sole criterion to be eligible for the exemption is residence in Luxembourg, which turns on liability to tax.

The Crown was granted leave to appeal the FCA's decision on August 6, 2020. As such, in 2021, the SCC will have the opportunity for the first time to consider the application of the GAAR to a tax treaty.

Also, as the FCA observed, measures taken by the Department of Finance to curtail treaty shopping were not applicable to its decision (i.e., the OECD's multilateral instrument (MLI) was not in force in Canada or Luxembourg at the time) and may affect future transactions. The MLI became effective for Canada's tax treaties with many countries, including Luxembourg, (a) for withholding taxes on January 1, 2020, and (b) for other taxes (including capital gains taxes), for tax years beginning on or after June 1, 2020 (which, for calendar year taxpayers, would be January 1, 2021).

FAPI: *Canada v. Loblaw Financial Holdings Inc.*

The issue in this case was whether Loblaw Financial Holdings Inc. was taxable in Canada on approximately $475 million of income earned by its Barbados resident subsidiary, Glenhuron Bank Limited. The Minister of National Revenue (the Minister) assessed Loblaw on the basis that Glenhuron carried on an "investment business," as defined in subsection 95(1) of the Tax Act, and that its income was therefore FAPI. Under the FAPI regime, a Canadian resident taxpayer may be required to pay tax on certain (generally passive) income earned in a non-resident subsidiary. As an alternative to her primary assessing position, the Minister also relied on the GAAR.

Loblaw's position was that Glenhuron's business qualified for the financial institution exception to the "investment business" definition and, therefore, its income was not taxable in Canada. Loblaw also argued that the GAAR did not apply.

The TCC found that Glenhuron satisfied all but one of the conditions necessary to qualify for the financial institution exception – namely, the requirement to conduct business principally with arm's length persons. Glenhuron therefore could not benefit from the exception. The TCC nevertheless concluded in *obiter* that the GAAR did not apply because there was no avoidance transaction.

The TCC determined that a proper interpretation of the arm's length test in a banking context requires an examination of both the receipt and use of funds. The TCC also found that an unexpressed competition requirement in the arm's length component of the financial institution exception was relevant to its conclusion, and that this competition requirement justified an emphasis on the receipts side of the equation. The TCC therefore placed significant emphasis on Glenhuron's non-arm's length sources of capital, especially equity capital received from its shareholder.

In allowing Loblaw's appeal, the FCA found several legal errors in the TCC's decision.

Applying the plain meaning of the phrase "business conducted ... with," the FCA held that the focus should be on business relationships, and not on receipts and uses. The determination of the "principal" conduct of a business is a factual analysis that looks to the income-earning activities which occupy the time and attention of employees engaged in the conduct of the business. The source of Glenhuron's capital was thus given little weight in considering whether its business activities were conducted principally with arm's length persons.

In addition, the FCA concluded that the TCC had erred by reading an unlegislated requirement for competition into the financial institution exception. The FCA observed that courts must be cautious before finding an unexpressed legislative intention implicit in otherwise clear provisions of the Tax Act. The FCA also clarified that the purpose of a provision, as determined in the course of ordinary statutory interpretation, should not be conflated with the policy or underlying rationale of the provision, as determined in the course of conducting a GAAR analysis. These are distinctly different exercises.

Finally, while the FCA acknowledged the Crown's concern that Glenhuron's income would not be subject to tax in Canada, it observed that such concerns do

The determination of the "principal" conduct of a business is a factual analysis that looks to the income-earning activities which occupy the time and attention of employees engaged in the conduct of the business.

not enable courts to give statutory provisions a broader interpretation than they can reasonably bear. Gaps in legislation, if any, are for Parliament to address.

The Crown's application for leave to appeal the FCA's decision to the SCC was granted on October 29, 2020. Osler acts for Loblaw.

Transfer pricing: *Canada v. Cameco Corporation*

In this case, the Minister reassessed the Canadian taxpayer, Cameco Corporation (Cameco Canada), to include in its taxable income all of the uranium trading profits reported by its Swiss subsidiary (Cameco Europe).

Following a corporate reorganization, Cameco Europe earned profits from market sales of uranium purchased pursuant to contracts with Cameco Canada as well as with arm's length non-residents of Canada. Cameco Canada provided Cameco Europe with a number of services pursuant to an intercompany services agreement.

At trial, the Crown's primary argument was that Cameco's transactions were a sham and, in the alternative, that the transfer pricing provisions in section 247 applied. The TCC dismissed the suggestion that there was any sham and found that neither branch of the transfer pricing provisions supported an adjustment, as the transactions were commercially rational and undertaken on arm's length terms and conditions. The Crown did not pursue its argument concerning the allegation of a sham before the FCA and only relied on transfer pricing arguments, primarily the "recharacterization" branch of the provisions.

In upholding the TCC's decision, the FCA observed that the goal of Canada's transfer pricing provisions is to ensure that transactions between related parties are priced on arm's length terms and conditions. The provisions do not allow the Minister to pierce the corporate veil and reallocate profits from a subsidiary to a parent by applying the "recharacterization" rule in the transfer pricing provisions.

The FCA also affirmed that the recharacterization rule applies in very limited circumstances and not where hypothetical arm's length persons would have entered into the relevant transactions. It rejected the Crown's subjective test, which was based on whether the taxpayer would have entered into the particular transaction with an arm's length party.

The decision confirms that transfer pricing is fundamentally a factual exercise and that the object of the rules is satisfied when transactions are priced on market terms. The FCA characterized many of the Crown's arguments as indirect attacks on the TCC's factual findings, for which no palpable and overriding error was present.

The Crown applied for leave to appeal the FCA's decision to the SCC on October 30, 2020. Osler acts for Cameco.

The *Cameco* decision confirms that transfer pricing is fundamentally a factual exercise and that the object of the rules is satisfied when transactions are priced on market terms.

Concluding observations

In response to these decisions, the Canada Revenue Agency has publicly indicated that it is considering alternative assessing positions and approaches to litigation while the government considers legislative changes. The appeal of the *Alta Energy* and *Loblaw* decisions to the SCC means that guidance from our highest court will be forthcoming on fundamental issues of international taxation, potentially paving the way for further change.

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INTELLECTUAL PROPERTY

2020: A year of clarity for Canadian life sciences and software patents

Two industries in which patents play an undeniable strategic role are life sciences and software. Canada has historically been a strategic jurisdiction for litigating life sciences patents, as launching a generic or biosimilar medicine requires that patents be addressed before product approval. Conversely, companies have often forgone protection and enforcement of software patents in Canada, due in part to barriers to approval of these patents either by our patent office or ultimately by the courts.

In 2020, Osler's patent litigation team helped to advance the law pertaining to life sciences and software patents in critical ways, providing guidance regarding patentability of contentious subject-matter as well as litigation strategy. This progress is owed largely to the efforts of Canada's Federal Court and Federal Court of Appeal, which worked through the pandemic to hear important patent cases using Zoom and the Federal Court's e-Trial platform.

A high bar for validity of patents directed to optimized use of known drugs

It is not uncommon for pharmaceutical patentees to attempt to extend patent protection for a drug by pursuing patents on optimized usage of the drug, even after the drug's use has been established. In *Eli Lilly v Mylan,* the Federal Court[1] invalidated such a patent, which was directed to low doses of tadalafil, the active ingredient in Eli Lilly's blockbuster drug CIALIS® that is used to treat erectile dysfunction.

Eli Lilly had sued multiple generic companies, including Mylan, for infringement of its low-dose patent. Mylan and other defendants alleged that Eli Lilly's patent was invalid in view of a prior tadalafil patent that already taught that the drug was useful to treat erectile dysfunction at a broad range of doses. Mylan alleged that the low doses were not "new" because the earlier patent taught that the doses worked. Mylan further alleged that the doses were "obvious" because there was no invention in the doses, given prior tadalafil patents and the routine nature of dose selection. Mylan and the other defendants won. Osler successfully represented Mylan in this action.

Patentees often point to the unexpected advantages of optimized medical uses and the high cost and risk associated with pre-clinical and clinical testing necessary to arrive at the optimized use. Eli Lilly pursued these approaches, asserting before the Court that low doses had the unexpected advantage of reducing certain side effects of the drug, and that the work required to arrive at the doses was fraught with obstacles that would have caused others to abandon it altogether. The Court was not persuaded by Eli Lilly's arguments, instead finding that the patent did not disclose doses that were peculiarly advantageous and, in any event, that selecting doses was a routine part of drug development.

The decision in *Eli Lilly v Mylan* provides useful guidance for pharmaceutical use patents. Where the invention is routine optimization of an existing drug with already known uses, a high bar will be set when determining the patent's validity, and it may be difficult to sustain. The court's approach helps clarify the balancing of two important interests: rewarding innovation for new drugs, but also enabling affordable access by limiting monopoly protection to only those innovations worthy of protection.

The decision in *Eli Lilly v Mylan* provides useful guidance for pharmaceutical use patents. Where the invention is routine optimization of an existing drug with already known uses, a high bar will be set when determining the patent's validity, and it may be difficult to sustain.

Preservation of first-mover advantage in pharmaceutical litigation

Preserving the balance between drug innovation and access to generic alternatives can also involve incentivizing generic and biosimilar drug manufacturers to challenge weak or invalid patents. Such challenges facilitate competition that can lower drug prices once a drug's valid patents expire. However, such patent challenges are risky and the litigation is expensive. Generic challengers who are leading (and shouldering the financial cost of)

1 *Eli Lilly Canada Inc et al.* (Eli Lilly) *v Mylan Pharmaceuticals ULC* (Mylan), 2020 FC 816. Eli Lilly appealed the Federal Court's decision on September 30, 2020.

the litigation taking on these types of patents lack the incentive to do so if their success will only be met with a flood of competition from other generic companies.

In May 2020, the Federal Court of Appeal addressed this issue,[2] overturning a decision of the Federal Court[3] that had allowed the trials of other generic drug manufacturers, which had started months later, to be heard at the same time as earliest (or first-moving) generic drug manufacturers. The result is that "first-mover position" is now preserved in drug patent litigation under Canada's *Patented Medicines (Notice of Compliance) Regulations* (the Regulations). Osler successfully represented the appellant, Teva, on the appeal.

The appeals concerned four generic drug manufacturers, each seeking approval for a drug product containing rivaroxaban. Teva and Apotex commenced their patent challenges within a month of each other. Taro Pharmaceuticals and Sandoz Canada commenced theirs several months later.

At issue was whether the trials for the later challengers, Taro and Sandoz, should be heard at the same time as the trials for the first-movers, Teva and Apotex. The addition of Taro and Sandoz to the first trial would have eliminated Teva's and Apotex's opportunity (if successful) to benefit from being the first to launch their rivaroxaban drug product in Canada, with the potential to occupy a larger share of the market.

The Court of Appeal held that the late-movers should not be added to the early-mover trials. A prohibition on joinder in the Regulations forbids trials involving different generic drug manufacturers to be heard concurrently even in respect of common issues. This prohibition is important. While first-movers can enter the market if they win at trial, late-movers must separately resolve their litigation under the Regulations, which typically means absent a settlement, they are unlikely to benefit from a first-mover's decision until it becomes final and unappealable (which can take months or years).

This decision preserves the incentive for generic and biosimilar manufacturers to make the commercial investment and absorb the litigation costs to be first-movers under the Regulations. The first generic or biosimilar drug manufacturer to commence a patent challenge will be protected from late-movers seeking to "piggy-back" on their efforts. This preserves a legitimate opportunity for first-movers to get to market first and enjoy a period with limited competition, thereby creating a reward for the risk they assume when successfully challenging weak drug patents.

A clearer path to software patent approval

Software companies have historically faced considerable uncertainty when applying for Canadian patents, not knowing in advance whether they will be able to obtain a patent and the associated protections on the inventions they create. This uncertainty has been exacerbated over the past decade, as the Canadian Intellectual Property Office (CIPO) has been applying a policy

2 *Teva Canada Limited* (Teva) *v Bayer Inc et al.* (Bayer) and *Apotex Inc.* (Apotex) *v Bayer*, 2020 FCA 86.

3 *Bayer v Teva et al.*, 2019 FC 1039.

of routinely denying patents for computer-implemented inventions based on a forensic and subjective assessment of the problem and solution addressed by the patent. Patents directed to solving "computer problems," such as chip control software that enables faster computer processing, have been considered more worthy of protection than patents that solve business or other types of problems, such as management of risk in an investment portfolio.

CIPO's approach created confusion regarding the availability of Canadian software patents, leading companies to forgo Canadian patent protection even when such protection could provide meaningful mitigation of business risk. Although copyright in software provides some residual protection against copying of source code, unlike patents, copyright does not provide broad protection over core software functionality. Thus, the previous challenges to obtaining the functional protection of a patent have had a negative commercial impact on companies in Canada.

On August 21, 2020, the Federal Court issued its decision in *Choueifaty,*[4] providing much-needed clarity for industry. The Court allowed an appeal from a decision of the Commissioner of Patents rejecting a patent application in relation to a new computer-implemented method for selecting and managing investment portfolio assets. The Court scrutinized and rejected the Commissioner's "problem-solution" approach, re-emphasizing that patent claims must be interpreted in the same way for all purposes, including assessing subject-matter eligibility.

The past year provided clarity regarding when innovations merit patent protection and how patent litigation is likely to unfold.

The *Choueifaty* case was not appealed. The Court's decision, which emphasizes the primacy of language that patent applicants choose to define their proposed monopoly, should enhance business certainty for both patent applicants and third-parties that seek clarity regarding the scope of patents in their fields of business. CIPO has now begun the process of rewriting its administrative policy arising from the case, including providing new guidance on computer-implemented inventions, as well as medical diagnostic methods and medical uses.[5]

Amid the global pandemic, many of the most important innovations have arisen in the life sciences and software fields, from new disease test kits and anti-viral medicines to software that enables socially distant connectivity. The past year provided clarity regarding when innovations in these fields merit patent protection and how patent litigation is likely to unfold. Guidance from the Court's recent patent decisions should shape companies' Canadian patent strategy, both during the pandemic and beyond.

4 *Yves Choueifaty v Attorney General of Canada*, 2020 FC 837.
5 CIPO Practice Guidance available at: http://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr04860.html.

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TECHNOLOGY

A busy year for technology: From contracting during COVID to consumer-directed finance

This past year we have continued to see considerable advancements in the technology sector. The COVID-19 pandemic has increased consumer and business reliance on technological solutions and added a level of complexity to the delivery of services.

The pandemic has had a significant impact on commercial contracting. Key contractual terms, such as those relating to business continuity, *force majeure*, service delivery, information security standards and incidents, and risk allocation require increased consideration, adjustment and negotiation.

There have been numerous developments in artificial intelligence (AI), an increase in the relevance of open data and further progress in payments modernization and consumer-directed finance (open banking). As data-driven solutions become more important, we have seen industries turn to open data for access to the information they need to solve problems and meet the needs of consumers and businesses. Additionally, there has been an increased need for the efficient and reliable delivery of financial services to both individuals and businesses, which has caused a heightened focus on Canada's payments modernization and open banking initiatives.

Commercial contracting and COVID-19

The COVID-19 pandemic has presented challenges and unique issues for commercial contracting that should not be overlooked. These issues are often not adequately addressed by an organization's standard provisions or risk management framework. Contract negotiations have become more challenging in light of the uncertainty of the business environment, with delays and rapid change impacting timelines.

In addition, a fresh look at many key contractual terms is required to assess whether and the extent to which they should be adjusted. For example:

- Business continuity terms – Both customers and suppliers may need to consider the business continuity provisions to take into account potential impacts and recourse associated with the COVID-19 pandemic. Customers may wish to conduct additional due diligence to review the supplier's business continuity plan. Suppliers will have to ensure their business continuity plans are able to meet customer requirements.
- *Force majeure* and change in law terms – Parties should consider whether standard *force majeure* provisions and definitions as well as provisions regarding changes in law and their impact on the contractual terms are sufficient to provide the intended risk allocation.
- Service delivery requirements – Provisions may need to be adjusted to account for the impact of the COVID-19 pandemic on service commitments, milestones or timelines. Consideration needs to be given to items such as remedies for late delivery, risks associated with future-state delivery commitments and the ability to meet standard service level commitments.
- Security standards, protocols and processes – The framework associated with security may need to be assessed and adjusted to account for the fact that services are, in many cases, being delivered in a work-from-home environment. Certain security requirements may not be possible to achieve in light of this change and alternative, mitigating standards may be appropriate. Similarly, security incident monitoring, notification and management protocols may require adjustment to account for the way in which services are currently being delivered.

For more details on the impact of the COVID-19 pandemic on commercial contracting, please see our Osler Update, "Working together while working from home: Key considerations for technology and other commercial service agreements" on osler.com.

Artificial Intelligence

AI continues to be of central importance to developments in technology and innovation. It is increasingly being adopted in various sectors and verticals, including financial services, telecommunications, supply chain, transportation and retail. As AI becomes more prevalent, there has been an increased emphasis on the development of standards to address potential risks that accompany the application of automated decision making. Organizations should be aware of these standards and how they will apply to their own application of AI and big data decision making.

These are some examples of areas where there is an increased focus on AI standards:

- There is growing concern about the ethics of using AI. In response to this, there has been greater focus on ethics standards in M&A transactions and commercial contracting. In many cases, this results in specific terms being imposed on service providers and organizations regarding their ethical practices. Such terms can require compliance with ethical declarations and statements, such as the Montreal Declaration, which sets out 10 principles and eight recommendations to help guide the development of ethical AI. To address these ethical concerns, new organizations and consultants have emerged to assist with these efforts. For example, the Montreal AI Ethics Institute helps organizations comply with ethics declarations, like the Montreal Declaration.
- The use of AI combined with big data raises concerns about the risks related to the use and consumption of the underlying information. The role of de-identification of data has become more important in the construction of AI models and in AI's use of big data as it can serve to mitigate these risks. Organizations such as the Canadian Anonymization Network (CANON) are working to develop a framework of principles for effective anonymization that are technologically and sectorally neutral. These efforts are expected to help organizations feel more confident about their use of AI and big data.
- The growth of AI has been accompanied by concerns surrounding the privacy implications of AI's applications. This November, the Privacy Commissioner of Canada published a number of recommendations on reform for the private sector privacy legislation (PIPEDA). The recommendations propose new exceptions to consent requirements, which would allow data to be used for the training of AI and the development of AI initiatives. The recommendations also propose to add two new rights for individuals to challenge AI decision making – a right to meaningful explanation and a right to contest. The rights would bring Canada closer in line with recent European Union changes to provide more protection to individuals regarding their personal information. The recommendations also propose that all automated decisions be regulated. If implemented, this change may have a profound impact on future AI developments.

Principles, standards and services relating to AI continue to develop and evolve. Following the establishment of the CAN/CIOSC 101:2019 standard on the Ethical Design and Use of Automated Decision Systems that was published last year, the CIO Strategy Council has launched an AI Ethics Assurance Program in collaboration with KPMG. The program will help organizations obtain assurance that their controls meet the criteria for ethical design and use of automated decision making set out in the CAN/CIOSC standards.

As AI becomes more prevalent, there has been an increased emphasis on the development of standards to address potential risks that accompany the application of automated decision making.

Similarly, the OECD, which adopted its Principles on Artificial Intelligence in 2019, continues to develop and evolve its AI principles. It recently launched the OECD.AI Policy Observatory, which combines resources on AI and facilitates a dialogue between multiple stakeholders in order to develop effective and fair AI public policy. The continued proliferation of competing standards will pose significant challenges to both developers and users of AI, as they seek to take advantage of the promise of AI in a way that meets what is fast becoming a patchwork of potentially overlapping and differing requirements.

As we look ahead to 2021, we expect that AI will continue to be incredibly important to technological developments and innovation in Canada. It is likely that we will see these ethical standards and data governance frameworks start to shape how AI is applied and developed, and as they continue to develop, we hope that there will be a convergence of standards worldwide to facilitate and foster a consistent approach.

Open data

Open data has become increasingly relevant in the Canadian innovation landscape. Open data is defined by the Government of Canada as "structured data that is machine-readable, freely shared, used and built on without restrictions." While not widely known, the Canadian government was one of the leaders in the establishment of the Open Data Charter.

The COVID-19 pandemic has demonstrated how open data can be leveraged to exchange information and to accelerate research, particularly when paired with advances in AI that are often reliant on large volumes of structured data. Companies across sectors may start to use open datasets more frequently in their research and development.

The COVID-19 pandemic has demonstrated how open data can be leveraged to exchange information and to accelerate research, particularly when paired with advances in AI that are often reliant on large volumes of structured data.

Here are some noteworthy observations from our survey of Canada's open data landscape in 2020:

- A majority of the provinces and territories have adopted open data policies, directives or guidelines. Most of these provinces also have open data websites or portals, evidencing an interest in leveraging open data solutions in the public sector. Additionally, several provinces and territories have adopted open data licences in some form. The federal government's licence version 2.0 is drafted in a largely permissive manner that permits copying, distribution, adaptation and exploitation for lawful purposes.
- In the private sector we have seen notable efforts to promote open data in the context of smart cities. Additionally, we have seen a reliance on existing open data licences by Creative Commons and Open Data Commons, which provide a broad scope of usage rights with few use limitations.
- Several organizations have developed data standards and frameworks for open data. For example, the CIO Strategy Council has published two standards on data governance, CAN/CIOSC 100-1:2020 and CAN/CIOSC 100-2:2020. These standards set out the requirements for data protection and privacy safeguards in the context of open data sharing.

We expect that Canada will continue to support open data initiatives in 2021, solidifying its position as a global leader in this area.

Blockchain

While we have seen a declining general interest in public blockchain, the blockchain sector has continued to mature, with a focus on more pragmatic uses for blockchain. In addition to cryptocurrency, the most widely recognized use of blockchain, there have been solutions focused on digital identity and supply chain implementations. In these cases, the benefits of a technology solution based on a distributed, immutable ledger outweigh the complexity and costs to implement and maintain such a solution.

Security and privacy issues remain at the forefront of blockchain considerations. Many organizations have elected to deploy private blockchain implementations, such as Hyperledger Fabric, within their private networks. These enable the organization to set access controls to further mitigate the risks associated with security and privacy of personal or sensitive data.

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A number of new standards seeking to assist with the proliferation and adoption of blockchain technology were published in 2020. Most notably, in July, the ISO/TC 307 Committee, approved by the International Standards Organization to develop blockchain and DLT-related standards, published two new standards: (1) the ISO 22739:2020 standard that provides a common vocabulary by establishing fundamental terminology for blockchain distributed ledger technologies; and (2) the ISO/TR 23244:2020 standard that provides an overview of privacy and personally identifiable information protection as applied to blockchain systems. These two standards supplement the ISO/TR 23455:2019 standard that describes what smart contracts are and how they work, including various technical methods of establishing interaction between multiple smart contracts.

These standards will provide a helpful framework for engaging in discussions regarding the use of blockchains, though whether these standards will be widely adopted remains to be seen.

Payments Modernization

Payments Canada has continued to push forward with its modernization plans to improve Canada's payments system. Their current proposal seeks to establish a national system for clearing and settlement of payments to ensure a faster, more efficient payment infrastructure. In May, Payments Canada published its Annual Report, highlighting the progress made on modernization. The main developments include

- the progression of Lynx (a new high value payment system), where Payments Canada advanced timelines to leverage the SWIFT ISO 20022 (the global payments messaging standard) deadline and solidified industry partnerships
- the progression of the Real-Time Rail (a new real time payments system) with Payments Canada's members and partners and Payments Canada's recent announcement of its partnership with Mastercard's Vocalink as the clearing and settlement solution provider for Real-Time Rail

- new service offerings, like initiatives to support ISO 20022 and API development, as well as to address the rising payments knowledge gap through international collaborative efforts

Shortly after the report was released, Payments Canada announced the availability of ISO 20022 messages for Lynx. This will allow system participants to prepare to leverage the value of ISO 20022, as well as supporting financial institutions in their preparations to meet SWIFT's ISO 20022 migration date (2022) for cross-border payments.

More recently, Payments Canada has announced changes to the *Payment Items and the Automated Clearing Settlement System* bylaws, which will allow for a wider range of member financial institutions to be eligible to become direct clearers or group clearers, amongst other benefits. These developments will help Canada's payments systems to be faster, more flexible and more secure. Although Canada's implementation of payments modernization has been slower than comparable countries, such as Australia and the United States, we expect these initiatives to stay on track to launch in 2021 and 2022.

Consumer-directed finance (open banking)

Open banking is slowly progressing in Canada, as industry stakeholders remain interested in the opportunities available through open banking to develop and offer new products and services and reach new customers. The Canadian government has conducted a review of open banking and in January 2020, published a Report on Open Banking in Canada (the Report). The Report has aptly given open banking the new moniker of "consumer-directed finance," which better reflects its role in providing consumers more control and protection over their financial data.

The Report sets out the findings and recommendations from stakeholders regarding consumer-directed finance in Canada, including a number of key findings

- privacy and cybersecurity are real concerns and, as such, a robust security framework for open banking must be established to address any data use and privacy concerns
- Canadian consumers want more control over their information, so open banking should allow for more meaningful consent (practices like screen-scraping are questionable)
- open banking drives innovation and growth globally while making Canada more competitive. It should be market led, with support from both federal and provincial governments
- a liability framework should be established to address how different participants would assume liability within an open banking model, rather than financial institutions taking on all the risks

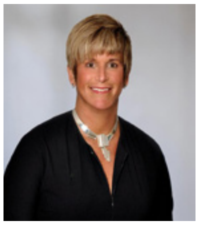
The Report was prepared by the Advisory Committee on Open Banking, a committee appointed by the Minister of Finance. With the Report having been made public, the Advisory Committee was expected to collaborate with the Department of Finance to consider the issues highlighted above. However, in light of the COVID-19 pandemic, additional consultations with stakeholders, originally scheduled for the spring of 2020, were put on hold. Such consultations are expected to resume virtually at the end of November and continue through December 2020.

The Advisory Committee has also recommended that the Department of Finance develop a white paper on a proposed consumer-directed finance framework. There is no set timeline for these next steps, making it difficult to anticipate how these developments may impact Canadians. We expect that with the continued support of stakeholders, the development of an open banking framework will move forward, opening the financial sector up to exciting new developments.

Conclusion

This year has presented some unique challenges. We expect that clients and their customers will continue to feel the impact of the COVID-19 pandemic well into 2021. At the same time, these changes present opportunities to continue to advance the use of technology in Canada. In the future, we expect to see a continued and growing emphasis on technology as a key driver for delivering solutions in both the private and public sectors. As standards and governance models for these technology-focused solutions are deployed more widely, it will be important for stakeholders to be aware of developments in this rapidly changing area.

AUTHORS



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PRIVACY

A year featuring a flurry of Canadian privacy legislative reform

Over the course of 2020, there was a flurry of legislative reform activity in the Canadian privacy arena. If enacted, proposals at both the federal and provincial level for enforcement regimes and statutory requirements potentially expose companies across Canada to severe financial penalties, enhanced litigation risk and significant compliance costs. Here is how the privacy legislative arena is changing.

Federal private sector privacy law to modernize PIPEDA

On November 17, 2020, the federal government introduced a bill proposing significant changes to the national framework for the protection of personal information in Canada.

The long-awaited and much-anticipated bill, the *Digital Charter Implementation Act, 2020* (DCIA), serves to modernize the *Personal Information Protection and Electronic Documents Act* (PIPEDA) – legislation that was enacted almost

20 years ago. If passed, DCIA would establish a new private sector privacy law in Canada, the *Consumer Privacy Protection Act* (CPPA), and a new Personal Information and Data Protection Tribunal.

One of the CPPA's most notable additions to the current PIPEDA framework is the creation of a new enforcement regime. Organizations that fail to comply with the CPPA may be subject to administrative monetary penalties of up to the greater of 5% of the organization's gross global revenue or C$25 million. Another addition is a statutory private right of action for loss or injury suffered as a result of a contravention of the CPPA. Finally, the CPPA confers order-making powers on the Office of the Privacy Commissioner of Canada.

Organizations will also be faced with increased costs associated with the operational implementation of – and the resources required to ensure – ongoing compliance with the CPPA's expanded and prescriptive requirements. Key proposed features of the CPPA include

- a requirement for organizations to implement a robust internal privacy management program that must include a full suite of written policies, practices and procedures, designed to ensure compliance with all requirements under the statute
- a strengthening of the consent requirements for personal information processing that will make it necessary for organizations to examine all collections, uses and disclosures of personal information, to improve their consent notices and to develop or enhance consent management practices
- a strengthening of the statutory transparency requirement, which will necessitate a review by organizations of public-facing notices to ensure that they are readily available in "plain language" and include prescribed content requirements
- a requirement for organizations to identify, assess the appropriateness of and maintain a record of the specific purposes for each collection of personal information
- a limitation on the collection of personal information to only what is "necessary" (i.e., not just reasonably required) in the circumstances

Individuals will also be afforded several new rights under the CPPA. Individuals will have the right of "disposal" of personal information, which will require organizations to "permanently and irreversibly" delete the individual's personal information (subject to certain exceptions). Additionally, the CPPA contains "data mobility" rights which would allow individuals to direct the transfer of their personal information from one organization to another.

Although a minority federal government and the COVID-19 pandemic are raising some uncertainty with respect to the timing of the enactment of the CPPA, the reform of Canada's federal private sector privacy law remains a high priority of the Liberal government. We anticipate that the bill could very plausibly come into force late in 2021.

Organizations that fail to comply with the CPPA may be subject to administrative monetary penalties of up to the greater of 5% of the organization's gross global revenue or C$25 million.

Québec's Bill 64 proposes drastic changes to existing privacy law

The introduction in June of Québec's Bill 64, *An Act to modernize legislative provisions as regards the protection of personal information*, proposed sweeping new changes to Québec's existing privacy regime. If enacted, this bill would introduce potentially severe monetary penalties (including fines of up to "4% of worldwide turnover for the preceding fiscal year" under the offence provisions), statutory damages, a security incident reporting regime, new statutory rights (including the right of an individual to require that an organization "cease disseminating [personal information] or … de-index any hyperlink attached to his name") and a range of other amendments affecting private sector organizations.

If passed in its current form, Bill 64 would impose the most onerous privacy protection requirements in the world. In many instances, the obligations and other elements of Bill 64 are more stringent and prescriptive than the requirements set out under the European General Data Protection Directive.

The stringent requirements under Bill 64 include obligations relating to accountability, a novel "confidentiality by default" requirement, a broad "deactivation" right for identification, location or profiling functions, transborder data flows, data impact assessments, consent and exceptions to consent, the standard for information security, data retention, transparency, automated decision making and multiple subject matter data rights.

If passed in its current form, Bill 64 would impose the most onerous privacy protection requirements in the world.

Over the course of a very brief consultation in October, the Québec government received numerous submissions highly critical of Bill 64. A revised version of the proposed legislation is expected early in 2021.

British Columbia's private sector privacy legislation under review

On February 26, 2020, the British Columbia Legislative Assembly appointed a Special Committee to review its *Personal Information Protection Act* (PIPA). The Information and Privacy Commissioner proposed a number of changes to PIPA that are thematically consistent with other proposed reforms. These include a significant enhancement to the enforcement regime (including administrative monetary penalties and order making powers), the creation of a mandatory breach notification requirement and the "modernization" of PIPA's consent requirements.

Ontario's move towards a private sector privacy statute

With a view to improving the province's privacy protection laws, during the summer of 2020 Ontario's Ministry of Government and Consumer Services launched a privacy consultation. The government's objective is to create a legislative framework for privacy in the private sector. The public consultation process, which concluded in October, sought to canvas input with respect to several areas. These include the enforcement powers of the Information and

Privacy Commissioner (IPC), an "opt-in" consent model, data portability and data deletion rights, data trusts for data sharing and de-identification requirements.

These consultation topics suggest that any forthcoming Ontario private sector legislation would remain relatively consistent with (and build upon) requirements under PIPEDA and other provincial models applicable to the private sector. In particular, consistent with other provincial private sector statutes, it is likely that this new legislation would govern provincially-regulated employment relationships, a previously unregulated area of privacy law in Ontario.

The precise timing for a proposed privacy statute, and how the federal government's proposed legislative reform will impact the Ontario's government legislative reform initiative, remains unclear.

Health privacy legislative reform

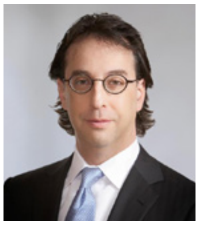
In the health sector, Alberta's Bill 46 introduced proposed amendments to the *Health Information Act* (HIA) and Ontario enacted significant changes to the *Personal Health Information Protection Act* (PHIPA).

PHIPA's changes include the provision of new powers for the IPC (such as the power to impose an uncapped administrative penalty), increased penalties for offences, new audit log obligations and the establishment of new prescriptive and permissible collections and disclosures of personal health information.

Conclusion

It is widely expected that the federal and provincial legislative reform activity will continue through 2021. Organizations are well-advised to familiarize themselves with the coming changes and of the progress of reforms in order to have the necessary compliance framework in place when amendments come into force.

AUTHORS



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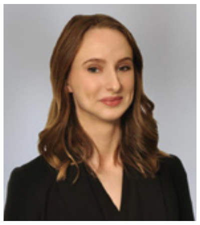

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INNOVATION

Acceleration in the adoption of innovative legal service delivery

Looking back at 2020, it is trite to say that the only constant has been change. The COVID-19 pandemic not only impacted the nature of lawyers' work by presenting new substantive legal challenges, but it also impacted how we work. Dispersion of workforces to remote locations hastened the adoption by most, if not all, professional service providers, including legal professionals, of collaborative tools and online solutions; dramatic uncertainty in business conditions reinforced the imperative of doing more with less.

The pandemic also provided a platform for conversations between lawyers and clients about innovative legal technologies, tools, processes and staffing models in a more widespread way than ever before, accelerating the pace of their adoption. One clear example is the increased focus on Alternative Legal Service Providers (referred to as ALSPs, and when functioning within law firms, as captive ALSPs) and the corresponding move by in-house legal departments to embrace them. As described below, the captive ALSP model is providing clients with innovative services and products, which are in turn assisting in addressing the substantive legal issues facing all aspects of a client's business in this challenging environment and beyond.

Why are law firms creating new businesses in parallel with traditional legal service delivery?

Home Court Advantage: The Am Law 100's Move into Alternative Legal Services, a recent survey by legal industry advisors Baretz + Brunelle, highlights the significant growth of captive ALSPs. Baretz + Brunelle reports that 35% of the largest law firms in the United States now have a captive ALSP, with a large majority of these ALSPs offering at least one service in addition to e-discovery.

Not surprisingly, this rapid expansion is intended to create more value in the delivery of legal services, particularly in relation to higher volume work. Not all legal services need to be delivered as bespoke solutions at the highest price point. Optimizing more routine service delivery, where appropriate, through lower cost, higher efficiency platforms allows legal professionals to better align their interests with those of their clients. Innovating with respect to the means of service delivery in this way can result in a better experience for clients, who can often take advantage of data-enhanced insights, improved efficiencies and lower, more predictable legal fees. This model also paves the way for developing innovative modes of service delivery within the captive ALSP in order to provide the promised value and efficiency.

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The captive ALSPs become part of an end-to-end solution for consumers of legal services, allowing them to obtain the level of advice they need, commensurate with the complexity of the matter, at the optimal price point and all from one service provider.

Sample areas of service delivery within ALSPs

Baretz + Brunelle identified several areas of service delivery within the ALSP model. Principal among these – and the area that provides the greatest scope for innovation – is the use of technology to perform operations. Leveraging technology can assist with making tasks more efficient by using software and artificial intelligence solutions. In particular, technology can often be used to perform routine tasks more quickly and in many cases more effectively than a human lawyer. The result is that adoption of software, AI and data analytics can rapidly improve functions such as documentary reviews for due diligence or for legal proceedings.

More specifically, on the transactional side, using machine learning tools, such as Kira Systems, can enhance the review and analysis of documents for purposes of due diligence or other contract review. Similarly, contract automation or assembly tools such as Contract Express allow for faster generation of documents, promote standardization of those documents, decrease the opportunity for and risk of error and can improve profitability and productivity. Legal transaction management tools such as Closing Folders provide a platform for the electronic administration and management of documents, particularly in the context of transaction closings. Compliance and legal entity management software can reduce risk by means of compliance calendars and reminders, as well as provide real-time access to entity data.

On the disputes side, e-Discovery review platforms, such as Relativity, can drastically reduce the volume of data for manual review using analytics, such as deduplication, email threading, key word searching, communication analyses, concept reports and data visualizations. Machine learning algorithms can further reduce volume by actively identifying and segregating relevant documents. The shift from a manual eyes-on-every-document review to computer-assisted review results in lower costs and increased accuracy. Platforms like Relativity that were historically used strictly for e-Discovery, now have expanded use cases, including for data breach and reporting reviews, internal investigations, competition reviews and regulatory requests.

Like external ALSPs, captive ALSPs also benefit from increased flexibility in pricing their services. As a result of efficiencies gained from technology and the dedicated expertise of the ALSP, the cost of legal services performed by ALSPs is more generally predictable. This benefits both captive ALSPs and law firm clients, who can share in the efficiencies gained though fee arrangements other than the billable hour, be it flat or fixed fee, contingency or other risk-sharing arrangement. Captive ALSPs may also serve a special advisory role with respect to legal technology as they are uniquely positioned to address client matters and pain points using firm owned technology and the associated technical expertise.

As a result of efficiencies gained from technology and the dedicated expertise of the ALSP, the cost of legal services performed by ALSPs is more generally predictable.

For some law firms, captive ALSP businesses are only the beginning of their innovation platform. A small, but growing, number of firms have set their sights on building and offering productized legal services to their client base. Legal products typically leverage the traditional bespoke legal expertise of a firm's lawyers in designing and building the technology, and then subsequently deliver legal services through a self-serve automated platform, an alternative staffing model – or some combination of the two – under a fixed or other predictable fee arrangement.

These solutions provide businesses with access to specialized legal expertise on a cost-effective basis when tackling everyday legal and legal operational challenges – for example, in standardized high-volume commercial transactions. Some firms, through captive ALSPs, have built centralized portals for completing smaller financing transactions that take advantage of an interactive platform and contract automation to generate documents efficiently. In other cases, firms may develop platforms to assist their clients in the better management of their contract portfolios through the use of interactive abstract databases of key terms and provisions.

Products such as these allow consumers to derive greater value from their legal budgets, with routinized – but nonetheless important – legal work being done at a lower, predictable cost through ALSPs and legal products, and more complex strategic and advocacy work reserved for higher-cost lawyers.

Innovative legal service delivery at Osler

At Osler, our captive ALSP – Osler Works – has been in business for the better part of a decade. Through this time, Osler Works has expanded significantly and now operates through three divisions: Osler Works – Transactional (OWT), Osler Works – Disputes (OWD) and Osler Works – HR (OW-HR). These services provide a broad and growing range of value-added ALSP services.

Through Osler Workshop, our products arm, we work closely with our clients and with Osler Works to develop technology-enabled solutions. Our products include Osler Dash (a franchise disclosure and contracting solution for franchisors), Osler ACTion (a legislative and regulatory tracking solution for financial institutions) and Osler Code Detect (a software detection tool). Leveraging data is also a priority. For example, we are in the process of developing a case assessment offering that uses interactive checklists and machine learning software to extract critical data points for use in a decision tree analysis of a case. This analysis maps litigation options using weighted probability modelling, including actual dollar figures, to assist with strategic decision making. The case assessment tool can be applied at any stage of a dispute or investigation, including pre-claim analysis, strategic checkpoints, mediation, trial and beyond.

These services not only provide meaningful added value for our clients by performing repeatable tasks on an efficient basis, but they have also changed the nature of practice for students, associates and partners of the firm. Embracing this change has allowed our practitioners to focus on solving complex problems not easily addressed through technology-enabled offerings.

We look forward to seeing COVID-19 in the rear-view mirror. However, we expect that the adoption of innovative legal service offerings that the pandemic has helped to foster will set the stage for new creative legal solutions that drive greater value to consumers of legal services even after the pandemic is over. That's good news for all of us.

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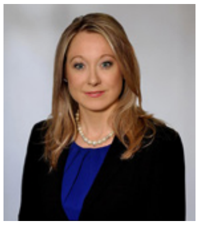

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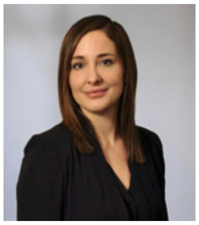

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Osler is a leading law firm with a singular focus – your business. From Toronto, Montréal, Calgary, Ottawa, Vancouver and New York, we advise our Canadian, U.S. and international clients on an array of domestic and cross-border legal issues. Our collaborative “one firm” approach draws on the expertise of over 400 lawyers to provide responsive, proactive and practical legal solutions driven by your business needs. For over 150 years, we’ve built a reputation for solving problems, removing obstacles, and providing the answers you need, when you need them.

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