Legal Year in Review

Osler’s insights on key developments in 2015 and their implications for Canadian business.
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Introduction

As 2015 comes to a close, we want to share with our clients and friends our observations about what we believe to be some of the most significant legal developments affecting Canadian business over the past year and their implications for 2016 and beyond.

Recently elected governments at both the federal and provincial levels had a major impact on Canadian business in 2015, introducing a number of important new policies and legal initiatives.

With a view to generating revenue and improving service delivery, Premier Kathleen Wynne’s Ontario government sold a partial interest in Hydro One through the largest initial public offering in Canada in 15 years. The Ontario government also materially altered the model for retail distribution and sales of beer in Ontario, opening the delivery model to new private participants, while preserving the existing low cost delivery and public-revenue-generating features. Finally, Ontario renewed its modernization initiatives in the gaming sector, seeking to promote increased private sector involvement in the industry, while streamlining government oversight and maintaining government revenues.

The financing of public pension plans – and the need to improve pension coverage for all Canadians – was also top-of-mind for governments. The Ontario government announced the new Ontario Retirement Pension Plan (ORPP). Whether the new federal Liberal government will follow with an amendment to the Canada Pension Plan and how this will affect the ORPP remains to be seen.

In the energy sector, the new NDP government in Alberta announced a robust climate change leadership plan. Meanwhile, the new federal government promised to beef up the regulatory process for the approval of energy projects. The energy industry is also grappling with the implications of the U.S. refusal to authorize the Keystone XL Pipeline Project.
On the tax front, the new federal government has promised to increase taxes for high-earning individuals and to limit the tax benefits afforded to employee stock options. The latter measure may have unintended consequences in the cash-strapped tech start-up sector, where employee stock options are a key tool for attracting top talent.

This past year was more evolutionary than revolutionary in securities law. A number of initiatives continued to move forward – including the push to create a common securities regulator, as well as the CSA’s review of the systems and practices surrounding proxy solicitation. We also saw new crowdfunding rules and changes to the way in which prospectus-exempt financings are conducted across the country.

Significant proposed changes to the take-over bid regime were published in March 2015 that would result in a 120-day permitted bid regime. If these rules come into effect, the Alberta Securities Commission’s order that Canadian Oil Sands Limited’s shareholder rights plan be cease traded 91 days after Suncor Energy Inc. formally commenced its $4.3 billion hostile take-over bid may be the last “poison pill” hearing of its kind.

The wave of special purpose acquisition corporation (SPAC) offerings was arguably the biggest development in Canada’s capital markets. The first Canadian SPAC offering was completed in April 2015, rapidly followed by four others. Whether we will see more SPACs will likely depend on whether any of the existing SPACs completes a successful qualifying acquisition.

As for governance, board composition – particularly representation of women on boards and in executive officer positions – remained a focus. Executive compensation was also the subject of considerable attention in light of the loss of “say on pay” votes by three large Canadian issuers.

In its ongoing efforts to enforce insider trading laws, the Ontario Securities Commission (OSC) had a notable success in the Finkelstein case. The evidentiary standard applied in Finkelstein, together with the OSC’s proposed new Whistleblower Program and the ability to enter no-contest settlements, has added to the regulators’ enforcement toolkit.

In a landmark year for privacy and data security laws, the courts demonstrated an increased willingness to allow plaintiffs to use class proceedings as a vehicle for protecting their personal information. The federal government continued its enforcement of its anti-spam legislation and passed significant amendments to PIPEDA, including security breach notification requirements.

A number of appellate decisions – several involving privacy issues – grappled with whether and how Canadian courts should adjudicate on matters involving foreign elements. The multi-national operations of major companies, including internet-based businesses like Facebook and Google, challenged the Canadian courts to define the limits of their jurisdiction and their judicial resources.

In another important litigation development, the Québec Superior Court’s unprecedented award in two Québec class proceedings brought against tobacco manufacturers for smoking-related injuries has the potential to change the future course of class proceedings. The $15 billion award (which is currently
under appeal) was made in the absence of any evidence from individual class members, raising important questions about the applicable evidentiary rules in the class actions context.

The past year also saw significant changes in international trade, foreign investment and anti-corruption measures.

Concluded in late 2015, the Trans-Pacific Partnership (TPP) is the largest and most far-reaching international trade agreement Canada has entered into in over 20 years. If ratified and implemented, the TPP (as well as the Canada-EU Comprehensive Economic Trade Agreement (CETA), entered into in late 2014) will address numerous subjects of paramount importance to Canadian business, including reduction of tariff and non-tariff barriers, intellectual property, electronic commerce, cybersecurity, anti-corruption and others.

Meanwhile, in relation to foreign in-bound investment, the Investment Canada Act “net benefit” review thresholds were amended. A higher monetary threshold, together with a change to “enterprise value” (as opposed to the former “book value”) as the calculation method, means that some transactions that were previously subject to review will no longer be. On the other hand, a number of other transactions will now be reviewable.

Canada’s efforts to fight corruption and improve transparency continued in 2015 with the laying of charges against SNC-Lavalin in relation to its overseas business activities and with the passage of the Extractive Measures Transparency Act (ESTMA). The ESTMA applies to businesses in the extractive sector, imposing new disclosure and transparency measures in relation to their dealings with both domestic and foreign governments.

In November 2015, Prime Minister Trudeau and the other G20 Leaders endorsed the OECD’s package of measures released as part of the base erosion and profit shifting (BEPS) project. The BEPS project is designed to address concerns about tax-planning strategies that exploit differences in domestic and international tax rules to shift profits to low tax jurisdictions. If the recommendations are adopted, they could have a significant impact on cross-border trade and the competitiveness of Canadian businesses.

As we monitor these and other legal developments in 2016, we would be happy to discuss them with you.

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Like many other provincial governments in Canada, Premier Kathleen Wynne’s Ontario government is struggling to find ways to deal with mounting debt and fund its “activist agenda,” including its efforts to address Ontario’s infrastructure deficit, in the face of a soft economy. Part of Premier Wynne’s approach has been to turn to innovative individuals and strategies for guidance and solutions.

PREMIER’S ADVISORY COUNCIL ON GOVERNMENT ASSETS

In 2014, Premier Wynne enlisted a unique ally in her endeavours when she appointed Ed Clark – a seasoned business executive who was about to retire as CEO of TD Bank and who also has a solid grounding in public policy – as the Chair of her newly formed Premier’s Advisory Council on Government Assets. More recently, she expanded Mr. Clark’s role by appointing him as her special Business Advisor.

The Council’s brief was to advise the government on how to wring more revenue from its assets, to help reduce Ontario’s deficit and support the Government’s ambitious program of infrastructure investment. The Council’s initial focus was to review the Liquor Control Board of Ontario (LCBO), Hydro One and Ontario Power Generation (OPG).

THE PRELIMINARY REPORT

The Council released a preliminary report late in 2014. In it, the Council rejected privatizing the LCBO in favour of other recommendations that would improve its profitability while introducing incremental improvements to customer experience and competition. The Council also suggested a broader examination of beverage alcohol distribution in Ontario, focusing on the privately owned quasi-monopolies of the Beer Store (owned by Labatt, Molson and Sleeman,
The offering resulted in total gross proceeds to the Province of approximately $1.83 billion, making it not only the largest IPO in Canada in 2015 but also the largest in the last 15 years.

ELECTRICITY SECTOR REPORT


• the Province should proceed with a partial sale of its interest in Hydro One to create a growth-oriented company centred in Ontario;

• the partial sale should occur by way of a public offering, with approximately 15% of the shares of Hydro One offered to the market initially; and

• the Province should indicate its intention to retain its remaining shares after selling down to 40% ownership, and that the balance should be widely held with no other individual shareholder having more than a 10% holding.

On November 5, 2015, Hydro One and the Province completed the initial public offering of 81,100,000 common shares of Hydro One Limited by way of secondary offering by the Province at a price of $20.50 per common share. The underwriters for the offering exercised their option to purchase 8,150,000 additional common shares from the Province at the initial offering price on November 12, 2015. The offering resulted in total gross proceeds to the Province of approximately $1.83 billion, making it not only the largest IPO in Canada in 2015 but also the largest in the last 15 years. The Province has retained 84% of the Company’s issued and outstanding common shares but, further to the Council’s recommendations, it has indicated that it intends to sell additional common shares over time, until it holds approximately 40% of Hydro One Limited.

BEER RETAILING AND DISTRIBUTION REPORT

In April 2015, the Council issued a further report, “Striking the Right Balance: Modernizing Beer Retailing and Distribution in Ontario.” The Report attached a term sheet, or “Framework of Key Principles” (Framework), that the Council had negotiated with the Beer Store and its owners. That Framework formed the basis for further negotiations with the Beer Store and its owners, culminating in a series of agreements that were signed and announced in September (the New Beer Agreements).

The New Beer Agreements, when fully implemented, will make a number of changes to the way that beer is retailed and distributed in Ontario:

• Ownership of the Beer Store will be opened up to all brewers with Ontario facilities that sell beer through the Beer Store.
• Governance of the Beer Store will be more transparent and accountable – smaller brewers will have board representation, and four independent directors (selected jointly by the Province and the original owners of the Beer Store) will represent the broader public interest.

• The Beer Store will be operated on a cost-recovery basis, with all brewers paying a fair share.

• The Beer Store will invest $100 million in capital expenditures to improve customer experience.

• 12-packs will be piloted in LCBO stores.

• Beer will be available for sale in up to 450 grocery stores in Ontario.

These changes represent a typically Canadian compromise: They preserve the benefits of Ontario’s current retail and distribution regime – relatively low costs, and a good balance of public revenue and lower consumer prices when compared to other Canadian jurisdictions – while making the system more fair for all participants and providing some enhancements to consumer convenience.

THE PREMIER’S BUSINESS ADVISOR: ONTARIO NOW HAS A CHIEF DEVELOPMENT OFFICER

In his ongoing role as the Premier’s Business Advisor, Ed Clark is lending his considerable reputation within the North American business community (he has been twice named by Barron’s as one of the world’s top 30 CEOs) to Premier Wynne’s agenda. He has recently signalled some of the initiatives that he feels are needed for Ontario to overcome its complacency and build upon its strengths (such as its public health and education systems, its open and tolerant society and its world-competitive tax system):

• becoming a leader in “smart” manufacturing and innovation

• helping small businesses to become more export-oriented, so they can achieve scale and focus on continued growth rather than selling out

• reducing unnecessary red tape by taking an outcome-based approach to regulation – with the goal of making government a source of competitive advantage

• shifting the Ontario economy to one that is knowledge-based and focused on the export of services

• opening up Ontario’s excellent hospitals and linking them more closely with the private sector, turning them into exporters of health services

• focusing on competing in industries where people are paid more, not less – such as advanced manufacturing, health, universities and consulting

• better capitalizing on Ontario’s huge innovation base in Ottawa, Toronto and Kitchener-Waterloo

These initiatives, if successful, could have a fundamental impact on the economy of Ontario, and Canada as a whole.
OTHER PROVINCES

Other provinces are struggling with comparable issues – or their own unique challenges – but not many of them will have an Ed Clark ready to help. We can expect to see other provinces looking at some of the initiatives that Ontario will be pursuing and asking similar questions: What government assets may help fund needed infrastructure investments? How can governments attract and grow businesses by easing their regulatory burden? How can their economies pivot from old industries to new? We will continue to monitor the situation across the country to determine the success of the initiatives that will undoubtedly be implemented in the months and years ahead.

Note: Osler acted for Hydro One on its IPO and for the Premier’s Advisory Council on Government Assets with respect to its work with the Beer Store.

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The politics of energy: Big changes in the oil patch

POLITICAL AND COMMERCIAL CLIMATE IN 2015

Unprecedented political, legal and market developments during 2015 posed significant challenges to the energy industry.

The extraordinary election of a New Democratic Party (NDP) majority in Alberta followed by a Liberal Party majority in Ottawa set in motion potentially significant changes in government policy affecting the energy industry, many of which are still under development. Provincially, corporations paid 2% more in income taxes immediately, and faced economic uncertainty from future royalty review and climate change initiatives. Federally, reform to the environmental assessment process and climate change regulation is expected, while promises to phase out fossil fuel subsidies, a pending moratorium on oil tanker traffic off B.C.’s North Coast and efforts to improve the duty to consult and accommodate First Nations also factor high on the federal government’s agenda. U.S. President Obama’s move to deny the presidential permit to build Keystone XL dealt a further blow to an industry whose global competitiveness requires export options.

From a market perspective, crude oil prices seesawed downward, with one month’s gains being erased by the next month’s losses. Energy companies slashed budgets, removing $31 billion from the economy. Job losses in the sector exceeded 35,000 and the “lower for longer” pricing reference became the new reality. OPEC maintained rather than curtailed production rates as Saudi Arabia ceased being the swing producer – perhaps in an attempt to slow the United States’s fracking boom and Canadian oil sands development, to create economic hardship for Russia, to secure relationships with European and Chinese buyers in a lower price environment, or some combination of these.

Significant oversupply dominated the year as onshore storage space dwindled and commercial tankers holding 100 million barrels sat anchored outside numerous ports in China, Malaysia, Indonesia and the Gulf of Mexico. Devastating terrorism attacks in Paris, mere weeks before the UN climate change conference there, added to the global pressures and uncertainty affecting the energy industry.
KEY LEGAL DEVELOPMENTS

(a) Taxes and Royalties

In June 2015, the Alberta government passed Bill 2 – *An Act to Restore Fairness in Public Revenue*, which received Royal Assent on June 29, 2015. Under this Bill, effective July 1, 2015, the corporate tax rate was increased from 10% to 12%. For 2015, corporate income tax will be prorated based on the number of days in the corporation’s taxation year that are before July 1, to which the prior 10% rate will apply, and the number of days after and including July 1, to which the new 12% rate will apply. In 2016, the 12% rate will apply for the full year.

Federally, the Liberal Party platform includes a promise to phase out fossil fuel subsidies. Full details on what this means are not currently known as the platform indicates that the Department of Finance will be instructed to conduct a detailed analysis of all fossil fuel subsidies. It is estimated that the phase-out will increase federal revenue by approximately $250 million by 2018.

A significant focal point of the provincial NDP platform was a promise to review the current oil and gas royalty regime and recommend changes to “ensure a full and fair return to the people of Alberta for their energy resources.” The government has appointed a four-person advisory panel, which began its review and public consultation process in late August 2015. With the process ongoing, the nature and scope of the changes to the royalty structure are uncertain. However, the panel’s mandate is to finish its review process by December 2015, with the current structure to remain in place until the end of 2016.

The Canadian Association of Petroleum Producers (CAPP) submitted a set of 60 recommendations to the Alberta government regarding the royalty review (CAPP Submission). The CAPP Submission stressed that for Alberta to remain competitive with other jurisdictions in attracting investment, the royalty review panel and the government must consider the full cost of doing business in Alberta. In addition to royalties, this would include municipal taxes, provincial corporate taxes at the new 12% rate, mineral rights and fees, carbon pricing policies and other costs.

(b) Regulatory Reform

The previous federal Conservative government attempted to streamline the process for approval of energy projects through an overhaul of the *Canadian Environmental Assessment Act*. The incoming Liberal government has promised further changes to the regulatory process, which will likely include repealing many of the changes made by the Conservatives. The framework and guiding principles for these changes are to: restore oversight and thorough environmental assessments under areas of federal jurisdiction; ensure decisions are based on science and evidence, which will include consideration of upstream carbon emissions in the assessment process; ensure that decisions serve the public interest; and provide ways for interested Canadians to express their views and for experts to meaningfully participate in assessments. Based on its platform, it is clear that the Liberal government intends to pay particular attention to the
role of Aboriginal peoples in the assessment process, promising to undertake a full review to ensure that the federal Crown is discharging its consultation, accommodation and consent obligations in regulatory processes.

The NDP government has stated its intent to resolve what it sees as the “conflicting mandate” of the Alberta Energy Regulator (AER) as both promoter and regulator of the energy industry. The AER was established by the provincial Progressive Conservatives to try to streamline the regulatory process by having one agency responsible for all environmental legislation and regulations. The AER is currently responsible for the Public Lands Act, the Environmental Protection and Enhancement Act and the Water Act. It is not clear what the restructured regulatory bodies would be responsible for, nor how they would interact to ensure consistency and efficiency.

(c) Climate Change

Both the Alberta NDP and federal Liberal Party have pledged to take steps to address climate change. However, policy development at both levels is in the early stages. The Liberal platform promises a collaborative approach between the federal, provincial and territorial governments to establish emissions reduction targets and ensure that the provinces receive federal funding while retaining flexibility to meet these targets through their own policies and pricing strategies.

The Alberta NDP announced a robust climate change leadership plan on November 22, 2015. It is based on the recommendations of the province's Climate Change Advisory Panel, whose report was released concurrently with the provincial government’s press conference. Although it is unclear which aspects of the Panel’s detailed recommendations will be adopted into law, the cornerstones of the new plan are: (1) an accelerated phase-out of coal, (2) an economy-wide carbon levy, (3) an absolute cap on oil sands emissions and (4) a methane gas emissions reduction plan.

The first prong of the new strategy will be to accelerate the phase-out of coal-fired power production by 2030. In its place, natural gas-fired power production is expected to provide the base load reliability while renewable power is expected to fill two-thirds of the new capacity. The province is expected to provide limited long-term fixed price emission offset credit contracts to renewable project developers to mitigate some of the merchant power pricing risk that has historically stymied renewable project financing in Alberta. However, both natural gas and renewable power producers will have to contend with merchant power pricing risk when securing financing, and coal plant operators spurned by the new plan may refuse to make the capital investments to smoothly transition the balance of power sources in Alberta.

The second prong of the new strategy is a carbon price applicable to the wider economy. In addition to the increased carbon levy of $30 per tonne to be paid by large industrial emitters, announced in June 2015, Albertans will be subject to an economy-wide carbon tax of $20 per tonne effective January 2017, growing to $30 per tonne by January 2018. The Climate Change Advisory Panel also recommended an annual escalator of 2% more than inflation, but it is not clear whether the government will adopt that recommendation. The broader economy-wide carbon price is expected to touch 78–90% of all emissions in the
province, the largest proportion in Canada. A key feature of the proposal is the pledge that all proceeds of the broader carbon tax would remain in and be put to work within provincial borders, through investment in green infrastructure (such as public transit), energy-efficiency programs, renewable energy research, development and investment (including the payment of emission offset contracts to be offered at auction for renewable power projects), and an adjustment fund. This fund would be used to help lower-income Albertans offset the cost increases of carbon pricing and to provide financial support to small businesses, First Nations and those working in coal facilities subject to the accelerated phase-out of coal-fired power production.

The third prong of the new plan is an absolute limit on oil sands emissions of 100 megatonnes (Mt) per year, with provisions for new upgrading and cogeneration. This announcement was largely unexpected and of great significance, since oil sands production in the province is currently responsible for approximately 70 Mt of annual emissions. For new projects with top-quartile or better potential emissions performance, the new treatment may provide significant advantages, but for those with high prospective emissions intensities (or significant risk of such an outcome), the policy will magnify risks and may make such projects less attractive. An absolute cap on oil sands emissions is a significant departure from the previous intensity-based cap and risks stymying the development of future oil sands projects. Given that the industry currently emits 70% of its new capped emissions allotment – and additional approved, but not yet operational, projects will contribute to such emissions – unless there are significant efficiency-based emissions reductions from existing projects, new projects will have to compete for the remaining capacity in order to come online. Companies may have incentives to seek regulatory approval for new projects before the absolute cap is reached. An absolute cap without the opportunity to buy or trade emissions capacity could also stifle the development of new projects.

As the fourth prong of the new plan, a methane gas emissions reduction strategy is intended to reduce emissions from Alberta’s oil and gas operations by 45% of 2014 levels by 2025. The details of this strategy are expected to unfold in early 2016.

(d) Transparency Legislation

In June 2015, the Extractive Sector Transparency Measures Act was proclaimed into force by the previous Conservative government in furtherance of its international anti-corruption and transparency commitments. This legislation requires extractive sector businesses operating in Canada to make public and report payments made to domestic and foreign governments in relation to the commercial development of oil, gas or minerals. For further analysis of the legislation please see the article entitled “Continuing crackdown on foreign corruption and new transparency measures.”

(e) Oil Pipeline Projects

On November 6, 2015, President Obama officially denied the presidential permit required to build the Keystone XL Pipeline Project (KXL). This decision will place greater importance on the other proposed pipeline projects to export oil from Canada: Trans Mountain Expansion Project, proposed by Kinder
Morgan; Energy East Pipeline, proposed by TransCanada PipeLines; and Northern Gateway, proposed by Enbridge. Each of these projects will face uncertain regulatory regimes, as the Liberal Party has promised significant changes to the assessment and approval process for such projects. Within weeks of being elected, Prime Minister Trudeau instructed federal Transport Minister Garneau to “formalize a moratorium on crude oil traffic on British Columbia’s North Coast, working in collaboration with the Minister of Fisheries, Oceans and the Canadian Coast Guard, the Minister of Natural Resources and the Minister of Environment and Climate Change to develop an approach,” signalling another blow to Canada’s pipeline industry’s ability to export crude oil.

Both the NDP and Liberal Party expressed disappointment at President Obama’s decision and offered support for the idea that Canada’s energy resources need improved access to global markets. However, they have also been circumspect in providing support for the remaining proposed projects. The Liberal Party has stated that each of the projects will have to undergo thorough regulatory review, and declined to pre-judge the outcome of the review. However, the Liberal Party has been clear in its position regarding Northern Gateway, promising to reverse the decision of the Conservative government to approve the project, citing concerns that the review process did not adequately consult with local communities and Aboriginal peoples.

CONCLUSION

How Canada’s energy industry will weather the challenges presented by such profound political and market developments remains to be seen, but one thing is clear. Our clients are entrepreneurial, responsible leaders in an industry the world depends on, and have made unparalleled contributions to the Canadian economy. As conventional oil supplies dwindle, let’s hope that when undertaking regulatory reforms on the royalty, climate change, duty to consult, and pipeline fronts, our politicians heed CAPP’s advice: before any value can be captured from such initiatives, resources need to be developed and development is expensive. Hopefully the result of such reforms will continue to motivate energy companies to invest the billions of dollars they invest annually in the very risky economics of an industry whose geopolitical and economic volatility created more barriers than opportunities in 2015.

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In 2015, the Ontario government’s ambitious plan to modernize the delivery of gambling entertainment options was reinvigorated after overcoming a number of challenges and delays. This Modernization Plan is yet another example – along with the Hydro One IPO and the restructuring of beer retail sales channels in the province – of Ontario’s desire to optimize assets and raise money for priorities such as transit and infrastructure. The revitalization of the gaming industry is opening up opportunities for expansion and growth across the province.

THE LEAD-UP TO MODERNIZATION

By many measures, Ontario Lottery and Gaming Corporation (OLG), the Crown corporation responsible for the conduct and management of commercial gaming in Ontario, is one of the biggest gaming organizations in North America. With over 30 gaming sites and 10,000 lottery points of sale, OLG’s revenues total nearly $7 billion annually, with contributions of approximately $2 billion of net profits to the province to support government priorities like healthcare, education and infrastructure. In addition, host municipalities receive just under $100 million in the aggregate from gaming revenues every year.

Recognizing the need to increase net profits to the province and optimize the delivery of land-based gaming, the government began its ambitious modernization initiative in 2012. At that time, OLG’s land-based gaming offering included over 23,000 slots and 500 table games. Nearly all gaming venues were owned and operated by OLG, with day-to-day operational services being provided by private sector operators for only a handful of facilities. OLG employed just under 18,000 people across Ontario. The cost of all of these properties and employees was borne by the public purse. With minor exceptions, all capital improvements also fully relied on public funding.
Conceding that this model was not sustainable in the long term, OLG undertook a strategic business review, consultations with stakeholders and comparative analyses of gaming in multiple jurisdictions. After obtaining government approval, OLG launched its Modernization Plan. From the very beginning, one of the primary drivers behind the modernization was to lessen the burden of capital costs on the public purse and maximize the opportunity for private sector investment. Another key driver was the recognition that private sector expertise can and should be leveraged better, not only to spur development and investment but also to provide enhanced, customer-focused operational services within a heavily regulated model. With forecasted new private sector capital investment of $3 billion expected to stimulate economic activity, the original projections were that all modernization initiatives combined would result in additional annual net profit to the province of $1.3 billion by 2017, along with over 2,300 net new gaming jobs and over 4,000 service sector jobs in related fields such as hospitality.

The province’s vision has always been to have new or redeveloped “casino gaming” facilities in Ontario, with the capital and operational risks borne by the private sector as opposed to the public, with a streamlined OLG providing operational “conduct and management” oversight. A parallel initiative to modernize the charitable bingo gaming sector by converting participating existing bingo halls to electronic bingo centres was also expected to generate more than $475 million for charitable organizations over its implementation period.

CHALLENGES AND ROADBLOCKS

Despite the best of intentions, the implementation of the modernization initiative has faced delays. The reasons for the delays include:

• backlash to the province’s decision to cancel the program to fund the horse racing industry by means of slot machines at racetracks
• the subsequent decision to continue funding the horse racing industry and integrate horse racing with gaming
• the development of a new host community funding formula
• decisions by some municipalities to reject new facilities or the relocation of existing facilities
• leadership change, including the OLG’s CEO and the Board of Directors
• change in the Ontario government’s leadership, including the Premier and Minister of Finance
• the OLG’s procurement process taking longer than originally anticipated

OVERCOMING DELAYS TO MODERNIZATION

In 2015, gaming modernization picked up momentum with a number of key developments:

• the appointment of Stephen Rigby, the former National Security Advisor to the Prime Minister of Canada, as the new President and CEO of OLG
the closing of seven RFPQs, including for the Greater Toronto Area, as part of the procurement process to increase private sector involvement

the approval by Toronto City Council, after many heated debates and lengthy consultations, of the expansion of gaming at Woodbine Racetrack with a view to developing an integrated casino entertainment complex

Ontario’s renewed commitment to integrating horse racing with casino gaming

the awarding of the first Gaming Bundle (the Ontario “East” Bundle, consisting of Belleville, Peterborough, and Thousand Islands sites) to Great Canadian Gaming Corporation, nearly three years after commencement of the procurement process

Although the original implementation plan and projections have been revised because of the evolving nature of modernization, the initiative continues to draw considerable interest from world-class gaming operators, developers and financiers. With the upswing in activity over the last year, and the anticipated release of multiple RFPs in the coming weeks and months, the province is poised to transition to a more modern oversight model that is based on a renewed partnership with the private sector. The overall goal is to spur economic activity, develop sustainable, modern and efficient operations, and provide Ontarians and visitors to Ontario with innovative entertainment options in a socially responsible way that will optimize funding for good causes.

THE GLOBAL M&A PICTURE

While OLG has been focusing on modernization, the global gaming industry has been experiencing a wave of mergers and acquisitions, triggered in large part by the significant growth of mobile and online platforms, the introduction of new taxation measures and the increased regulation that followed suit. The requirement to meet more onerous regulatory requirements, as well as the increased need to promote products in a competitive landscape, has increased compliance-related costs and operating expenses for industry players. The economies of scale under such circumstances have resulted in increased M&A activity.

The number and scale of transactions in 2015 made it the biggest year yet for M&A in this sector. We witnessed three proposed mega-deals: the £2.3 billion tie-up between Ladbrokes and Gala Coral in July 2015, a £6 billion merger between Betfair and Paddy Power in August 2015, and GVC’s £1.1 billion acquisition of Bwin.party in September 2015.

These deals came on the heels of the mega M&A transaction in Canada that took place in the summer of 2014, when Montreal-based Amaya Inc. (Amaya), represented by Osler, purchased privately held Oldford Group, then owner and operator of PokerStars and Full Tilt, for US$4.9 billion (the Oldford Group Acquisition). Prior to and following the completion of the Oldford Group Acquisition, Amaya went on a divestiture spree by unloading its land-based gaming assets and other non-core assets. These divestitures contributed to the initial public offering of three new issuers: The Intertain Group Ltd. (TSX: IT), NYX Gaming Group Ltd. (TSXV: NYX) and Innova Gaming Group Inc. (TSX: IGG).
As a result of these transactions and others in the market, Canada is quickly being recognized as one of the world-leading jurisdictions for gaming companies.

Our European counterparts saw a great deal of action as well, including the acquisition of IGT for £3.591 billion by Gtech in July 2014, followed by the purchase of Bally Technologies for £3.04 billion by Scientific Games in November 2014.

It is worth noting that some of the world’s largest and most well-known private equity firms participated in financing the recent M&A activity, fuelling expectations that M&A activity in the Canadian and global gaming industry will continue to grow in 2016. Combined with the anticipated awarding by OLG of multiple Gaming Bundles, and all of the concomitant transitional, operational and development activity, the gaming industry in Canada is poised for significant activity in 2016.

Note: In 2015, Osler launched its Gaming Specialty Group.

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Recently, there has been significant debate and discussion regarding retirement savings adequacy and coverage in Canada. Are we saving enough? Should there be expanded mandatory government sponsored plans, such as the Canada Pension Plan (CPP)? What role should employers and/or governments play in improving pension coverage in Canada? These important social questions have thrust pensions into the media and political spotlight. Consequently, politicians are now paying attention to pension matters – so much so that pensions have become an election issue – with the result that legislators are introducing new laws across the country that will affect employers and the Canadian retirement income system in general.

This renewed focus on pensions has led to ongoing reforms to pension standards legislation, including the creation of new innovative plan designs like Pooled Registered Pension Plans, Voluntary Retirement Savings Plans and Target Benefit Plans. However, perhaps the most significant and innovative development yet is the Ontario government’s proposal to implement the Ontario Retirement Pension Plan (ORPP), which will cover all employers/employees in Ontario who are not in a comparable workplace pension plan. While there is considerable uncertainty at this time regarding any potential CPP expansion at the federal level, we do know that the Ontario government is currently proceeding with the ORPP.

**WHAT IS THE ORPP?**

The ORPP is intended to close the retirement savings gap for Ontarians without a secure workplace pension plan. Because of the unwillingness of the former federal government to consider mandatory expansion of the CPP, the Ontario government has taken steps to implement the ORPP and has passed two bills providing certain details regarding the ORPP thus far.
The ORPP is intended to be supplemental to the CPP. The plan aims to provide a predictable source of retirement income based on an employee/employer contribution rate of up to 1.9% each. The Ontario government is committed to ensuring that by 2020 every employer will participate in the ORPP or a comparable workplace pension plan for all employees in Ontario.

WHO WILL THE ORPP COVER AND WHO IS EXEMPT?

As discussed in more detail below, the ORPP will be phased in to apply to employers that do not provide a comparable workplace pension plan to all their employees. In 2016, employers will be canvassed to determine whether they provide a registered pension plan and to establish their phase-in timing for participation in the ORPP where applicable.

The Ontario government defines a comparable workplace pension plan as a registered pension plan that meets certain minimum thresholds. Defined benefit (DB) pension plans will be comparable plans where the plan provides a minimum annual benefit accrual rate of 0.5%. Defined contribution (DC) pension plans must have a minimum annual contribution rate of 8% of pay and require at least 50% of that minimum to be contributions by the employer to be considered a comparable plan. It is important to note that only “registered pension plans” may qualify. Accordingly, a group RRSP or deferred profit-sharing plan (DPSP) would not qualify as a comparable workplace pension plan, regardless of the contribution rates.

PHASE-IN SCHEDULE FOR THE ORPP

The Ontario government plans to phase in the ORPP in four waves, with the first wave being in January 2017. Employers first need to determine what wave they fall within. If the employer does not currently offer a registered pension plan, the employer will fall within wave 1, 2 or 3, depending on the size of the employer. Employers that do offer a registered pension plan will fall within wave 4.

- **Wave 1**: Large employers (500 or more employees) without registered workplace pension plans – ORPP contributions to start January 1, 2017
- **Wave 2**: Medium employers (50–499 employees) without registered workplace pension plans – ORPP contributions to start January 1, 2018
- **Wave 3**: Small employers (49 or fewer employees) without registered workplace pension plans – ORPP contributions to start January 1, 2019
- **Wave 4**: Employers with non-comparable registered workplace pension plans or comparable workplace pension plans that do not apply to all Ontario employees – ORPP contributions to start January 1, 2020

Wave 4 employers will have until 2020 to determine whether to amend their registered pension plan to cover all employees in a comparable plan or to participate in the ORPP for employees who are not so covered. By 2020, employers of all sizes will be required to provide a comparable workplace...
pension plan or participate in the ORPP. Where all employees of an employer participate in a comparable workplace pension plan, the employer will not be required to participate in the ORPP.

For the first three waves, the contribution rate for both employers and employees will start at 0.8% for the first year and 1.6% for the second year, and will reach the fully phased-in rate of 1.9% each by 2019, 2020 and 2021, respectively. The fourth wave will start at the fully phased-in contribution rate of 1.9% in 2020. By 2021, the fully phased-in contribution rate will be 3.8% split equally between the employer and the employee.

WHAT SHOULD EMPLOYERS BE DOING NOW?

The ORPP will be implemented in Ontario effective January 1, 2017. Accordingly, employers need to get ready for the change.

Employers need to examine their existing workforce, pension and retirement savings plans to determine if they will be subject to the ORPP. If an employer currently has a registered pension plan in place that would not be a comparable plan, the employer should consider whether it is advisable to change its plan to a comparable plan. If an employer currently sponsors a group RRSP or DPSP or does not have any retirement plan in place, the employer should consider whether to implement or commence participation in a new comparable plan. Any employer considering plan amendments to make their plan comparable for purposes of the ORPP or establishing a new comparable plan should seek legal advice on the implementation of the plan amendment or new registered pension plan.

Employers also need to examine their existing employment contracts and collective agreements. An employer that will participate in the ORPP may wish to consult labour counsel and potentially take this into consideration in collective bargaining, as it will be an additional benefit cost for the employer. It will also come into account in total projected compensation costs, unless the employer makes other benefits or compensation changes. Again, any such proposed changes should be discussed with legal counsel.

WHAT ABOUT CPP EXPANSION?

The recent federal election created uncertainty surrounding pension reform in Canada at both the federal and provincial levels. Will there be CPP expansion? How would it impact the ORPP? With the recent change of the federal government, the Ontario government has stated that Premier Kathleen Wynne and Prime Minister Justin Trudeau will be “active partners” in a national discussion regarding pension enhancement, including the CPP and the ORPP.

The CPP is a joint pension program between the federal government and the provinces, and CPP expansion would therefore require the support of the federal government, as well as two-thirds of the provinces, representing two-thirds of citizens. Accordingly, a key component of any CPP expansion would be strong federal backing, as well as obtaining the requisite support of the provinces, which is potentially daunting.
At this stage, whether CPP expansion will proceed and what any such expansion would look like is unclear. If the CPP were to be sufficiently expanded it is possible that the ORPP would be incorporated in some manner into the CPP expansion. What remains clear is that some mandatory expansion of public plans will occur to improve the pension plight of Ontarians, and perhaps Canadians, and employers will have to determine how to change their plan designs so as to integrate with these plans.

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A new Liberal majority government was elected federally in 2015 following a campaign that included a pledge to finance certain campaign commitments, in part by increasing taxes for the wealthiest Canadian individuals. A key challenge for the government will be to strike a fair balance between increasing revenues and redistributing income, on the one hand, and creating appropriate and effective incentives for innovation and productivity on the other.

The Liberals’ campaign included two key tax commitments – a promise to increase taxes on individuals with incomes in excess of $200,000 with a new top federal marginal tax rate of 33% and a promise to reduce the ability of high income individuals to obtain tax-preferred stock option benefits by imposing a cap that would apply to employees with over $100,000 in annual stock option gains.

Stock option rules in Canada currently compare favourably with those in our largest neighbour (and competitor for tech talent), the United States. Under existing Canadian tax rules, an employee who acquires shares upon the exercise of an employment stock option is allowed a tax deduction of 50% of the employment benefit (this benefit is calculated as the difference between the fair market value of the share acquired over the exercise price paid by the employee to acquire the share), provided that certain other conditions are met. The effect of this deduction is to tax the stock option benefit at the rate applicable to capital gains – which is one-half of the rate that would otherwise apply to ordinary employment income.

The new Liberal government proposes to change these rules. Although the government’s November 20, 2015 “Update of Economics and Fiscal Projections” did not provide any formal guidance or proposal, the Honourable Bill Morneau, Minister of Finance, stated that details of the proposal remain to be developed “in the next few months.” He did provide some comfort, however, that any changes to the taxation of stock options on tech companies’ ability to attract and retain the best talent.
changes to the tax rules relating to employment stock options would only affect stock options granted after the government has settled upon a course of action in this regard. Employment stock options granted prior to that time will remain subject to the current taxation regime and should not be affected by the government’s proposal.

Employee stock options are frequently used as part of a compensation package in the technology sector, particularly in start-up companies that are cash-constrained and might otherwise struggle to attract the top talent they need to advance their business. The new government should carefully consider the potential impact of the proposed changes to the taxation of stock options on tech companies’ ability to attract and retain the best talent.

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This past year was marked by a few major developments in Canadian securities laws that could lead to significant changes in practice, such as the proposed reform of Canada’s take-over bid regime. For the most part, however, 2015 saw more evolutionary developments such as the introduction of several new prospectus exemptions and the imposition of stricter investor protections for individuals. Here is our list of the year’s most notable developments:

**CCMRS – A MARCH TOWARDS A NATIONAL SECURITIES REGULATOR?**

The push by a number of the provinces and the federal government to create a common securities regulatory regime (the Cooperative Capital Markets Regulatory System) continued to move forward in 2015. In particular, updated draft legislation for the uniform [Capital Markets Act](#), draft initial regulations and related materials were published for comment on August 25, 2015, with the comment period remaining open until December 23, 2015. It remains to be seen how much political priority will be given to the initiative by the recently elected federal Liberal government, given that the initiative was previously backed by the prior Conservative government at the federal level.

**NEW TAKEOVER BID REGIME – HIGHER HURDLES FOR BIDDERS**

Following years of debate among market participants regarding the role of defensive tactics and the use of shareholder rights plans in particular, in March 2015 the CSA published for comment significant proposed changes to the takeover bid regime in Canada. The changes will effectively give the target of a hostile bid 120 days to respond, as it will require the bid to remain open for at least 120 days unless the target’s board agrees to a shorter period (of not less
than 35 days) or unless the target enters into an alternative transaction. The new rules will also require a mandatory 10-day extension of a bid following the satisfaction or waiver of all conditions, including the minimum tender requirement. All bids will be subject to a mandatory minimum tender requirement of more than 50% of the outstanding securities not already held by the bidder or its joint actors. The new take-over bid regime, if implemented as currently proposed, will likely result in the end of shareholder rights plan or “poison pill” hearings by regulators in most cases, since it is expected that securities regulators will cease trade rights plans after 120-day bids, absent unusual circumstances. Please refer to the article entitled "The swan song of poison pill hearings?" for more information.

CROWDFUNDING COMES TO CANADA

Given the rapid growth of crowdfunding as a means for early-stage companies to access capital, it was only a matter of time before securities regulators established a legal framework for the practice. The CSA has created a crowdfunding prospectus exemption that will come into force on January 25, 2016. Under this regime, issuers will be required to prepare an offering document containing all information that investors should know about their business; investors will be subject to an investment limit on each individual investment and overall annual limits that vary depending on the investor’s accreditation status; investors will be required to sign a prescribed risk acknowledgement form confirming they are aware of the risks of the investment; and issuers will be required to continue to make annual financial statements and certain other information available to investors on an ongoing basis, even if they are not subject to public company reporting obligations. The securities may only be sold through a registered “funding portal” meeting prescribed requirements, and there will be a prohibition on advertising and general solicitation of the securities.

REFORMS TO THE EXEMPT MARKET SYSTEM FOR CAPITAL RAISING

A number of other important revisions to the exempt market system in Canada will have a significant impact on the way in which prospectus-exempt financings are conducted across the country. Two of these initiatives reflect in part the constrained financing environment for certain smaller issuers. The first is the introduction of a new exemption aimed at allowing exempt issuances to be made to existing securityholders, and the second is a revised rights offering regime designed to streamline the rights offering process and facilitate the (relatively rare) usage of the exemption. Other developments in 2015 include a series of amendments in Ontario designed to harmonize exemptions relating to offering memorandums and family, friends and business associates with other jurisdictions. Finally, a number of amendments designed to enhance investor protections in the context of exempt offerings were introduced or published in draft form, including the introduction of a risk acknowledgement form for accredited investors that do not meet financial asset requirements and a new substantially expanded form of exempt trade report.
OSC WHISTLEBLOWER INITIATIVE
The Ontario Securities Commission (OSC) has unveiled a proposed Whistleblower Program, which would be the first program of its kind in Canada. Though it is modelled on the SEC’s whistleblower program in the United States, the OSC’s proposal seeks to avoid some of the more egregious aspects of that program, which resulted in 120 whistleblower award claims in 2015 alone, and in one case resulted in a payment of over $30 million to a single individual. Further details regarding the OSC’s proposed Whistleblower Program are set out in the article entitled “Securities enforcement: Big win and broader tools for regulators.”

PROXY VOTING INFRASTRUCTURE – THE LONG AND WINDING ROAD CONTINUES
The CSA has been engaged in a review of the Canadian voting infrastructure since August 2013, in the wake of various concerns expressed by market participants regarding the integrity and reliability of the network of organizations, systems, legal rules and market practices that support the solicitation, collection, submission and tabulation of proxy votes for shareholder meetings in the context of the Canadian beneficial share ownership system. CSA staff issued a report in January 2015 that discussed the progress made to date in their review and outlined next steps. The progress report confirmed that the CSA believes the current system to be fragmented and requiring modernization and improvement, and identified a number of specific improvements that must be made in the vote reconciliation process. We expect this review process to continue in 2016 and beyond. In the spring of 2015, the CSA also chose not to regulate proxy advisory firms such as ISS and Glass Lewis, opting instead to issue guidance on best practices that proxy advisory firms should follow.

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In what may be the last major rights plan decision prior to the implementation of proposed amendments to the take-over bid regime (Proposed Amendments) that will give target issuers 120 days to respond to a hostile take-over bid, on November 30, 2015 the Alberta Securities Commission (ASC) ordered that Canadian Oil Sands Limited’s (COS) shareholder rights plan would be cease traded 91 days after Suncor Energy Inc. (Suncor) formally commenced its $4.3 billion hostile bid for COS.

The largest hostile bid in Canada this year, Suncor’s offer commenced on October 5, 2015 and was intended to be structured as a 60-day “permitted bid” under COS’s rights plan in effect at that time. Suncor made its offer after the release of the Proposed Amendments – the most significant changes to the take-over bid regime in 15 years – but before they have come into force.

Under the Proposed Amendments, all non-exempt take-over bids (including partial bids) will be subject to the following new requirements:

• 50% Minimum Tender Requirement – Bids will be 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, or over which control or direction is exercised, by the bidder and its joint actors.

• 10-Day Extension Requirement – Following the satisfaction of the Minimum Tender Requirement and the satisfaction or waiver of all other terms and conditions, bids will be required to be extended for an additional 10-day period.

• 120-Day Bid Period – Bids will be required to remain open for a minimum of 120 days, subject to two exceptions. First, the target issuer’s board of directors may issue a “deposit period news release” in respect of a proposed or commenced take-over bid providing for an initial bid period that is shorter than 120 days but not less than 35 days. If so, then all other outstanding or subsequent bids
will also be entitled to the shorter minimum deposit period counted from the
date that other bid is made. Second, if an issuer issues a news release that it
has entered into an “alternative transaction” – effectively a friendly change of
control transaction, such as an arrangement – then all other outstanding or
subsequent bids will be entitled to a minimum 35-day deposit period counted
from the date that other bid is made.

(For more information, refer to our Update entitled “It’s about time – CSA
proposes amended take-over bid regime” on osler.com.)

Against this regulatory backdrop, and having regard to what the COS board
concluded was an opportunistic bid by Suncor made in unique and volatile
market circumstances and timed to expire just after the release of critical budget
information, COS’s board authorized the adoption of a second tactical rights
plan that provided for a 120-day permitted bid. The Suncor bid was not a
permitted bid for purposes of this second rights plan.

In explaining its order, the ASC noted that the Proposed Amendments are not
yet in force and applied the factors set out in the previous Royal Host and Regal
decisions in determining not whether but when it was time for the pill to go.
The ASC found that although COS did not obtain shareholder approval of the
second rights plan, this fact was not determinative. The ASC concluded there was
still a real and substantial possibility that COS could surface a superior alternative
if its value-maximizing process was given more time to unfold. Accordingly, the
ASC concluded that a total of 91 days was appropriate, and ordered the rights
plan to be cease traded at 6:00 p.m. (Calgary time) on January 4, 2016. At the
time of publication, formal written reasons for the ASC’s decision had not yet
been released.

It is unclear when the Proposed Amendments will be implemented, and if there
will be any changes to them in the wake of comments received by the Canadian
Securities Administrators (CSA). It is possible they will be adopted in the first
half of 2016.

Pending their implementation, the ASC’s decision is highly relevant to hostile
take-over bids made during this transition period. The ASC’s decision is a
welcome acknowledgement that target companies with existing rights plans that have
60-day permitted bids may legitimately require more than 60 days to
respond effectively to a hostile bid and that circumstances can and often will change
between the time of initial board and shareholder approval of a 60-day permitted bid
rights plan and the time of an actual hostile bid.

A notable omission from the Proposed Amendments is how rights plans will
ultimately be treated following their adoption. This is of particular interest
considering that the Proposed Amendments arose out of competing proposals
from the CSA and Autorité des marchés financiers of Québec (AMF) on rights
plans and defensive tactics more generally. The AMF and the balance of the CSA’s
members have previously aired different perspectives on the most appropriate
approach to the regulation of defensive tactics, which may account for the
Proposed Amendments’ silence on this issue.

If implemented in their current form, we anticipate that the Proposed Amendments
will have the following effects on Canadian rights plans:
• Rights plans will be waived by targets or cease traded by securities regulators after a 120-day formal bid, absent unusual circumstances, and therefore securities regulators will be called upon much less frequently to hold hearings as to when “the pill must go.” This will result in greater regulatory certainty as to timing of bids than under the current regime.

• Since the Proposed Amendments will give a target issuer 120 days to respond to a hostile bid, in many cases target issuers may conclude that they have sufficient time to respond to a hostile bid without needing to adopt a rights plan. Accordingly, we would expect that there will be less of an incentive for issuers to adopt rights plans either “strategically” at their annual meetings or “tactically” in the face of a bid.

• As the Proposed Amendments do not apply to exempt bids, there will still be a role for rights plans in protecting target issuers against “creeping bids,” such as bids made through the normal course purchase and private agreement exemptions. We therefore expect issuers that are concerned about the possibility of creeping bids to continue to adopt rights plans.

We would encourage the CSA to provide guidance on their proposed approach to rights plans if and when the Proposed Amendments are implemented. As the COS rights plan litigation has illustrated, the current regime results in uncertainty as to how much time target issuers have to respond to a bid. The CSA should make the rules and timelines as clear as possible in the circumstances.

Note: Osler is acting for COS in response to Suncor’s hostile bid and represented COS before the ASC.

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The wave of special purpose acquisition corporation (SPAC) offerings was arguably the biggest development in Canada’s capital markets in 2015. Although the TSX adopted SPAC rules in 2008, the first Canadian SPAC offering was only completed in April 2015. Four other deals followed in quick succession, raising over $1.1 billion in capital.

<table>
<thead>
<tr>
<th>SPAC</th>
<th>Capital Raised</th>
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<tbody>
<tr>
<td>Dundee Acquisition Ltd.</td>
<td>$112.3 MM</td>
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<tr>
<td>INFOR Acquisition Corp.</td>
<td>$230.0 MM</td>
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<tr>
<td>Alignvest Acquisition Corporation</td>
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<tr>
<td>Acasta Enterprises Inc.</td>
<td>$402.5 MM</td>
</tr>
<tr>
<td>Gibraltar Growth Corporation</td>
<td>$104.5 MM</td>
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**HOW SPAC OFFERINGS ARE STRUCTURED**

A SPAC is a publicly traded shell corporation that is formed to complete a “qualifying acquisition” of an operating business within 24 months (with the potential of an extension to 36 months if approved by investors). If a deal is not completed, investors get their money back with interest.

In all SPAC deals to date, the public has acquired Class A units, consisting of a Class A restricted voting share and 1/2 of a Class B share purchase warrant (one full warrant in the Gibraltar deal), at a price of $10 per share. Each warrant is exercisable for one Class B voting share at a price of $11.50 per share, and the warrants expire five years after completion of a qualifying acquisition. Each Class A restricted voting share automatically converts into a Class B voting share upon completion of a qualifying acquisition. The gross proceeds of the issuance of Class A units are held in escrow pending completion of a qualifying acquisition.
acquisition and are invested in short-term Canadian government securities with a maturity of 180 days or less.

The founders of the SPAC – a sponsoring entity and certain directors and officers – provide seed financing to the SPAC by purchasing Class B units, consisting of a Class B voting share and 1/2 of a Class B share purchase warrant (one full warrant in the Gibraltar deal), also at a price of $10 per unit. The seed financing covers underwriting fees and legal and other fees in connection with the IPO and qualifying acquisition.

Before the IPO, the founders also acquire initial shareholdings that constitute 20% of the Class B shares for nominal consideration. These “founders’ shares” compensate the founders for the risk they have assumed with their seed capital, for their efforts in organizing the SPAC and for their ability to source and execute a successful qualifying acquisition. As a result, the average cost of the Class B shares for the founders (including the founders’ shares and the Class B shares underlying the Class B units) has been in the range of $1.22 to $1.33 per share, as compared to $10 per Class A share for the public. The founders’ shares cannot be traded until the earlier of one year following the closing of a qualifying acquisition and the date on which the closing price of the Class B shares equals or exceeds $12 per share for 20 trading days within a 30-day trading period. In addition, 25% of the founders’ shares are subject to forfeiture unless the closing price of the Class B shares exceeds $13 for 20 trading days within a 30-day trading period in the five years following the qualifying acquisition.

A qualifying acquisition (or combination of related acquisitions) must have a fair market value of not less than 80% of the assets held in escrow and must be approved at a shareholders’ meeting by a majority of votes cast by Class A and Class B shareholders voting together as a single class. If the qualifying acquisition is approved by shareholders, the SPAC uses the escrowed funds to complete the acquisition (most likely with additional debt financing and the issuance of equity to the owners of the target business).

If the qualifying acquisition is not approved by shareholders and no qualifying acquisition is completed within the permitted timeline, escrowed funds are returned to the shareholders.

Class A shareholders have the right to exercise redemption rights in connection with the shareholders’ meeting to vote on a qualifying acquisition – regardless of whether they vote for or against or do not vote at all on the qualifying acquisition. However, in the deals to date, no single shareholder (together with any joint actors) can redeem more than 15% of the outstanding Class A shares. In addition, Class A shareholders have the right to keep their purchase warrants after they have redeemed their Class A shares.

WILL SPACs CONTINUE TO BE A VIABLE ASSET CLASS?

A SPAC presents a potentially favourable investment opportunity to shareholders. They are effectively assured of a T-Bill return over a 24-month period, with the potential of further upside on their equity participation if a qualifying acquisition is completed.

In 2015, SPACs represented a new and attractive investment option. Whether SPACs will continue to be a viable asset class will likely depend on the current group of SPACs completing successful qualifying acquisitions.
SPACs are potentially attractive for certain kinds of businesses that are considering either an IPO or a sale. A SPAC transaction may be the most desirable option where the owners of the business would like to remain in control but monetize a sizable stake, want a pre-established shareholder base, can benefit from the SPAC’s existing management team and experience, or where the IPO or M&A market may otherwise be closed.

However, SPACs also have certain limitations. With respect to a sale transaction, a SPAC must obtain shareholder approval before completing a deal. Other bidders aren’t typically subject to the same completion risk. Even if shareholder approval is obtained, shareholders may redeem too many shares, which could deplete the available cash and result in the SPAC being unable to complete the qualifying acquisition. Furthermore, without additional financing, SPACs are unable to provide deposits or pay break fees if deals are not completed, since their cash is escrowed.

Going public through a SPAC is also not suitable for everyone. While marketing risk is avoided, it is replaced by the risk of having to obtain shareholder approval, as in a sale transaction. In addition, many issuers that go public prefer to do so directly rather than through a pre-existing publicly traded vehicle.

The United States has a fairly robust SPAC market, with some notable successes. Data from the United States from 2003 through September 2015 show that 228 SPACs completed IPOs, raising US$29 billion. Of these, 56% completed an acquisition, 1% announced an acquisition that has not yet been completed, 33% liquidated and 10% are still looking for an acquisition. See “SPAC 2.0 – A Lightning Start, What’s Next?”, industry report by 4Front Capital Partners Inc., dated September 28, 2015.

Until one or more of the current group of Canadian SPACs completes a qualifying acquisition, it may be that the market window for new SPAC offerings is closed (although two SPACs – Avingstone Acquisition Corporation and Kew Media Group Inc. – have filed preliminary prospectuses). SPACs have become a permanent feature of the U.S. capital markets and there is no reason to think that a similar market in Canada won’t also emerge. Time will tell how big a long-term market exists and whether 2015’s initial wave of transactions will spawn more in the future.

Note: Osler acted for the underwriters on the Alignvest Acquisition Corporation SPAC offering.

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Board composition and recruitment were key governance issues in 2015 as a result of changes to corporate governance disclosure requirements and initiatives by institutional investors to promote proxy access in the United States and Canada. Compensation also remained a major focus, as institutional shareholders expressed their displeasure by saying “nay” on pay at three large Canadian issuers, and the Securities and Exchange Commission advanced several compensation-related regulatory initiatives.

**BOARD COMPOSITION**

*Board Diversity Disclosure* – Effective December 31, 2014, most Canadian issuers (other than TSX Venture Exchange issuers and investment funds) became subject to disclosure requirements regarding the representation of women on boards and in executive officer positions. Our survey of disclosure by TSX-listed issuers provided a snapshot of current practices – and the picture is disappointing. We noted significant areas of non-compliance, low representation of women on boards and executive officer positions, few issuers with board policies or goals to improve gender diversity on boards and virtually no issuers with targets for women in senior executive positions. Canadian boards should be considering ways to enhance board and executive officer diversity. The extent to which Canadian issuers make progress in increasing the representation of women in leadership positions will drive the corporate governance agenda in 2016.

(For more information, refer to our report entitled “Diversity Disclosure Practices” on osler.com.)

*Board Renewal* – Issuers subject to gender diversity disclosure requirements are also required to disclose any term limits for board service or other board renewal mechanisms, or explain why they do not have such mechanisms. Earlier this year, the Institute of Corporate Directors (ICD) issued its report concluding that term limits can be a supporting mechanism, but should not be the only
process used for board renewal and may even be counterproductive. Instead, the ICD recommended that board renewal be based on performance management within a culture that demands accountability of directors and focuses on the future needs of the board.

A review of corporate governance disclosure practices to July 31, 2015 by the Canadian Securities Administrators (CSA) staff showed that only 19% of the issuers reviewed had adopted some combination of service term limits and/or age limits. Of these, over half (53%) adopted only age limits, 24% adopted only service term limits and 23% adopted both. The vast majority of issuers, however, have no formal mechanism for board renewal beyond their director assessment process. Canadian boards continue to discuss the utility of adopting various formal mechanisms for board renewal.

Proxy Access – “Proxy access” refers to proposals to enable qualified shareholders to submit nominations for directors to be included in the issuer’s proxy materials. SEC proposed rules to implement proxy access were struck down in court, prompting institutional shareholders to submit shareholder proposals for proxy access to U.S. corporations through by-law amendments. The SEC has permitted these to be presented despite objections from U.S. issuers, with the result that an increasing number of U.S. issuers have adopted proxy access.

Consistent with the original SEC proposed rule, proxy access in the United States permits shareholder(s) collectively holding at least 3% of the outstanding shares who have been shareholders for at least three years to nominate up to 25% of the positions on the board and have their nominees included in the issuer’s proxy circular. In some cases, issuers have either limited (to 10 or to 20) the number of shareholders that may collectively make such a nomination or have retained the ability to exclude nominations if the issuer has received notice of an intention to nominate directors pursuant to the issuer’s advance notice provisions for director nominations.

Most Canadian corporate statutes already permit shareholders to make a shareholder proposal that includes nominees to replace up to 100% of the positions on the board and to have that proposal included in the company’s proxy circular, provided that the submitting shareholder(s) hold a prescribed minimum number of shares and have been a shareholder for a prescribed period before making the submission.

The Canadian Coalition for Good Governance (CCGG) is promoting a version of proxy access that differs both from the Canadian statutory provisions and the version adopted in the United States. The CCGG proposal is to permit shareholder(s) collectively holding at least 3% of the outstanding shares (5% for smaller companies) to nominate up to 25% of the positions on the board and have their nominees included in the issuer’s proxy circular, without any pre-submission shareholding requirement. The absence of any shareholding requirement is somewhat surprising given recent criticism of “short-termism” by leading investors, including members of the CCGG. In light of the existing corporate statutory provisions for proxy access in Canada, and especially since these are more shareholder-friendly than proxy access proposals in the United States, Canadian corporations are unlikely to voluntarily adopt either the U.S. version of proxy access or the CCGG’s proposal.
**Overboarded Directors** – In its most recent update to its proxy voting guidelines, Institutional Shareholder Services (ISS) adopted a new stricter standard for determining when a director is “overboarded.” Now a director who is the CEO is considered to be overboarded if he or she sits on more than one public company board in addition to his or her employer’s board (previously more than two). A non-CEO director is overboarded if he or she sits on more than four public company boards in total (previously more than six).

**COMPENSATION**

**Say on Pay** – Failed say on pay votes this year at Barrick Gold Corporation (73.4% against), Yamana Gold Inc. (62.73% against) and Canadian Imperial Bank of Commerce (56.84% against) demonstrated that executive compensation disclosure continues to be subject to close scrutiny by shareholders and the media. This was Barrick’s second failed say on pay vote, having received both the lowest level of shareholder support on a say on pay vote in Canada (14.8% in 2013) as well as the second lowest (26.6% in 2015). In some cases, shareholders also expressed their dissatisfaction by withholding from voting for the compensation committee chair and, in the case of Barrick, the compensation committee members.

(For more information, refer to our Update entitled “Say on pay votes come back in a big way: Three failed votes in one week” on osler.com.)

Say on pay is voluntary in Canada and adoption rates continue to increase, although very slowly. This summer, the CCGG sent letters to issuers to encourage those who have yet to do so to adopt say on pay. However, this year’s vote results are an important reminder that issuers must carefully consider disclosure implications when making pay decisions, should be transparent about the rationale for their decisions – especially when making decisions that may be unpopular – and should avoid surprising their shareholders.

**Pay Ratio Disclosure** – The SEC issued final rules for disclosure of the ratio of CEO pay to pay of the median compensated employee, which will require such disclosure effective in 2018. Canadian issuers that are foreign private issuers in the United States will not be required to comply with this requirement unless they choose to satisfy Canadian executive compensation disclosure requirements by providing disclosure in accordance with U.S. rules. As noted by the SEC, neither the Dodd-Frank Act, which requires the SEC to adopt such rules, nor its legislative history states what objectives or benefits the requirement is intended to provide. Canadian issuers are unlikely to provide such disclosure, although they may find it interesting for internal purposes to estimate what their ratio would be.

**Pay for Performance** – The SEC issued proposed rules on pay for performance disclosure in April 2015. Again, Canadian issuers that are foreign private issuers in the United States will not be required to comply with this requirement unless they choose to satisfy Canadian executive compensation disclosure requirements by providing disclosure in accordance with U.S. rules. In anticipation of such rules and in response to demands from institutional shareholders to better demonstrate the relationship of corporate performance to CEO compensation, several U.S. and Canadian public companies have taken a variety of different
approaches to provide supplemental information regarding the CEO’s realized or realizable pay over a period of three to five years.

The SEC’s proposed rule takes a different approach, prescribing a manner for calculating compensation that requires disclosure in comparison to total shareholder return (TSR), and requiring disclosure not only with respect to the CEO but also with respect to all other named executive officers as a group. If the SEC adopts a final rule in line with the proposal, it may further reinforce use of TSR as a performance metric and increase company and investor focus on short-term stock price movements.

(For more information, refer to our Update entitled “SEC proposes pay-versus-performance disclosure rules” on osler.com.)

Compensation Clawbacks – In the summer, the SEC issued proposed rules to require issuers of securities listed on U.S. stock exchanges to adopt, disclose and enforce incentive-based compensation clawback policies to recover excess incentive-based compensation received in the three-year period preceding the date the issuer is required to restate previously issued financial statements due to an error. Whether or not the executive officer engaged in misconduct or otherwise shared any responsibility for the error prompting the financial misstatement is irrelevant to determining both whether the executive officer is affected and the amount to be clawed back.

All issuers listed on a U.S. stock exchange, including Canadian companies that are foreign private issuers, would be subject to the proposed clawback requirements. Foreign private issuers would be permitted to forgo recovery in very limited circumstances if recovery would violate their home country law. A significant number of Canadian issuers, including Canadian issuers not listed on a U.S. stock exchange, have adopted compensation clawback arrangements. Most of these contemplate a double-trigger, involving both a financial restatement and misconduct on the part of the executive contributing to the restatement. However, some Canadian issuers have a “no fault” standard where the absence of misconduct by the executive is not relevant. The SEC’s proposal is likely to accelerate clawback arrangement adoption rates in Canada and increase the number of arrangements triggered by a financial restatement even in the absence of misconduct.

(For more information, refer to our Update entitled “SEC proposes listing standards for clawback of erroneously awarded incentive-based compensation” on osler.com.)

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From 2012 to 2014, Canadian securities regulators commenced 27.5% fewer proceedings and concluded 22.2% fewer cases. Given this backdrop, developments in 2015 – including the highly anticipated decision in *Finkelstein*, along with the Ontario Securities Commission’s (OSC) proposed Whistleblower Program and the recent availability of “no-contest” settlements – could mark a change for securities enforcement in Canada.

**EVIDENTIARY STANDARD FOR INSIDER TRADING AND TIPPING**

After an extended period of mixed success by Canadian securities regulators in prosecuting capital markets wrongdoing, including setbacks in 2014 in *Re Jowdat Waheed and Bruce Walter* and *Walton v. Alberta (Securities Commission)*, the OSC scored a significant victory in 2015 in the *Finkelstein* decision. Although it is now under appeal, the ruling holds promise for regulators launching future administrative proceedings against persons alleged to have engaged in insider trading and tipping.

In *Finkelstein*, an OSC panel found that Toronto lawyer Mitchell Finkelstein and four investment advisors breached Ontario’s Securities Act by engaging in insider trading and tipping. In its decision, the panel highlighted that Finkelstein’s position as a lawyer put him in a special relationship with the reporting issuers. As a partner in a Bay Street law firm, he misused his crucial gatekeeping role by disclosing confidential information.

In many insider trading and tipping cases, only the offenders themselves will have actual knowledge of the relevant communications. This makes direct evidence for tipping and trading offences rare and successful prosecutions difficult. The OSC panel in *Finkelstein* overcame this difficulty by relying on circumstantial evidence to draw inferences that material non-public information had been shared and received, allowing them to conclude on a balance of probabilities...
that violations of the Securities Act had occurred. This lower evidentiary standard allowed OSC staff to secure convictions in Finkelstein, but underscores the regulators’ need to be cautious in pursuing administrative proceedings and ensuring sufficient procedural safeguards during the proceeding itself.

The OSC has had some success in other administrative – as opposed to criminal – settings by relying on circumstantial evidence, as it did in Finkelstein. A similar finding was made in Re Aqueci et al., which is also under appeal (Osler represents one of the appellants). However, there are mixed views in Canadian securities law generally on the extent to which and situations in which circumstantial evidence can be used.

For example, the Alberta Court of Appeal’s 2014 decision in Walton, from which the Supreme Court of Canada refused to grant leave to appeal, suggests that something more than mere circumstantial evidence is needed to meet the evidentiary standard to secure a conviction. This decision is directionally more consistent with recent experience in the United States. While downstream tippees in Finkelstein were found liable for insider trading, those in United States v. Newman and Chiasson were not, as the Court in Newman seems to have imposed an increased burden on prosecutors to demonstrate that the tippees had knowledge that the tipper received an impermissible personal benefit, and not merely that the tipper disclosed material non-public information.

The Supreme Court of the United States recently refused to hear the federal government’s challenge of the decision in Newman. The possible sea change resulting from Newman and the mixed record in Canada suggest that there is room for appellate review and clarification.

PROPOSED WHISTLEBLOWER PROGRAM’S IMPLICATIONS FOR CULTURE OF COMPLIANCE

The OSC hopes that its enforcement efforts will be enhanced with its proposed Whistleblower Program, which seeks to motivate reporting of securities law violations by offering monetary awards to whistleblowers. The current proposal, which is still in its draft form, reflects changes that the regulator made in light of public comments on its earlier proposal.

While the OSC’s proposed program would be the first in Canada, the United States already has a program for whistleblowing that was created by the Dodd-Frank Act. In fiscal year 2015, the SEC received a total of almost 4,000 tips from whistleblowers, a 50% increase since fiscal year 2012. Tips received from abroad, however, declined slightly; the SEC received 421 tips in fiscal year 2015, a 6% decrease since fiscal 2014. Of the tips received from abroad in fiscal 2015, 49 were from Canada, the second-highest foreign source of whistleblowing tips to the SEC after the United Kingdom.

Eligibility for financial rewards under the OSC’s proposed program would require that whistleblowers have credible and detailed information that the regulator currently does not have, and the information provided must lead to the commencement of an OSC proceeding. The new proposal also extends eligibility to culpable whistleblowers and in certain circumstances to employees involved in compliance, oversight and audit roles – for example, 120 days after they first reported the information through the proper internal channel.
If the information provided by a whistleblower leads to monetary sanctions or voluntary payments in excess of $1 million, then the whistleblower would be entitled to an award between 5% and 15% of the total sanctions or payments, for an award up to $5 million. This award cap was raised from $1.5 million following public comments, but is contrasted with the American model where there is no cap on the total reward that may be payable. In the fiscal year 2015, the SEC paid more than US$37 million in rewards to eight whistleblowers, for an average reward of over US$4.6 million. In one of those cases, the SEC paid more than US$30 million to a single whistleblower. The OSC’s proposed program seeks to avoid payments of this magnitude by introducing a proportionally smaller reward scale and the maximum reward cap.

While whistleblowing awards could create incentives for persons with inside knowledge of securities violations to come forward, tying reward amounts to penalties awarded potentially poses problems in that it reflects and perpetuates a misalignment in the traditional functions of Canadian securities regulators, which is to prevent and protect capital markets from misconduct. The focus of the Whistleblower Program should be to drive the behaviour of registrants towards increased compliance, which respects the core tenets of the OSC’s traditional enforcement mandate, instead of punishing bad behaviour.

Concern has also been expressed that the program may undermine businesses’ internal reporting and compliance programs by giving incentives to employees to bypass these channels entirely and go straight to the OSC in the hope of pocketing a significant monetary award. While the OSC says that it will encourage reporting internally, there is still no requirement that employees first use available internal channels – or provide proof as to why there were good reasons not to – before they are eligible for a whistleblowing reward. In our view, imposing this condition is vital if the OSC wants to encourage a corporate culture of compliance, and the absence of such a requirement could undermine the essential role of internal compliance and complaint procedures in ensuring robust compliance with securities law.

Confidentiality risks also pose a unique challenge to the proposed Whistleblower Program. While the OSC intends to use all reasonable efforts to keep confidential the identities of whistleblowers, there are certain permitted exceptions for disclosure, such as when it would be necessary to allow a person charged with a securities law violation to make full answer and defence or to advance the goals of securities legislation. These categories are extremely broad and vague. Disclosure may advance prosecutorial goals in certain proceedings, but the risk that a whistleblower’s identity could be disclosed may correspondingly deter the whistleblower from coming forward.

### NO-CONTEST SETTLEMENTS – A FURTHER ADDITION TO THE ENFORCEMENT TOOLKIT

The proposed Whistleblower Program comes after the OSC made “no-contest” settlements available in 2014, and is part of a recent trend of expanding the OSC’s enforcement toolkit. Aimed at improving the regulator’s enforcement capability, no-contest settlements allow the alleged wrongdoer in administrative proceedings to settle without admitting to an offence. Last November, the OSC
approved a significant $13.5 million no-contest settlement with entities related to TD Waterhouse regarding excess client fees that the TD entities themselves had discovered and reported. The TD settlement underscores the need for market registrants to maintain strong internal systems to comply with securities law, and showcases the OSC’s role in protecting investors and facilitating fair and efficient capital markets.

The outcome of the appeal in Finkelstein and the final shape of the proposed Whistleblower Program could have significant ramifications for the enforcement of securities law in Canada. While this may improve enforcement capabilities and the success of prosecutions, Canadian regulators should still be wary of overstepping their traditional enforcement mandate in favour of a more punitive approach towards securities violators.

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In 2015, there was a flurry of legal and regulatory developments in the Canadian privacy and data management arena, highlighted by privacy class actions, Canadian anti-spam law (CASL) enforcement activity, and key amendments to Canada’s private sector privacy legislation, the *Personal Information Protection and Electronic Documents Act* (PIPEDA). Collectively, these developments have heightened the need for Canadian organizations to enhance their data governance programs to mitigate an expanding array of legal, regulatory and adverse publicity risks.

We expect 2015 will be viewed as a watershed year in Canadian privacy law. The willingness of the courts to provide an expansive view on the availability of class proceedings to privacy-related matters, the commencement of new class proceedings involving privacy breaches (including proceedings related to the much-publicized data breach involving the Ashley Madison website), the imposition of significant monetary penalties under CASL, and the enactment of PIPEDA’s security breach notification requirement (which will come into effect once regulations are passed, likely in 2016) have significantly altered the Canadian privacy and data management landscape.

**PRIVACY CLASS ACTIONS**

There are private remedies in Canada under statute and at common law to recover damages for invasions of privacy, and in 2015, the courts in Canada issued a number of noteworthy judicial decisions that appear to have created a favourable environment for class proceedings.

In particular, the courts have granted class certification in a number of important privacy cases, and the courts have also found the existence of a broad jurisdiction
to grant extra-territorial remedies over online businesses. In light of these and other developments, it has now become commonplace for a business that has experienced a data breach to face multiple and parallel class proceedings in Canada and the United States that seek an aggregate award of damages.

The following developments from 2015 will have considerable risk management implications for domestic and foreign companies that are in the possession or control of personal information of Canadian residents:

• In 2015, the courts in Canada certified a number of significant class proceedings in respect of data breaches. In *Condon v. Canada*, the Federal Court of Appeal upheld the certification of a class action against the federal government relating to the loss of a hard drive by Human Resources and Skills Development Canada. In *John Doe and Suzie Jones v. Canada*, the Federal Court also certified a class proceeding against the federal government relating to disclosures of the identities of participants in the federal government’s medical marijuana program. The outcome of these cases suggests that under the right circumstances, the court will certify classes and authorize collective relief for damages against organizations (including governments) that are allegedly reckless in maintaining and safeguarding personal information.

• On the heels of their success in arguing class certification in these and other cases, the plaintiffs’ bar in Canada launched a number of new class actions in 2015, including class actions in respect of data breaches caused by third-party hackers (such as the class action against Avid Media for the data breach of the Ashley Madison website), as well as for the alleged misuse of customer data by companies themselves (such as the $750 million class action against Bell for its relevant ads program). The plaintiffs’ bar has become more active and competitive in light of their recent successes, and we can expect further new filings in 2016.

• In 2015, the Ontario Court of Appeal released a significant decision that removed a major barrier to private class action litigation in the health care sector. More specifically, in *Hopkins v. Kay*, the Ontario Court of Appeal rejected an argument that the Ontario *Personal Health Information Protection Act* (PHIPA) was a comprehensive code that precluded tort claims for invasion of privacy. The Supreme Court of Canada denied leave to appeal this decision. As a result, it is now open for individual and class plaintiffs to pursue claims and to seek damages beyond the limited restitutionary provisions in PHIPA.

• In a decision that stands in sharp contrast to *Hopkins v. Kay*, the B.C. Court of Appeal released an important decision (*Ari v. Insurance Corporation of British Columbia*) that limited the scope of common law remedies for the invasion of privacy in the province of British Columbia. In particular, on a motion to strike part of a class action involving alleged unauthorized access to and use of personal information by a “rogue” employee, the B.C. Court of Appeal held that the *Freedom of Information and Protection of Privacy Act* is a comprehensive statute, and there is no cause of action in negligence for

We expect 2015 will be viewed as a watershed year in Canadian privacy law.
breach of the statute. However, the Court refused to strike a claim under the B.C. *Privacy Act* for vicarious liability against the employer, ICBC, for the actions of its employee.

- In its certification decision in *John Doe and Suzie Jones v. Canada*, the Federal Court held that there was viable cause of action for the novel tort of “publicity given to private life.” This particular tort is recognized in numerous U.S. states, but it has not yet been widely recognized in Canada. In addition, in a departure from the usual rules of civil litigation, the Court authorized the use of pseudonyms to protect the privacy of representative plaintiffs in privacy cases to facilitate access to justice.

- In *Equustek Solutions Inc. v. Google Inc.*, the B.C. Court of Appeal upheld an extraordinary injunction against the world’s leading online search engine. Further details regarding this case are provided in the article entitled “Canadian courts’ jurisdiction: How long is the ‘long arm of the law’?”

- Finally, in *Douez v. Facebook, Inc.*, the B.C. Court of Appeal dismissed a proposed privacy class action against Facebook by enforcing a forum selection clause in favour of the courts of California. Further details regarding this case are provided in the article entitled “Canadian courts’ jurisdiction: How long is the “long arm of the law”?”

**CASL ENFORCEMENT ACTIVITY**

CASL is perhaps the most stringent anti-spam legislation in the world. Phase 2 of CASL, which imposes strict consent and notice rules covering the installation of computer programs, came into effect on January 15, 2015. The first phase of CASL, which came into force on July 1, 2014, imposed similar requirements in respect of the sending of commercial electronic messages (CEMs).

The penalties for non-compliance are potentially severe: Organizations can be subject to administrative penalties of up to $10 million and a private right of action for damages of up to $200 per contravention of the legislation. This private right of action is scheduled to come into force on July 1, 2017.

The Canadian Radio-television and Telecommunications Commission (CRTC) announced a number of enforcement proceedings in 2015. The CRTC issued a Notice of Violation, including a penalty of $1.1 million, against Compu-Finder for sending CEMs without the recipients’ consent and without a properly functioning “unsubscribe” mechanism. In addition, Plenty of Fish agreed to pay $48,000 and Porter Airlines Inc. agreed to pay $150,000 as part of separate undertakings with the CRTC for alleged violations of CASL’s CEM rules. Most recently, Rogers Media agreed to pay $200,000 as part of an undertaking to the CRTC on the basis that the company had allegedly sent CEMs to customers that contained an “unsubscribe” mechanism that did not function properly.

Enforcement of CASL by the CRTC will continue through 2016 and beyond.

We also expect CASL compliance efforts to increase in 2016, as companies seek to mitigate the class action risk associated with the private right of action under the legislation.
AMENDMENTS TO PIPEDA

Amendments to PIPEDA came into effect in June 2015. Among other things, the amendments include:

- a security breach notification requirement, which mandates notification to the Office of the Privacy Commissioner of Canada, affected individuals and other organizations in the wake of a security incident involving a “real risk of significant harm” to affected individuals
- offences related to the contravention of the security breach notification requirements
- a concept of “valid consent” for the collection, use and disclosure of personal information
- exceptions to the consent requirement, including for administering the employment relationship, and for certain investigations
- new powers for the Privacy Commissioner to enter into compliance agreements

In response to these privacy law developments of the past year, Canadian organizations should enhance their data governance programs in 2016 to mitigate the legal, regulatory and adverse publicity risks associated with this evolving landscape.

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In 2015, Canadian courts continued to consider their role in adjudicating disputes that have significant foreign elements. This issue arises with increasing frequency as global commercial activity expands and takes new forms, making it critical for both local and foreign entities to appreciate the ramifications of the courts’ decisions.

Cases confronting Canadian courts in the past year grapple with “big picture” questions such as: Should Canada’s laws extend to companies with no physical presence in Canada? What are or should be the limits on Canada’s willingness to defer to foreign legal systems? To what extent should Canada extend legal assistance to litigants who experience the impact of foreign business activity in Canada? When should Canadian courts decline to become involved in matters that are best addressed in a foreign court or that may place undue strain on Canadian judicial resources?

Key cases decided in 2015 show how Canadian courts are also faced with the need to adapt traditional legal concepts to non-traditional facts – such as Internet search engines with only a cyber-presence in Canada and social media sites with potentially onerous terms of use that may or may not be read by users.

THE MOST INFLUENTIAL CASES OF 2015

Some of the leading cases exploring these issues in 2015 include

- Equustek Solutions Inc. v. Google Inc. – In this case, the British Columbia Court of Appeal upheld an injunction requiring Google to remove an entire website from its world-wide global search index – not just search results found through Google.ca. The decision was in aid of the plaintiff’s ongoing litigation in B.C. against the defendant for misuse of confidential information and unlawful use of trade secrets. Google was not a party to this litigation. The Canadian court asserted jurisdiction over the global search giant, even though Google did not maintain any physical presence in B.C., on the basis that Google
carried on business in B.C. The Court relied on facts such as Google selling advertising to B.C. residents, including the defendants, and indexing websites located in B.C. and/or owned by B.C. residents.

The case is potentially good news for businesses seeking to expand the arsenal of remedies against unfair competition from counterfeit goods or illegally copied content sold or distributed online by individuals that are seeking to evade court orders.

But the case also sounds a cautionary note for companies that provide Internet technical or business infrastructure, even if they have no physical place of business in Canada. The extent of activity in Canada that may justify the assumption of jurisdiction by a Canadian court and the scope of the available remedies against an Internet business will no doubt be explored in future cases. (For more information, refer to our Update entitled “B.C. court of appeal upholds injunction over global search results.”)

• **Douez v. Facebook, Inc.** – By contrast, the British Columbia Court of Appeal declined to take jurisdiction over a proposed class proceeding commenced against Facebook by B.C. residents. These residents alleged that the appearance of their names or photographs in a Facebook advertising feature was in violation of British Columbia’s *Privacy Act*. However, Facebook’s terms of use required all disputes to be adjudicated in the courts of California.

The Court of Appeal held that this forum selection clause was clear and enforceable, despite provisions of the B.C. *Privacy Act* stating that actions under the legislation were to be heard in the B.C. Supreme Court. This provision of B.C. law could not bind the California courts, nor could it take away jurisdiction from a foreign court that the foreign court would otherwise have under its own laws. The California court would therefore have to consider the effect of this provision under its own law.

Although the Court of Appeal would have considered evidence from the plaintiffs of “strong cause” not to enforce the forum selection clause, the plaintiffs did not adduce any such evidence.

This case confirms that Canadian legislatures are limited in their ability to reserve to Canadian courts the right to adjudicate on matters arising out of their own legislation. However, participants in online commerce, including social media, may be reassured that terms of use that are clear will be given effect, even if they require a Canadian resident to litigate a dispute in a foreign jurisdiction such as California. (For more information, refer to our Update entitled “B.C. court of appeal stays a proposed privacy class action against Facebook based on a forum selection clause” on osler.com.)

• **Kaynes v. BP plc** – On March 26, 2015, the Supreme Court of Canada denied leave to appeal from the Ontario Court of Appeal’s determination that a securities class action should not be litigated in Ontario.

The plaintiffs were Canadian residents who purchased securities of BP on the NYSE and European exchanges. BP had ceased to be a reporting issuer under Ontario securities laws, but remained under an obligation to provide investor documents to securityholders in Canada. The plaintiffs alleged that some of
these documents contained certain misrepresentations made before and after the Deep Water Horizon oil spill in the Gulf of Mexico that affected the price of their shares. A similar class proceeding had been commenced in the United States by those who purchased their shares on the NYSE.

The Ontario Court of Appeal confirmed that there were sufficient connecting factors to Ontario (i.e., the fact that the plaintiffs received disclosure from BP in Canada) to permit the Ontario Court to assume jurisdiction over the class action. However, the Ontario Court of Appeal agreed with BP that Ontario was not the preferable forum (forum non conveniens) to determine the plaintiffs’ claims, thereby confirming that even when the Ontario court could adjudicate a particular dispute involving foreign elements, there is an additional question as to whether it should assume carriage of the dispute.

The United States and Europe were clearly more appropriate forums for a number of reasons. The U.S. class action covered a similar time period and applied to all BP shareholders, including the plaintiffs, who purchased their shares on the NYSE. U.S. securities laws conferred exclusive jurisdiction on U.S. courts to adjudicate secondary market misrepresentation claims involving trades on a U.S. securities exchange. Given that the plaintiffs’ claim related to a large degree to U.S. securities law disclosure requirements (BP was no longer a reporting issuer in Ontario), it was appropriate for the Canadian court to defer to this jurisdiction as a matter of comity. By the same token, Canadian residents who purchased shares on the London or German stock exchanges had a reasonable expectation that any claims they had would be governed by the securities laws of those jurisdictions.

Finally, the Court was motivated by a concern to avoid a multiplicity of proceedings in more than one jurisdiction over the same claims of the same parties. This decision, therefore, not only promoted order and fairness but also economic use of Canadian judicial resources.

• Chevron Corp. v. Yaiguaje – The plaintiffs seek recognition and enforcement in Canada of what the Southern District of New York (SDNY) called a “fraudulent judgment” in the amount of approximately US$9 billion. The plaintiffs obtained this judgment in Ecuador for purported environmental damage allegedly caused by a corporate predecessor of Chevron Corporation. On September 4, 2015, the Supreme Court of Canada determined that a plaintiff who has obtained a judgment in a foreign jurisdiction does not have to demonstrate that the foreign defendant (in this case, Chevron Corporation) has any connection to Ontario – either through its presence or owning assets in Ontario – in order for an Ontario court to consider whether the foreign judgment should be recognized and enforced in Ontario.

The Supreme Court of Canada decision only allowed the plaintiffs to “get in the door.” It permits the Canadian court to assume jurisdiction over the dispute as to whether Canada should recognize and enforce the judgment. The judgment has been found after a lengthy trial in the SDNY to have been obtained through a massive fraud, including by bribing and threatening Ecuadorian judges. The SDNY held that the plaintiffs’ lawyers violated the federal Racketeer Influenced and Corrupt Organizations Act (RICO),
committing extortion, money laundering, wire fraud, Foreign Corrupt Practices Act violations, witness tampering and obstruction of justice in obtaining the Ecuadorian judgment and in trying to cover up their crimes.

The next chapters in the Chevron story in Canada remain to be told. At least some part of this story will come before the courts in 2016.

These cases suggest that, as business activity takes on an increasingly global character and becomes less anchored in physical territory, courts will continue to be faced with new and complex situations. The limits of traditional concepts such as “jurisdiction” and “convenient forum” will continue to be tested. This will have consequences for everyone involved. In particular, businesses with only a “cyber presence” in Canada will need to pay close attention to legal developments in this area to assess when the Canadian legal system may be brought to bear on their activities.

Note: Osler acts for Facebook, BP and Chevron.

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One of the most significant decisions of the past year has the potential to change the way class actions in Canada are argued and adjudicated. On May 27, 2015, the Québec Superior Court rendered judgment in two of the largest class actions in Canadian history. The proceedings were commenced in 1998 on behalf of two disparate classes of smokers and former smokers. With a total class membership in excess of 1 million Québec residents, each of whom was alleged to suffer from either a smoking-related disease or a tobacco-related addiction, the two actions sought collective recovery from the three Canadian tobacco manufacturers for alleged civil faults arising from conduct dating back to 1950.

Notably, the action sought recovery of “moral damages” (akin to damages for “pain and suffering” in common law jurisdictions) in an amount exceeding $15 billion, as well as punitive damages, solely on the basis of a common issues trial (and to the exclusion of any subsequent individual trials). The plaintiffs did not tender evidence on their own behalf or on behalf of a single member of either class. Rather, plaintiffs’ counsel relied exclusively on expert evidence and certain statutory mechanisms that they claimed were sufficient to provide the court with a reasonable basis to make class-wide determinations of fault, causation and injury in respect of each and every class member.

QUESTIONS RAISED IN LANDMARK RULING

Although the trial judge ultimately dismissed most of the allegations advanced against the three defendant tobacco manufacturers, he concluded that there was a class-wide fault in respect of the defendants’ failure to adequately inform of product risks (a finding that is now under appeal to the Quebec Court of

If the courts permit issues such as causation and injury...to be addressed in the aggregate, how will they ensure that the fundamental principles of procedural fairness and access to justice are preserved for class action defendants?
Appeal). Accordingly, he awarded in excess of $15 billion in aggregated moral and punitive damages. Although he also ordered provisional execution of a portion of the total award, in the amount of $1 billion – payable within 60 days of judgment – this latter order was subsequently overturned by the Québec Court of Appeal.

The case represents a landmark ruling, not only by virtue of its unprecedented scope but also as a result of the novel legal questions raised. It is the first product liability class proceeding in Canadian history in which compensatory damages were awarded in the aggregate on the basis of a common issues trial and in the absence of class member evidence. Accordingly, it may presage the use in future of class actions procedures and related statutory mechanisms – including those contemplated by provincial consumer protection legislation – to impose liability and damages on defendants in a context where the plaintiff class members are effectively sheltered from individual scrutiny.

As the courts have repeatedly affirmed, class actions are intended to be purely procedural mechanisms that bring together commonly situated individuals who share a legal interest. They are not intended to alter the parties’ fundamental legal rights, nor expose parties to liability that would not otherwise exist in the context of an individual action. If the courts permit issues such as causation and injury – which have traditionally been characterized as inherently “individualistic,” particularly in the product liability context – to be addressed in the aggregate, how will they ensure that the fundamental principles of procedural fairness and access to justice are preserved for class action defendants? Moreover, if this “aggregated” approach is indeed going to be applied going forward, will the courts adopt a more stringent approach to certification of class proceedings to ensure that “commonality” across the class truly exists in all material respects? Alternatively, the courts may ultimately consider this judgment an opportunity to reiterate and reaffirm the purely procedural nature of the class actions regime, with a view to highlighting the potential hazards of aggregating differently situated class members with disparate claims. The decision is under appeal, and it is likely that many of these questions will be addressed by the appellate court in 2016 and beyond as the proceedings continue to unfold.

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In November 2015, Canada entered into the Trans-Pacific Partnership (TPP). The TPP will be the largest and most far-reaching international trade agreement that Canada will implement since the North American Free Trade Agreement (NAFTA) in 1994 and the World Trade Organization (WTO) Agreements in 1995. Together with the Canada-EU Comprehensive Economic and Trade Agreement (CETA), which was entered into in 2014, these initiatives were part of the previous federal government’s Global Market Action Plan to diversify Canada’s international trade and investment relationships by providing new, improved and preferential access to foreign markets for Canadian businesses.

LENGTHY, COMPLEX NEGOTIATIONS LEAD TO AGREEMENTS

In early November 2015, the Canadian government publicly released the TPP – an agreement among Canada and 11 other Pacific Rim countries representing 40% of the global economy. The agreement is a result of seven years of negotiations and comprises 30 chapters plus schedules, annexes and side letters, totalling thousands of pages. In addition to Canada, the members of the TPP are Australia, Brunei Darussalam, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam.

A year before the TPP legal text was issued, the Canadian government and the European Union released the text of the CETA, which took over four years to negotiate. As the name suggests, this comprehensive agreement goes beyond the template of previous international trade agreements and consists of 34 chapters as well as various annexes and declarations.

These state-of-the-art international trade agreements cover subject areas previously addressed by other international trade and investment agreements,
such as the reduction of tariff and non-tariff barriers, cross-border services trade (including financial services), temporary entry of business persons, intellectual property, investment protection (including investor-state arbitration), trade remedies, public procurement and dispute resolution. However, they also cover subjects not previously considered as standard features of international trade and investment agreements. For example, the TPP deals with anti-corruption, electronic commerce, rules on transfer of data and cybersecurity.

The TPP and CETA will add to the intricate web of critical trade and investment rules that Canadian businesses will need to analyze and take into account in the formulation of their business strategies. Canadian businesses should ensure they are taking advantage of all benefits available to them under Canada’s free trade initiatives and that they are also able to respond to the competitive challenges from other businesses that will be doing the same. Both the TPP and CETA can be expected to effect fundamental shifts in the flow of goods, services and investments both from Canada and into Canada.

With the TPP negotiations concluded, the parties must now begin the process of ratification and implementation at the domestic level. Since 2008, the federal government has followed the process of tabling treaties in the House of Commons before ratification. There have been calls within Canada for the agreement to be reopened as it was negotiated by the previous government without full consultation with the Canadian public. However, this appears to be unlikely given the years of complex negotiations and balancing of competing interests required to complete the TPP.

In the case of the CETA, while the negotiations between Canada and the EU were completed in November 2014, the ratification process has been held up because of concerns raised by certain EU members, particularly Germany, in relation to the investment chapter and the investor-state arbitration mechanism within CETA. These concerns, together with the ongoing U.S. negotiations of investment standards in the context of the Transatlantic Trade and Investment Partnership (TTIP), may create pressure to modify the CETA before it receives ratification from Canada and the EU.

Here is a very high level review of the TPP and CETA:

**Tariff Elimination:** A key aim of both the TPP and the CETA, like any free trade agreement, is to reduce and ultimately eliminate tariffs to improve market access opportunities abroad for domestic producers. Not surprisingly, the agreements set out detailed tariff liberalization obligations. For instance, both the TPP and the CETA include specific provisions for the agriculture sector. Under the TPP, parties are prohibited from using export subsidies in TPP markets and must work together to discipline the use of export credits at the WTO. Under the CETA, EU tariffs on products like maple syrup, fruit, vegetables, processed pulses and grains, and sugar confectionary will be eliminated immediately upon the agreement coming into effect. Other products, like pork and beef, will be duty-free but quota-limited. The Canadian market will also be significantly liberalized with 93.6% of agricultural tariff lines set at 0% immediately on entry into force of the CETA, subject to notable exclusions for products such as poultry and eggs.
A significant change for the automotive sector is the reduction in the required level of regional value content for auto parts and light duty vehicles to benefit from the TPP tariff reduction. The TPP provides for minimum regional value content of 45% for finished vehicles and between 35% and 45% for auto parts. This is a reduction from the 62.5% regional value content provided for in NAFTA. Whether these regional value content percentages within the two agreements are directly comparable is a matter of some debate because of the different formulas for calculating regional value content under the two agreements. Nevertheless, industry experts are concerned that this reduction could be harmful to Canada’s steel sector and to automotive manufacturers and suppliers.

**Trade in Services:** Like NAFTA, the TPP and the CETA adopt a “negative list” approach (in contrast to the WTO “positive list” approach) to liberalization of services. Under the TPP and CETA, all service sectors should benefit from non-discriminatory treatment and market access, except for those expressly excluded. The TPP and CETA also include chapters focused on financial services trade – one of the largest service sectors in Canada. These chapters provide for enhanced market access commitments for Canadian financial services firms from TPP parties and the EU. They also provide protections for financial investors and a special dispute resolution framework tailored to the financial services sector. However, like other financial services trade agreements, the TPP and CETA preserve the broad discretion of financial regulators to take measures to promote financial stability and maintain the integrity of their financial systems.

**Intellectual Property:** Both the TPP and CETA introduce additional protection for patented inventions, particularly in the pharmaceutical field. Within the CETA, unreasonable delays in approving a pharmaceutical product will lead to additional protection for up to two years following patent expiry. The TPP further provides that unreasonable delays at the Patent Office will lead to extended patent terms. Canada’s eight-year market protection for biologics has now become an international standard, with flexibility in how it is achieved. New safeguards will ensure transparency in national pharmaceutical reimbursement and removal of technical barriers in pharmaceutical review and inspection. Other important changes arising from the TPP include an increase in the copyright term from 50 to 70 years, the application of trade secrets law to state-owned enterprises and the criminalization of certain misuses of trade secrets. Furthermore, under CETA, Canada committed to introduce a geographic indication protection system and to protect over 170 marks covering various foods and beer, with limitations to protect existing public domain uses.

**Investment:** The TPP and the CETA investment chapters include what are now considered standard guarantees prohibiting expropriation without prompt and adequate compensation, and requiring investors from each of the parties to be treated in a fair and equitable manner. Both the TPP and the CETA will ensure investors are accorded both “national treatment” and “most-favoured-nation treatment,” meaning that foreign investors cannot be treated in a less advantageous manner than domestic investors or investors of any other country. The investment provisions also include access to international investor-state arbitration.
mechanisms for dispute settlement, enabling foreign investors to enforce their rights against the host-state of the investment in an independent international arbitration proceeding. At the same time, the TPP and the CETA preserve the right of governments to legislate and regulate in the public interest. In particular, they preserve Canada’s ability to review certain foreign investments pursuant to the Investment Canada Act. However, under both agreements, the review threshold will be raised to $1.5 billion in enterprise value for investors from the EU and original signatories to the TPP. State-owned enterprises will not be eligible for the higher threshold.

**Public Procurement:** Subject to certain exclusions and exceptions, the TPP and the CETA will expand the ability of businesses to compete in the national and sub-national public procurement markets.

**Transparency and Anti-Corruption:** Under the TPP’s Transparency heading, parties will have to ensure developments affecting other signatories are published or disclosed, including legislative updates and administrative rulings and proceedings. The TPP also requires each party to adopt legislation criminalizing the offering of an undue advantage to a domestic or foreign public official. Among other obligations, parties will also be required to ensure corporations are held liable for corruption offences and adopt measures regarding books and records, whistleblower protection and integrity of officials.

The parties to the TPP and the CETA must now complete the process of ratifying and implementing the agreements at the domestic level.

Running a business domestically and abroad without knowing the fundamental rules of international trade and investment can lead to surprises, which are more often than not unfavourable. Canada’s current free trade arrangements present many opportunities that are either not fully understood or incorporated into the strategic business plans of many Canadian enterprises. Often, businesses make critical investment decisions without fully comprehending the potential threats that exist when competing organizations are taking or can take advantage of market liberalization initiatives.

The TPP and CETA add to an already complex web of critical trade and investment rules that Canadian businesses need to understand and integrate into their business strategies in order to remain competitive.

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There were several significant developments in foreign investment law in Canada in 2015. Chief among these was the change to the size of transactions that are now subject to the “net benefit” review test under the *Investment Canada Act* (ICA). Not only did the monetary threshold increase but also the basis on which the threshold is calculated changed from “book value” to “enterprise value.” As a result, certain transactions that were previously subject to review will no longer be reviewable, while at the same time, some that were not subject to review under the old threshold will now be subject to ICA scrutiny. Proposed increases to the review threshold are also contemplated under new trade agreements.

In addition, the regulatory burden on investments has increased, including more extensive information disclosure requirements for foreign investors in relation to non-reviewable acquisitions of control of Canadian businesses.

One of the most significant events in 2015 was the election of the new Liberal government. It remains to be seen whether this political shift will cause corresponding policy changes in the area of foreign investment regulation in 2016 and beyond.

**THE CHANGES TO THE REVIEW THRESHOLD**

Effective April 24, 2015, the threshold for determining whether net benefit review under the ICA is required for acquisitions or dispositions by entities owned by nationals of a World Trade Organization member state is $600 million based on enterprise value of the target business, rather than the former threshold of $369 million in book value of the assets of the target business. The threshold will increase to $800 million in 2017, then to $1 billion in 2019, after which it will be indexed annually. If the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) or the Trans-Pacific Partnership (TPP) trade agreement comes into force within the next year or so, eligible investors...
will only be subject to investment review at a threshold of $1.5 billion – almost
double the threshold that would otherwise apply ($800 million in 2017).

The enterprise value threshold is calculated differently depending on the type
of target business:

- **Direct acquisition of a publicly traded entity** – $600 million or more
  in enterprise value, based on the target’s market capitalization plus its
total liabilities (excluding its operating liabilities), minus its cash and
cash equivalents.

- **Direct acquisition of a privately held entity** – $600 million or more in
  enterprise value, based on the total acquisition value plus its total liabilities
(excluding its operating liabilities), minus its cash and cash equivalents.
  If the investor is acquiring 100% of the voting interests, total acquisition
  value is the total consideration payable. Where the investor is acquiring less
  than 100% of the voting interests, total acquisition value is the aggregate of
  the consideration payable by the investor, the consideration payable by any
  other investors and the fair market value of any portion of the voting interests
  that are not being acquired.

- **Acquisition of assets** – $600 million or more in enterprise value, based on
  the total consideration payable, plus the liabilities that are assumed by the
  investor (other than operating liabilities), minus the cash and cash equivalents
  that are transferred to the investor.

However, a state-owned enterprise (SOE) investor is still subject to review based
on the threshold of book value of assets of the Canadian business at $369 million
(indexed annually). All cultural investments will continue to be reviewable if
the book value of assets of the Canadian business exceeds $5 million.

**IMPLICATIONS OF THE MOVE TO ENTERPRISE VALUE**

The change from an asset-based threshold to an enterprise value threshold has a
number of important implications for foreign investors contemplating direct
acquisitions of control of Canadian businesses:

- **Review of transactions involving targets with large enterprise value but
  low book value** – acquisitions of some businesses that would not have been
  subject to review based on the former threshold of $369 million in book value
  of assets may be reviewable because they exceed the $600 million enterprise
  value threshold.

- **Enterprise value can be tactically determined to affect reviewability of
  a transaction** – in private transactions the purchase price will be the key
  factor and could be structured with a view to reducing the enterprise value.
  In public transactions, a purchaser may be able to carefully time its offer to
  coincide with a low market capitalization that results in an enterprise value
  below $600 million.

- **Different treatment of SOEs and private investors** – a possible unintended
  consequence of the amendments is that a private sector investor may trigger a
  review as a result of the target’s enterprise value exceeding the $600 million
  threshold, but a SOE investor would not trigger a review if the book value of
  the target’s assets is below the $369 million asset value threshold that applies
to SOE investors.
NEW TRADE AGREEMENTS WITH IMPLICATIONS FOR THE ICA REVIEW THRESHOLDS

The TPP trade agreement concluded in October 2015 proposes an increase in the ICA review threshold to $1.5 billion in enterprise value. Only investors who are nationals of an original signatory to the TPP, or entities controlled by nationals of those TPP parties, may benefit from the higher review threshold. SOE investors are not eligible for the higher threshold.

The $1.5 billion threshold will match the increase in the threshold proposed under the CETA concluded in 2014, which is still not yet in force. The higher threshold in CETA will apply to an acquisition of a Canadian enterprise by an EU investor that is not an SOE. The determination of whether the acquirer is an EU investor would be based on whether an EU national controls the acquirer in law, or in the absence of a majority ownership, whether EU nationals control the acquirer in fact such as through the ownership of voting interests or the nationality of members of the board of directors. Moreover, EU enterprises that are controlled by nationals from Canada’s existing free trade agreement partners (eg, the United States) would also benefit from the higher threshold.

At this time, no in-force dates have been set for the TPP or CETA. Of the two, CETA is expected to be in force sooner.

NEW INFORMATION BURDEN

In addition to changes to the review thresholds, the new regulations impose revised disclosure requirements. A foreign investor is now required to provide significantly more information to the federal government regarding the investor, its business activities and shareholders than was previously the case. This information burden applies to notifications required to be filed for all acquisitions of control of Canadian businesses by non-Canadians that are not reviewable.

EXTENDED TIMELINE FOR NATIONAL SECURITY REVIEWS

Independent of the ICA net benefit review process, the ICA national security regime allows the federal government to review a broad range of foreign investments, including minority investments, on the basis that such investments could be “injurious to national security.” Effective March 25, 2015, the government’s maximum review period extended from 130 days to 200 days (or possibly longer upon the consent of the investor). There are still no published criteria for what kind of investment might be “injurious to national security,” nor are there publicly available statistics on enforcement of this aspect of the ICA. Anecdotally, national security issues seemed to arise with greater frequency in the last couple of years of the Conservative government.

REVIEW STATISTICS

The number of transactions subject to ministerial review and approval under the ICA remains small. For the year ended March 31, 2015, excluding national security reviews, 15 applications were reviewed and approved, up from 11 in 2013–14. The average review time was 75.3 days, up from 71.5 days in 2013–14.
These investments totalled $21.78 billion in asset value, an increase of 41.2% compared to 2013–14. The number of national security reviews is unknown, but they are not uncommon.

NEW LIBERAL GOVERNMENT

The new Minister of Innovation, Science and Economic Development, the Honourable Navdeep Singh Bains, is responsible for approving large investments under the ICA and administering the ICA’s national security regime. The new minister has both academic and business experience. He was a visiting professor at Ryerson University’s Ted Rogers School of Management and holds an MBA with a specialization in Finance. He also holds a Certified Management Accountant qualification and worked for several years in accounting and financial analysis for the Ford Motor Company of Canada.

Will the new minister and the Liberal government adopt a different attitude to foreign investment?

Foreign investment was not a campaign issue during the 2015 federal election. The Liberal Party did not advocate changes to the ICA. The last Liberal government routinely allowed large takeovers even in the face of some populist concern at the time about the “hollowing out” of Canadian-controlled industries. Based on this track record, it is difficult to imagine this Liberal government being more critical of foreign investment than the former Conservative government, which turned down some high-profile proposals on “net benefit to Canada” and national security grounds. Indeed, given the weakness of the Canadian economy, the new government may be inclined to more quickly approve foreign investment that promises significant employment and capital investment.

It is too early to say what approach the Liberals will take. Will they administer the national security regime differently? How will they deal with the ICA policies that put investments by SOEs through the additional hurdles of demonstrating transparency and commercial orientation while all but prohibiting them from acquiring control of oil sands businesses?

The way these legislative and regulatory changes are put into practice over the years ahead will certainly have an impact on the foreign investment climate in Canada, though the extent and tenor of that impact remain to be seen.

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Recent efforts to crack down on foreign corruption and increase transparency in dealings between Canadian businesses and governments continued in 2015 with two key legal developments. The first was the laying of charges against SNC-Lavalin in relation to alleged corruption in its overseas activities. The second was the enactment of the *Extractive Sector Transparency Measures Act* (ESTMA). The ESTMA imposes new disclosure and reporting measures on participants in the extractive sectors, with the objective of enhancing transparency and deterring corruption. With the enforcement tools under the ESTMA and the *Corruption of Foreign Public Officials Act* (CFPOA), the Canadian government now has one of the world’s more robust anti-corruption enforcement regimes.

**CORRUPTION CHARGES BROUGHT AGAINST SNC-LAVALIN**

In last year’s “Legal Year in Review,” we discussed the RCMP’s three-year criminal investigation into the overseas operations of SNC-Lavalin to determine the existence of corruption. On February 19, 2015, the RCMP National Division brought charges against the SNC-Lavalin Group Inc., its division SNC-Lavalin Construction Inc. and its subsidiary SNC-Lavalin International Inc. (together, SNC-Lavalin). Each entity was charged with one count of corruption under the CFPOA and one count of fraud under the *Criminal Code*.

The laying of charges against this leading – and respected – Canadian public company confirms that the government is intent on rooting out corruption on the part of Canadian companies, regardless of their reputation and size. The prosecution of these criminal charges will unfold in the months to come, with the first court appearance by the accused currently scheduled for February 2016.
The prosecution of SNC-Lavalin for foreign bribery and fraud is a direct message from the federal government that officers and directors of Canadian corporations should be carefully monitoring the activities of their overseas businesses, including those of their agents, as well as their record-keeping and internal controls. We expect that this will lead to the implementation of risk-based robust anti-corruption compliance programs for those Canadian companies operating overseas that have not yet heeded several prior wake-up calls.

THE ESTMA COMES INTO FORCE

As of June 1, 2015, Canadian businesses involved in resource extraction either within Canada or overseas need to comply with the transparency obligations of the ESTMA. The legislation requires Canadian businesses involved in resource extraction to file and make publicly available reports on certain types of payments made to both domestic and foreign governments.

The ESTMA will apply to any corporation, trust, partnership or other unincorporated organization “engaged in the commercial development of oil, gas or minerals in Canada or elsewhere” or any such entity that “controls a corporation or a trust, partnership or other unincorporated organization that is engaged in the commercial development of oil, gas or minerals in Canada or elsewhere.”

The ESTMA applies to all publicly listed companies in Canada if they are engaged in the commercial development of oil, gas or minerals in Canada or elsewhere. Private companies engaged in the commercial development of oil, gas or minerals will also be subject to the ESTMA, if the company has a place of business in Canada, does business in Canada or has assets in Canada, and meets at least two of the following conditions in any one of its two most recent financial years:

a. owns $20 million or more in assets
b. generated at least $40 million in revenue
c. employs an average of at least 250 employees

The ESTMA requires the annual reporting of all payments made to any domestic or foreign government or trust, board, commission, corporation, body or authority if the total amount paid within a prescribed payment category and made to the same payee in a financial year exceeds $100,000. The definition of "payee" in the ESTMA is broad and likely will capture any Indian, Inuit or Métis government or “council of the band” under the Indian Act.

Reports must be filed annually within 150 days of the end of each reporting entity’s financial year. Reporting is not required for the financial year in progress on June 1, 2015, or for any prior financial year. A reporting entity with a financial year end of December 31 will, for example, be required to begin reporting payments made in 2016 and to file its report no later than May 30, 2017. The requirement to report payments made to First Nations groups in Canada, however, is deferred for two years.
The term “payment” is broadly defined and includes “a payment – whether monetary or in kind – that is made to a payee in relation to the commercial development of oil, gas or mineral” and falls within one of the following categories:

a. taxes (other than consumption taxes and personal income taxes)

b. royalties

c. fees, including rental fees, entry fees and regulatory charges as well as fees or other consideration for licences, permits or concessions

d. production entitlements

e. bonuses, including signature, discovery and production bonuses

f. dividends other than those paid as ordinary shareholders

g. infrastructure improvement payments

If the reporting requirements of another jurisdiction achieve the purposes of the ESTMA, the Minister of Natural Resources may determine that a report filed pursuant to the requirements of that jurisdiction is an acceptable substitute for a report filed under the ESTMA. The Department of Natural Resources Canada (NRCan) has made this determination in relation to reports submitted pursuant to the rules of EU member states that have implemented the EU Accounting and Transparency Directives at a national level. It is expected that NRCan will make a similar determination in relation to reports filed under the U.S. rules following their reissuance by the U.S. Securities and Exchange Commission, as well as in relation to Québec’s recently enacted transparency legislation.

The ESTMA makes the provision of misleading information or a failure to comply with reporting requirements an offence, subject to the defence of due diligence. Fines of up to $250,000 can be levied for each day that the offence is continuing.

With the enactment of the ESTMA, Canada has moved to the forefront of resource extraction transparency regimes which, when coupled with the more rigorous enforcement under the CFPOA, should cause Canadian companies to take a hard look at their internal anti-corruption and transparency compliance programs.

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In November 2015, Prime Minister Trudeau and the other G20 Leaders endorsed the OECD’s package of measures released as part of the base erosion and profit shifting (BEPS) project. The BEPS project, an ambitious plan undertaken jointly by the OECD and G20 to overhaul the global international tax system, culminated this year in hundreds of pages of recommendations that, if adopted, could have a significant impact on cross-border trade and the competitiveness of Canadian businesses.

The OECD’s final report on the OECD/G20 BEPS project (the Final Report) was released in 2015. The Final Report represents the culmination of the OECD’s multi-year project aimed at improving the coherence, substance and transparency of the international tax system. The project was initiated at the request of the G20, in response to growing public concern about BEPS. BEPS generally refers to tax-planning strategies that exploit differences in domestic and international tax rules to shift profits to low tax jurisdictions. The BEPS project has received unprecedented attention from governments and the private sector.

The final report outlines the OECD’s recommendations and the participant countries’ consensus for addressing BEPS. It was approved by the G20 Finance Ministers on October 8, 2015 at their meeting in Lima, Peru, and endorsed by the G20 Leaders on November 16, 2015 at their meeting in Antalya, Turkey.

The Final Report represents the consensus views of 44 countries that make up about 90% of the global economy. As a result, if the recommendations in the reports are adopted into tax treaties and domestic law, they could have a significant impact on cross-border trade and investment around the world. The Final Report includes recommendations on the digital economy, the use of hybrids, designing controlled foreign corporation rules, limiting interest deductibility, limiting the use of patent boxes and certain other harmful tax

...if the recommendations in the reports are adopted into tax treaties and domestic law, they could have a significant impact on cross-border trade and investment around the world.
practices; preventing abusive treaty shopping, preventing artificial avoidance of “permanent establishment” status, aligning transfer pricing outcomes with value creation, measuring and monitoring BEPS, mandatory disclosure rules, transfer pricing documentation and country-by-country reporting, making dispute resolution mechanisms more effective, and developing a multilateral instrument to modify bilateral tax treaties.

At the time of writing it is not yet known whether, and the extent to which, the new federal government may seek to adopt the various BEPS recommendations. The consensus nature of the Final Report results, in many cases, in ambiguous recommendations. Combined with broad access to financial data, such rules will undoubtedly result in many countries seeking to raise additional corporate tax revenues, and may lead to an escalation in international tax disputes and compliance costs in Canada and around the world. By avoiding discussion of difficult issues (such as the allocation of taxing revenue between source and residence countries), the consensus in the Final Report may mask significant differences in views between countries as to who will collect more tax revenue as a result of the proposals.

In Canada’s case, we hope that the new government will remain mindful of the need to ensure that tax treaty provisions and domestic rules protect the competitiveness of Canadian businesses and encourage investment in Canada.

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