

2017 Legal Year in Review

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As 2017 comes to a close, it is time again to share with our clients and friends our observations about some of the most significant legal developments affecting Canadian business over the past year and their implications for 2018 and beyond.

Remarkable technological innovations are currently affecting all sectors of business and society. For example, in 2017, crypto-assets evolved from a fringe technological curiosity into a global business. The rapid price appreciation of crypto-assets and the incredible growth of initial coin offerings has caught almost everybody off guard. This booming market is creating both new opportunities and challenges as investor interest pushes the price of crypto-assets ever higher. Blockchain, cloud computing and Agile software development practices are revolutionizing the manner in which people enter into contracts, exchange payments or value, and store and access data. Clients will need to be proactive in keeping pace with these rapid changes in order to capitalize on new opportunities and mitigate risks.

Outside the technological realm, a groundbreaking shift in social policy in 2017 set the stage for the legalization of cannabis for recreational use in Canada, which is scheduled to take effect no later than July 1, 2018. In preparing for the launch of this new market, businesses face a fluid and changing legal environment. All the rules of the game are not yet known. Provinces are in the process of passing legislation that will address issues such as marketing, purchase and use. Meanwhile, there are a number of minefields to navigate arising from lack of uniformity in regulation both inter-provincially and internationally. Businesses that fully understand all of the regulatory implications of the new regime and that anticipate and adjust to new legislative requirements as they are introduced will be best positioned to succeed.

In the corporate and securities law arena, the increase in initial public offering (IPO) activity in 2017 saw an increase in the use of “growth targets” – forward-looking information about a company’s medium- to long-term financial and operating results – to supplement the company’s growth strategy disclosure. The quality of a company’s growth strategy and management’s track record for achieving growth can significantly impact the success of an IPO as well as ongoing share price performance. Although growth targets are being more closely scrutinized by investors as well as Canadian securities regulators, companies looking to go public should continue to consider their benefits.

New and renewed investor focus on issues of board diversity and proxy access and an increasing interest in climate change disclosure accounted for some of the most significant developments in corporate governance in 2017. These regulatory developments will affect corporate governance and executive compensation disclosure in 2018 and activist defensive tactics in the years to come.

While the number of Canadian M&A transactions in 2017 has been slightly higher than in 2016, the total value of deals is somewhat lower. There was also a drop in the number of proxy contests. Nevertheless, important legal developments include a new securities commission staff notice on material conflict of interest transactions, increased regulatory scrutiny of the use of private placements in the context of proxy contests, and the evolution of fairness opinion practice in light of last year's *InterOil* decision. It is too soon to assess the impact of the new take-over bid regime adopted in 2016, but it is interesting to note that there were only three hostile bids in 2017.

Meanwhile, in the United States, most developments of interest to Canadians that came from the Securities and Exchange Commission (the SEC) are more procedural than substantive. Canadian issuers registered with the SEC that report their financial statements in International Financial Reporting Standards (IFRS) will feel the pinch of at least one procedural change related to the format for filing financial statements, starting with their next annual report filing with the SEC.

In the area of enforcement, regulators continue to try to "move the needle" in their pursuit of insider trading and other white-collar misconduct. Notably, the first court-imposed conviction for bribery under the *Corruption of Foreign Public Officials Act* was upheld by the Ontario Court of Appeal. While there were few notable securities enforcement cases, the Ontario Securities Commission appears to be capitalizing on the fact that courts support the use of circumstantial evidence to prove insider trading and tipping offences.

Although 2017 saw increased activity and optimism in the mining sector compared to the previous three years, significant challenges remain. Especially for mid-tier and junior mining companies, which represent the largest segment of the Canadian mining sector, this past year could be effectively summed up as "two steps forward, one step back" in terms of overall market conditions and outlook. However, there were a number of noteworthy trends – such as increased exploration, moderate M&A activity and continued focus on alternative financing structures – which merit close attention by deal makers as we head into 2018.

In response to political pressure due to rising electricity rates, the Ontario provincial government introduced an innovative financing structure to allow it to lower electricity bills for residential consumers, small businesses and farms. Electricity rates have been rising in Ontario due in large part to the cost of fixed-price contracts entered into with clean energy generators over the last decade. The financing structure used by the Ontario government bears watching, as (to our knowledge) it is one of the first uses of a statutory securitization mechanism to collect a current revenue shortfall from future ratepayers.

In 2017, the Alberta Electric System Operator commenced the first Renewable Electricity Program (REP) competition in Alberta. The REP is a result of Alberta's 2015 Climate Leadership Plan, which seeks to implement an economy-wide carbon levy, phase out coal, develop renewable energy, cap oil sands emissions and reduce methane gas. The REP is estimated to result in \$10.5 billion in new investment and the creation of at least 7,200 new jobs. Project developers and investors should closely monitor the evolving electricity landscape in Alberta to maximize opportunities while minimizing risk.

There were a number of important tax developments in 2017. Most notably, the Department of Finance released a package of broad proposals targeting Canadian private companies and their shareholders. The measures, which were largely intended to reduce certain perceived advantages of earning income through a corporation, were widely criticized by the business community and financial advisors and several of the proposals have now been abandoned or substantially revised. In addition, the Tax Court of Canada heard the landmark *Cameco* case, now on reserve, which was the first tax appeal involving the scope of the recharacterization provisions in Canada's transfer pricing rules for related-party international transactions. In *BP*

Canada Energy Company v. Canada, the CRA pursued a test case to the Federal Court of Appeal on the limits of its power to require production of a taxpayer's internal analysis of uncertain tax positions.

Limits on document production also received considerable attention outside the tax context. The Supreme Court of Canada reaffirmed the sanctity of solicitor-client and litigation privilege, setting a high standard for legislatures that intend to abrogate the broad protection that privilege offers. At the same time, two other decisions (one of the Federal Court, and one of the English High Court) could dramatically erode the protection in areas where it was thought to have been long-established – specifically, “deal” or “transaction” privilege and the privilege attaching to documents prepared by counsel during an internal investigation. If these two decisions are upheld on appeal, their potential ramifications could be far-reaching.

Privacy issues were top of mind for organizations across all sectors in 2017, in light of sophisticated cybersecurity threats, high-profile data incidents, and an explosion in the volume of data analytics initiatives. There were several notable legal and regulatory developments in the Canadian privacy and data arena – namely, a new statutory security breach notification regime, a full Parliamentary review of Canada's Anti-Spam Legislation in response to stakeholder concerns, and a renewed focus on the need for robust data governance plans.

The federal Liberal government took a number of steps in 2017 to liberalize foreign investment review, making it easier for foreigners to acquire Canadian businesses. The most noteworthy development has been the significant increase to the financial threshold used to determine whether private-sector investments in Canadian businesses will be subject to “net benefit” review under the *Investment Canada Act*. The threshold began the year at \$600 million, was raised in the middle of the year to \$1 billion, and in the fall of 2017 was set at \$1.5 billion.

Unprecedented changes in the international trade landscape over the past year are likely to have a profound impact on many Canadian businesses. These include the renegotiation of the North American Free Trade Agreement (NAFTA), the implementation of the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) and the potential revival of the Trans-Pacific Partnership among 11 countries (TPP-11) excluding the United States. While the renegotiation of NAFTA creates significant uncertainty, the CETA and TPP-11 provide opportunities for businesses wanting to diversify their trading relationships with markets other than the United States.

As we monitor these and other legal developments in 2018, we would be happy to discuss them with you.

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