Dentons' Pick of Canadian Regulatory Trends to Watch in 2020

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Message from Sandy Walker, head of Dentons Canada's Regulatory practice group and Editor of *Dentons' Pick of Canadian Regulatory Trends to Watch in 2020*.

In this publication, Dentons' team of leading regulatory lawyers forecasts key trends for 2020. These reflect the digitization of the economy, including the significant role of data, networks and communications infrastructure, as well as unpredictable and disruptive political and economic currents at a global level, which have repercussions for trade and international investment flows affecting Canada. All of these trends are set against a backdrop of growing concerns about climate change, consumer protection and privacy.

Wading through the evolving regulatory requirements is challenging. Our team of regulatory lawyers and public affairs advisors is here to assist you to successfully navigate this shifting landscape, relying on our deep experience, strategic insights, and familiarity with the rules and regulators.

While Dentons' national team focuses on Canadian law, our clients also rely upon the Firm's global network of lawyers to help prepare for the latest regulatory developments around the world.

For more information about this report, or how we can help you, please reach out to one of our key contacts.

Public affairs

The political and policy landscape in Canada is, at all times, complex and challenging. Coming on the heels of the 2019 federal election, 2020 will bring a suite of large issues of pan-Canadian consequence for us to consider and navigate.

Even though the federal parliament is a minority parliament, few observers expect any perceived instability to lead to another federal election in 2020. At this time, there are no clear incentives for any of Canada's parties or leaders to trigger an election this calendar year. On the provincial side, an election is also not expected in the minority government-led British Columbia, and there will not be elections in Ontario, Québec, Alberta, Manitoba, Nova Scotia, or Newfoundland & Labrador in 2020. Prince Edward Island and New Brunswick both have minority legislatures and could face elections if the right dynamics cause a loss of confidence in the incumbent governments.

Beyond elections, we expect the issues outlined below to dominate politics and policy in 2020.

Canadian economy and Federal Budget 2020

According to the Conference Board of Canada, Canada's real GDP is forecast to expand by 1.8 percent in 2020, and 1.9 percent in 2021, which is up slightly from the 1.7 percent gain in 2019. Weak global growth will challenge our exports, and business investment in Canada has been underwhelmingover the past few years.

In mid-December, Finance Minister Bill Morneau delivered his first fiscal update since the 2019 federal election. There were notable takeaways from the update, namely a large increase in the federal deficit profile, up to CA$36.8 billion over a five-year window, with no plans to mitigate growth or arrive back to balance. A major driver on fiscal pressure was the projected growth in government employee-defined benefit pensions and costs, which pushed the deficit up by a total of CA$27.8 billion through fiscal 2023-24.

Among the questions raised as a result of the new deficit figures was which of the election promises made by Prime Minister Trudeau – including proposals around childcare costs, changes to the Old Age Security System, Employment Insurance, Pharmacare, and others – will he be able to credibly deliver on in the minority parliament, and how will they be paid for.

US presidential election

On November 3, 2020, American voters will decide whether or not to re-elect President Donald Trump. Canada and the United States have the world's largest and most comprehensive trading relationship, exchanging CA$1.9 billion in goods and services every day. Canadian access to the US market is responsible for roughly one in five Canadian jobs, so who wins the presidency of the United States is not only a curiosity, but critical to Canada's prosperity and security.

Whether it is trade broadly, the Canada-US softwood lumber issue, tariffs, "buy America" provisions, or immigration tensions, the re-election of President Trump, or the election of an alternative, will have far-reaching diplomatic, economic and security implications across Canada, and the campaign will be followed closely.

Federal-provincial relations

Among the revealing outcomes of the 2019 federal election were the regional tensions that exist in confederation and how they were expressed electorally. The Bloc Québécois is back in Canada's second largest province, and the Liberals were routed out of the prairies and the energy-producing parts of western Canada. In reaction to this, Prime Minister Trudeau named Chrystia Freeland, among his most capable and trusted Ministers, to the post of Minister of Intergovernmental Affairs. Since her appointment, she has actively engaged with Alberta Premier Jason Kenney, Saskatchewan Premier Scott Moe, Ontario Premier Doug Ford, and Québec Premier François Legault, among others. Regional tensions have always been a hallmark of Canadian federalism, but with a slowing economy, seeming irreconcilable policy and personality divisions, 2020 is a year of needed reconciliation between the federal and provincial governments.

Issues like pipelines, carbon pricing and pharmacare could cause further division, whereas issues like expanded internal trade, infrastructure spending, and tax policy alignment could prove pathways to greater unity. Time will tell.

Minority parliament

Through the sweep of Canadian history, roughly one-third of our federal parliaments have been minority parliaments. On average, they last about 18 months. In the current 338-seat parliament, the Liberals have 157 seats (12 short of a majority), the Conservatives have 121, the Bloc Québécois have 32, the NDP 24, the Greens three, and there is one Independent MP. The Liberals can work with any one of either the Conservatives, the BQ or the NDP to pass legislation to keep the parliament moving forward. Therefore, on the surface, passive observers would say that this is a "stable" minority parliament.

However, as with all minority parliaments, instability and chaos can arrive very quickly and unexpectedly due to a scandal, an economic crisis, a national unity challenge, an unexpected change in leadership, or a sudden swift change in public popularity that could entice opposition parties to rally together and call for a change of government.

Minority parliaments are, typically, subject to rogue waves of instability and partisan drama. Watch for this in the fall, after the June 2020 Conservative leadership race is over.

Conservative leadership

In 2019, the Conservative Party gained seats over their showing in 2015, and they won more popular votes than did the Liberals. Still, having been defeated and seeing limited growth potential in their leader Andrew Scheer, the Conservatives will choose a new leader on June 27, 2020. Already a strong group of candidates – arguably a stronger group than ran for the Conservative leadership in 2017 – has emerged, and it will be a high profile, high-stakes election with the winner in a seemingly strong position to seek the office of Prime Minister in the next campaign.

NAFTA – USMCA/CUSMA

Both the Mexican and American governments have passed the new North American Free Trade Agreement (NAFTA), or the United States-Mexico-Canada Agreement (USMCA), or the Canada-United States-Mexico Agreement (CUSMA), ,but Canada has not yet passed the necessary legislation.However, Prime Minister Trudeau stated on January 21 that the government will be tabling legislation to ratify the CUSMA the week of January 27 when parliament resumes, and he will be looking for quick passage. It is expected that both the NDP and Greens will oppose the legislation. It is further expected that the Bloc Québécois may oppose the legislation if there is not a large financial compensation package for Québec industries that are challenged by the new market access provisions of the reformed agreement.

While the Conservatives have signaled that they will support the agreement, heightened partisanship stirred by the coming leadership race, coupled with effective parliamentary tactics and demands by the BQ, NDP and Greens, could result in a challenging legislative

dynamic for the Liberal government. This will be their first big legislative test in this parliament, and will require effective management and tactics to deliver on a key agreement for the Canadian economy.

Global tensions

Canada is one of the most globally connected and integrated countries in the world. We are members of NATO, the UN, the Commonwealth, the Francophonie, NORAD, partners in NAFTA, European Free Trade, Asia-Pacific trade through the CPTPP and other agreements, as well as through our multicultural global familial networks and roots. This interconnected reality means that, at all times, Canada has real obligations and a large stake in the events happening beyond our borders.

For example, US-China trade tensions have had serious domestic consequences in Canada through 2018 and 2019, and will continue in 2020. Further, there are roughly 300,000 Canadians living in Hong Kong and more than 400,000 people of Hong Kong descent living in Canada, so when there are massive pro-democracy protests in the streets of Hong Kong, it weighs enormously on the minds of Canadians and policy makers in Ottawa.

In addition, when Ukraine International Airlines Flight PS752 was struck by an Iranian missile in retaliation against an American attack, 176 people were killed, including 138 passengers en route to Canada, and among them were 57 Canadian citizens. It was a stark reminder that events happening elsewhere are of Canadian concern.

Whether it is the US Presidential election, tariffs, Iran, North Korean belligerence, Chinese trade expansion, Brexit and the future of Europe, natural disasters, or global economic insecurity, expect 2020 to be an active year of international, and therefore domestic, preoccupation with powerful political and economic currents.

As the world's largest law firm that is deeply integrated across Canada and throughout the globe, Dentons will be watching, analyzing and providing insight into these and other issues throughout 2020.

Competition/ antitrust law

In 2020, Canada's Competition Bureau can be expected to sharpen its focus on the digital economy—a clear priority for Commissioner of Competition Matthew Boswell. Shortly after Mr. Boswell's March 2019 appointment, the Commissioner declared his "big picture" vision to be "for the Bureau to be among the world's leading competition agencies in terms how we do all aspects of our work in the digital economy." As we discuss below, this is one of several trends that could see the scaling up of competition enforcement this year in Canada.

A heightened focus on digital issues

The most visible of the Bureau's initiatives on the digital front was a September 2019 "call-out" to market participants for information on potential anti-competitive conduct in key digital markets, such as online search, social media, display advertising and online marketplaces. This "tip line"-like approach was an unusual move for the Bureau. With written submissions in the call-out process now in, all eyes are on the Commissioner as to whether 2020 will see an uptick in digital-related enforcement cases or advocacy.

An early sign of a potential digital enforcement trend came this past summer, when private equity firm Thoma Bravo saw the Bureau challenge—post-closing—its acquisition of oil and gas reserves software maker Aucerna. The firm quickly came to a consent agreement resolution with the Commissioner, committing to divest an Aucerna rival that it owned. On the Bureau's theory of the case, the Aucerna deal represented a "merger to monopoly" in a market for reserves data it described as "critical" to the business and compliance requirements of Canadian oil and gas producers.

A further development was the release of the Competition Tribunal's decision in the *Vancouver Airport Authority* (VAA) case. Among other things, *VAA* clarifies the competition law criteria that apply to actors that exercise control over, or set the rules of, a market without competing in it, including what constitutes a "plausible competitive interest" in a market sufficient to support abuse of dominance allegations. These criteria may be important in any future Bureau action concerning a digital platform. That said, the *VAA* decision set a low bar for the "plausible competitive interest" required for the Commissioner to pursue a case, but did underscore the importance of having legitimate business justifications for conduct that is challenged as anti-competitive.

The Bureau's digital focus in 2020 may also draw upon the resources of the "Chief Digital Enforcement Officer" position the organization created in 2019, with its hiring of an ex-IBM data and AI specialist. This officer's role is to ensure the Bureau has the technology, tools and techniques to capture evidence of deceptive marketing practices online or cartels/bid-rigging, monitor threats and underlying emerging technologies and work with domestic and international partners in digital enforcement.

Finally, 2020 may see the creation of the role of the Data Commissioner, as outlined in the mandate letter to Minister of Innovation, Science and Industry. The mandate letter states that the Data Commissioner will oversee new regulations for large digital companies to better protect people's personal data and encourage greater competition in the digital marketplace. How this commissioner's responsibilities will align with those of the Commissioner of Competition is not clear at this time.

Non-notifiable mergers increasingly on the Bureau's radar

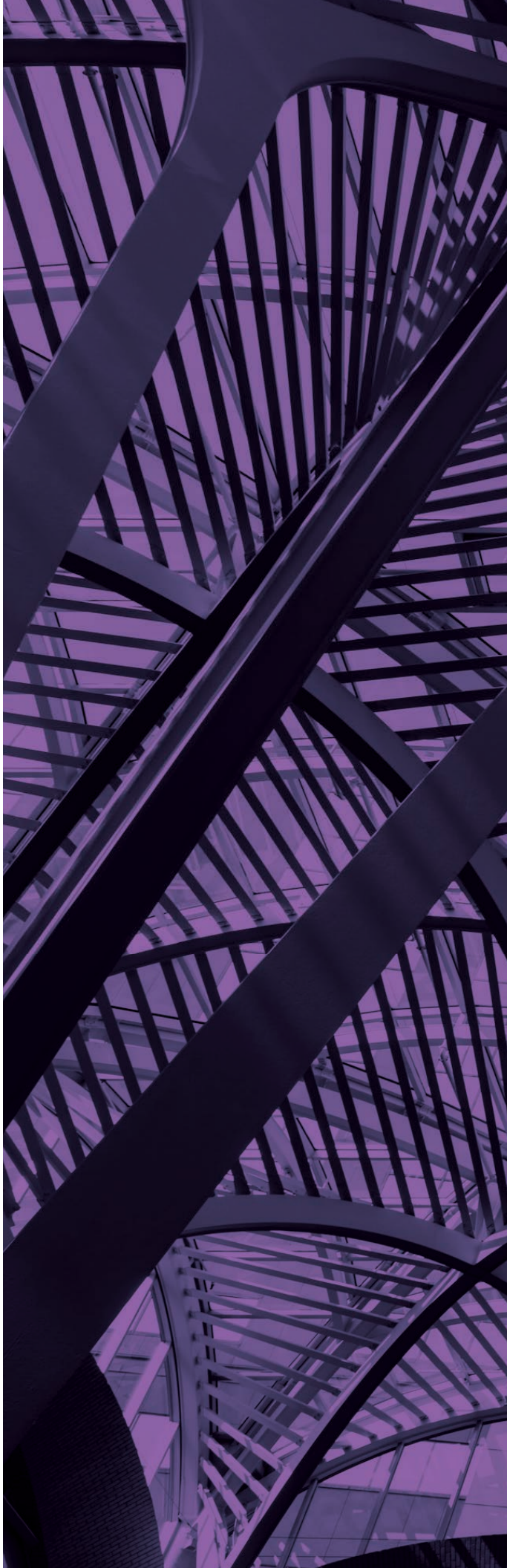
Another recent organizational change for the Bureau was the rebranding of its Merger Notification Unit as the "Merger Intelligence and Notification Unit." In announcing the change, the Bureau noted its intent to more actively scrutinize mergers falling below the *Competition Act*'s thresholds for notification.

Consistent with the announcement, many observers noted an increase in Bureau interest in non-notifiable mergers in mid-to-late 2019, such as its document production order relating to the acquisition of Encore Event Technologies by PSAV in the audiovisual services market. The Bureau's legal authority to investigate or challenge non-notifiable mergers is not new; in fact, one such case was litigated to the Supreme Court of Canada several years ago. However, the Bureau's new enforcement tack should cause companies looking to acquire Canadian businesses to more proactively assess and address competition risks in 2020.

An expanded scope for competition class actions

The Supreme Court of Canada's highly anticipated decision in *Pioneer Corp. v Godfrey* can also be expected to have consequences for competition enforcement going forward. The Court found that so-called "umbrella" purchasers that buy goods or services from non-cartelists in a sector affected by price-fixing could bring private actions under the *Competition Act* to seek damages. It also found that the discoverability principle was available to extend the two-year limitation period under the statute, and that a private right of action was not intended to displace other common law or equitable remedies available to plaintiffs. Finally, the Court established a lower bar for showing a loss at the class certification stage than in the United States.

Each of these developments can be expected to spur on private class actions in Canadian courts in 2020 and beyond.



Energy regulatory

In 2020, Canada's energy sector is poised to discover whether the regulatory uncertainty that has clouded over it for years will finally begin to abate. The Trans Mountain Expansion pipeline and a small number of other major projects have now resisted or overcome almost all legal challenges, and are inching closer to completion. Nevertheless, shifting global attitudes toward climate may yet become a long run game-changer for energy regulation. The approach to the issue from the second-term Trudeau government will be closely watched, with several of its ministers being directed to work toward a goal of net-zero emissions by 2050. Meanwhile, the government will be defending its existing policies on carbon pricing and environmental assessment against litigation brought by several provinces.

Implementation of Bill C-69

In June 2019, the federal government passed Bill C-69 to reform, among other things, how Canada assesses project impacts at the federal level. Bill C-69 enacts the *Impact Assessment Act* (IAA) and the *Canadian Energy Regulator Act* to replace, respectively, the *Canadian Environmental Assessment Act*, 2012 (CEAA 2012) and the *National Energy Board Act*.

A key area of interest for the energy regulatory world in 2020 will be how Bill C-69's implementation alters the federal review process for projects affected by its changes.

Significant changes occurred with the adoption of the IAA. Among other things, the Impact Assessment Agency of Canada is now required to apply a public interest test in carrying out "impact" assessment—which is notably broader in scope than the "environmental" assessment required under CEAA 2012. Among the new factors to be considered during an impact assessment are greenhouse gas emissions and a project's contribution to sustainability. 2020 will see the first projects make their way through the new process.

Several provinces have raised concerns about the new process, arguing that it encroaches on areas of provincial jurisdiction. In September 2019, the Alberta government filed a reference question with the Alberta Court of Appeal that asked the Court to determine the constitutionality of the IAA, as well as its related "Project List" regulations. The Alberta government, the federal government and other parties are expected to file their written submissions in early 2020. These proceedings, together with the carbon pricing litigation discussed further below, can be expected to frame the Trudeau government's next steps on environmental and climate regulation.

Developments to follow regarding pipeline projects

2020 looks to be yet another significant year for the outcome of various pipeline projects in Canada.

In mid-2019, the federal government issued a new approval for the Trans Mountain Expansion (TMX) project after the Federal Court of Appeal quashed the pipeline's initial approval in 2018 on the basis of marine and Crown–Indigenous consultation issues. Several Indigenous groups challenged the new TMX approval on the basis that the government's additional consultations were inadequate, but the Federal Court

of Appeal dismissed these challenges in a February 2020 decision. In the interim, construction began on the Alberta portion of TMX, while the Supreme Court of Canada (SCC) in January 2020 dismissed attempts by the BC government to limit the transportation into BC of heavy oils shipped from TMX and other interprovincial pipelines.

The prospects of a successful west coast liquefied natural gas (LNG) project also stand to become clearer in 2020, notably with the ongoing pursuit of the Coastal GasLink (CGL) pipeline connecting BC's significant unconventional gas resources to the Kitimat-based LNG Canada project. The BC government supports CGL, and agreements have been signed with all First Nation councils along its route. However, it is unclear whether construction blockades will continue despite RCMP enforcement of a court injunction.

Challenges to federal carbon pricing legislation

A cornerstone policy of the Trudeau government has been its national carbon-pricing scheme, implemented in 2018 with the passage of the federal Greenhouse Gas Pollution Pricing Act (the GGPPA). The GGPPA effectively imposes a minimum federal carbon price on the provinces through a "backstop" mechanism that applies where provincial legislatures do not implement federally-compliant policies of their own. 2020 will see significant developments relating to the court challenges provinces have brought against the GGPPA.

As noted last year in our **Dentons' Pick of Canadian Regulatory Trends to Watch in 2019**, Ontario and Saskatchewan challenged the constitutionality of the GGPPA in their respective Courts of Appeal, arguing, notably, that it violated the principles of federalism and that it was an encroachment by the federal government into an area of provincial jurisdiction. Last year, both Courts of Appeal rejected the provinces' arguments in split decisions.

In 2020, the debate will shift to the SCC. A new conservative administration in Alberta, which launched its own reference case on the GGPPA, can be expected to lend support to the Ontario and Saskatchewan positions. Québec, for its part, has intervened on the basis that carbon pricing, while beneficial, is a matter of exclusive provincial responsibility. A decision on Alberta's reference is expected sometime in 2020, while the SCC will hear arguments in its case in March.

Alberta curtailment policy

We anticipate that the Alberta government will continue its policy of oil production limits (or "curtailment") in 2020 to counter continuing large discounts on western Canadian oil caused by the Province's major export pipelines being at capacity. The Alberta government first announced its curtailment policy in late 2018, which requires operators with more than 20,000 bbls/day in Alberta production to scale down their output in order to achieve the government's desired province-wide oil production rate. The current Alberta government has extended the oil production limit to December 31, 2020, with a possibility of earlier termination. However, recent exemptions granted for non-oilsands production and production moved by new rail capacity suggest that targeted adjustments to the policy may be on the Alberta government's radar in 2020.

Québec, for its part, has intervened on the basis that carbon pricing, while beneficial, is a matter of exclusive provincial responsibility.

Environmental law

Over the course of the past few years, climate change and environmental considerations have influenced the political, social and economic landscape at international, federal, provincial, territorial and local levels. These issues are at the forefront of public discussions and affect the way many sectors of the Canadian economy are being regulated. In 2020, climate change and environmental matters will continue to have significant effects on how Canadian policies, laws and regulations are being shaped and applied at all levels throughout the country.

On December 13, 2019, following the federal election, Prime Minister Trudeau released mandate letters to his cabinet members, including to the Minister of Environment and Climate Change, the Minister of Fisheries, Oceans and the Canadian Coast Guard (F&O), and the Minister of Transport, notably with requests to:

- Strengthen existing and introduce new greenhouse gas (GHG) emissions reducing measures to exceed Canada's 2030 emissions reduction goal and to achieve net-zero emissions by 2050;
- Ban single-use plastic products, and work with provinces and territories to develop national targets, standards and regulations so that corporations that manufacture plastic products or sell items with plastic packaging be responsible for collecting and recycling them;
- Strengthen the *Canadian Environmental Protection Act*, 1999;
- Evaluate the effectiveness of the existing *Species at Risk Act* and assess the need for modernization;
- Implement the recently modernized *Fisheries Act*, which came into force in August 2019 (New FA). The New FA has notably enhanced the conservation powers of the F&O Ministry. It has also reinstated certain protections, including the prohibition against the harmful alteration, disruption or destruction of fish habitat, and the proscription against causing the death of fish by any work, undertaking or activity other than fishing; and
- Advance toward the zero-emission vehicles targets of 10 percent of light-duty vehicles sales per year by 2025, 30 percent by 2030 and 100 percent by 2040.

It will be relevant to watch how these mandates take form in 2020. Among the many other environmental and climate change law trends to be followed this year—in addition to matters related to the adoption of the highly anticipated federal *Impact Assessment Act* further analyzed under our Energy section—we highlight the following ones.

Constitutional issues in environmental and climate change law in Canada

Significant developments in various court cases pertaining to constitutional issues in environmental and climate change law in Canada are also to be followed in 2020, including:

- Developments to be expected this year relating to court challenges that certain provinces have brought against the federal *Greenhouse Gas Pollution Pricing Act*, which is analyzed under our Energy section;
- The outcome of the application for leave to appeal at the Supreme Court of Canada (SCC), filed in November 2019, by the Attorney General of Québec, in the IMTT-Québec (IMTT) and the Québec Port Authority (QPA) case regarding the application of provincial environmental statutes to ports (IMTT Case).

In September 2019, in the IMTT Case, the Québec Court of Appeal (QCA) confirmed the Québec Superior Court's decision, holding that certain provisions of Québec's *Environment Quality Act* (EQA) related to the obligation to obtain certain environmental authorizations, did not apply to IMTT's construction project on QPA's lands. In doing so, the Court provided relevant insights into federalism, as it relates to environmental matters that are of concurrent jurisdiction. Based on the doctrine of interjurisdictional immunity recognized in constitutional law, the QCA concluded that:

1. The tank terminal leased by QPA to IMTT is a federal public property;
2. IMTT is an enterprise that is closely intertwined with matters of navigation and shipping, as well as interprovincial transportation, making it a federal enterprise; and
3. The doctrine of federal paramountcy resolves conflicts of application and purpose between federal legislation and the EQA, rendering the provisions of the latter pertaining to the requirements of obtaining environmental authorizations ineffective with respect to IMTT's facilities and activities within the Port of Québec.

Following this decision, an application for leave to appeal at the SCC was filed.

The 26th Annual Conference of the Parties of the United Nations Framework Convention on Climate Change (COP26)

This year, COP26 is to be held in Glasgow, Scotland, and will notably aim to have countries set more ambitious targets and updated plans (i.e., Nationally Determined Contributions) to reduce GHG emissions pursuant to the 2015 Paris Agreement. In Canada, discussions in that regard will likely occur this year given the federal government's priority of exceeding its 2030 emissions reduction goal and achieving net-zero emissions by 2050. Issues of global carbon markets pursuant to section 6 of the Paris Agreement—which had not been resolved in 2019 at COP25—will also be a key agenda item to follow closely at COP26 in December 2020.

Privacy and data protection

Privacy law has been a fast-evolving field for some years now, and 2020 should be no exception. Building on developments in 2019, below are the top trends we expect to see this year that will affect Canadian businesses.

Ongoing pressures to modernize PIPEDA

The federal government has signalled its interest in updating the federal law that protects personal information: the *Personal Information Protection and Electronic Documents Act* (PIPEDA). In its May 2019 **paper**, the government proposed major reforms under three headings: "Enhancing Individuals' Control," "Enabling Responsible Innovation," and "Enhancing Enforcement and Oversight." Concretely, the proposed changes include:

a. Providing the right for individuals to move their personal information from one organization to another (known as "data portability");

b. Establishing an explicit right to request the deletion of personal information (similar to the "right to be forgotten");

c. Formally recognizing codes of practice, and accreditation/certification schemes and standards as a means of establishing compliance with certain of PIPEDA's requirements;

d. Empowering the Privacy Commissioner to issue certain types of binding orders; and

e. Expanding PIPEDA's regime for fines (both by imposing higher dollar amounts and by broadening the offences for which fines could be levied).

The changes described above would constitute major reforms, but would bring Canadian law closer in line with more recent legislation adopted in jurisdictions such as Europe (the *General Data Protection Regulation*), and California (the *California Consumer Privacy Act*). While no formal legislative proposals for major reforms have been drafted, 2020 will see more calls for legislative change, whether in the upcoming year or beyond.

Dentons has published guides to both the ***General Data Protection Regulation*** and the ***California Consumer Privacy Act***.

Personal information—and data more generally—attracts broader regulatory scrutiny

As the digital economy grows in importance, it is the use of data that is attracting attention from regulators beyond the Office of the Privacy Commissioner (OPC), whose jurisdiction is limited to personal information. In May 2019, the federal government published a **Digital Charter** that included a **letter** to the Commissioner of Competition, which called on the Competition Bureau (the Bureau) to scrutinize the marketplace effects of "digital transformation", and "data accumulation, transparency and control." In September, the Bureau issued a **call-out** to market participants asking them to share "information on potentially anti-competitive conduct in the digital economy."

As the public consultation remains ongoing, we do not yet know what conclusions the Bureau may draw from the input it receives, but as in other major jurisdictions, there may well be calls for greater scrutiny of digital giants that have amassed large quantities of data, including personal information. What is all but certain is that the importance of data and personal information will only continue to grow, making it increasingly likely that authorities that have not historically been central to the privacy law framework (such as the Competition Bureau), will require more attention from organizations that handle personal information; and organizations that have typically handled data sets that did not

have personal information (and therefore escaped regulation), may now find themselves within an evolving data regulatory perimeter (for example, the proposed Data Commissioner mentioned in the December 2019 mandate letter for the Minister of Innovation, Science and Industry).

Dentons has published Insights on both the **Digital Charter** and the Bureau's **call-out**.

Cybersecurity continues to be high priority

Exponential growth in the volume of personal information being collected, along with numerous high-profile data breaches and ongoing adaptation to PIPEDA's breach notification requirements adopted in November 2018, should continue to put the spotlight on cybersecurity. A **report** by the OPC indicated that 58 percent of breaches reported over the past year were due to unauthorized access (by both external and internal (employee) actors), and 22 percent were categorized as accidental disclosures.

These figures are a reminder that cybersecurity means not only having passwords and firewalls, but also adopting – and enforcing – policies governing how employees handle data. Whether emailing personal information to one's private account to work from home, or leaving a company laptop in the back seat of a car, carelessness can be as dangerous as fraud. Employee education will continue to grow in importance, as the rise of **"deepfake technology"** will only make phishing and other attacks more sophisticated.

Dentons has published Insights on both the **breach notification requirements** and the **OPC's one-year report**.

Cannabis regulatory

There were numerous regulatory developments in the cannabis industry in 2019, including the official launch of "Cannabis 2.0" (the legal regime for cannabis edibles, extracts and topicals). We also saw the onset of a public health scare regarding vaping-related illness. As a result of the rapidly changing regulatory regime, Canada experienced some of the growing pains expected with being the first G7 nation to roll out a national recreational cannabis regulatory regime. In 2020, we expect to see additional regulatory developments that will further impact the emerging cannabis industry.

Under the federal *Cannabis Act*, each province has the power to enact legislation to govern the distribution of cannabis within its province. This has resulted in each province having a distinct regulatory regime and model for the distribution of cannabis. Certain provinces seem to have fared better during the first full year of legal recreational cannabis, although retail distribution within Canada, and certain provinces in particular, was far from smooth. We saw an expected initial supply shortage of cannabis, followed by a comparatively unexpected oversupply of cannabis, resulting in many of the provincial distributors returning product and many licensed producers of cannabis (LPs) reducing sales estimates for the years ahead. LPs have consistently pointed to the slow rollout of retail stores in Ontario and Québec as a primary factor for why sales figures have been underwhelming and why certain LPs have produced excess inventory. Ontario recently announced that it will scrap the current lottery system for cannabis retailers, which has largely been perceived as a failure, and open the market for private cannabis retailers.

In 2020, we expect to see a rapid rollout of retail stores in Ontario, providing new economic opportunities for private businesses, while also combatting the proliferation of the illicit market. While nothing definitive has been announced, there has also been speculation about several provinces abandoning their wholesale distribution model and allowing licensed retailers to purchase cannabis from LPs directly (rather than having a government monopoly acting as intermediary). In this regard, we expect that provincial governments will start to collaborate to develop models for the distribution of cannabis that may prove more beneficial for their population and economy. While it is unlikely that all provinces will align their cannabis regulatory regimes, we do expect that certain provinces will take steps to revise their regulations based on lessons that can be learned from the provinces where cannabis distribution has been deemed most successful.

While cannabis edibles, extracts and topicals (colloquially referred to as "Cannabis 2.0") technically became legal in late 2019, the majority of the Cannabis 2.0 rollout will occur in 2020. As with any new commercial product, we expect there to be intense scrutiny of the distribution and impact of these products, as well as potential regulatory responses. For example, there have been reported cases of e-cigarette or vaping product lung injury with an apparent association with cannabis vaping products. In response to this, we have already seen the Provinces of Nova Scotia, Newfoundland, Québec and Alberta make announcements either completely prohibiting, restricting or delaying the sales of cannabis vaping products in their province. We expect that all provincial governments will be keeping a close watch

on further developments with respect to Cannabis 2.0 products, and in particular, vaping products, and that other Canadian provinces may implement regulatory changes with respect to such products.

Additionally, LPs and other cannabis industry stakeholders have long pointed to the strict limitations on the marketing and promotion of cannabis products as having a significant adverse impact on their ability to grow their businesses. While we do not expect that changes to the marketing regime for cannabis products to be imminent, we expect that cannabis industry stakeholders will continue to vigorously lobby for the loosening of the regulatory regime as the sector rapidly develops into a more traditional consumer packaged goods industry.

Cannabis is one of the most rapidly growing areas of law in Canada and around the world. Doubtless, regulatory trends affecting cannabis beyond those identified here will emerge. While we cannot know with certainty what the future has in store, Dentons expects that regulatory developments will focus on three key areas: addressing health and safety concerns; accelerating the growth and competitiveness of industry stakeholders; and eradicating the illicit market through measures taken to enhance the accessibility and affordability of legal cannabis.

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Electronic communications regulatory

New methods of communicating are at the heart of an expanding and interconnected web of economic, social, cultural and political activity that challenges notions of carriage (telecom) and content (broadcasting). Consumers are not communicating the way they used to, on dedicated connections provided by incumbent telecommunications and cable networks, and are no longer consuming content in a linear fashion from a limited range of choices provided by licensed distributors and over-the-air undertakings. Free applications, delivered over the internet, are increasingly the way people communicate and obtain content, including news and information. Much of the experience is being shaped by behavioural analytics based on massive amounts of information about users, which service providers rely on to deliver customized experiences and generate advertising revenue.

These changes represent tremendous innovation, choice and opportunity, but also come with some well-known challenges in terms of holding new types of service providers accountable to expected or desired norms. The historic purposes and modes of control over carriage and content are called into question by the new environment.

Heading into 2020, the **Broadcasting and Telecommunications Legislative Review** (BTLR) Panel, which was constituted in June 2018 to review the legislative framework governing Canada's communications sector, will transmit its final report to the responsible Ministers at the end of January. Following this report, we expect the Government of Canada will attempt to deliver on its May 2019 Digital Charter, which set out the governing Liberals' pre-election plan to build an innovative, people-centered and inclusive, data-driven digital economy.

This will be challenging, to say the least. The list of issues that defy traditional concepts and jurisdictional boundaries continues to grow, and proposals for legislative reform will require buy-in from opposition parties that hold the balance of power in the upcoming 43rd Parliament of Canada. Against this backdrop, Canadian regulatory authorities will continue to regulate carriage and content under 30-year-old legislation, with a view to promoting competition, broadband deployment and the consumer interest. The work of the CRTC is rendered even more interesting by the Supreme Court of Canada's recent decision in *Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65) that strips away deference from administrative actors subject to a statutory right of appeal, including the Canadian Radio-television and Telecommunications Commission (CRTC).

Regulation of carriage

In 2019, the federal government issued a **policy direction** to the CRTC under the *Telecommunications Act*, which directed the Canadian communications regulator to focus on "competition, affordability, consumer interests and innovation."

All indications are that the Canadian telecommunications regulatory agenda in 2020 will be busy. Industry and the federal government will need to respond to the recommendations pertaining to

telecommunications networks and services in the BTLR Panel's final report. In addition, we will see the extent to which several major decisions will be shaped by the 2019 Policy Direction.

On the wireless side, jurisdiction over spectrum allocation and assignment resides with the newly renamed Minister of Industry, Science and Innovation (ISI), while the power to regulate the terms and conditions of wireless telecommunications services resides with the CRTC.

In 2020, the Minister of ISI will issue decisions on the licensing and policy framework for mobile terrestrial use of 3,500 MHz spectrum, and will likely hold a public auction under the resulting framework by the end of 2020. The Minister will also likely consult on the release of additional spectrum for 5G mobile wireless deployments, including millimetre wave (26 GHz, 28 GHz, and 37-40 GHz) spectrum and C-band spectrum (3.5 GHz – 7 GHz).

The CRTC will complete its review and release a decision in relation to the regulation of mobile wireless services, under the watchful eye of the federal government, which has committed to lowering wireless prices by 25 percent. It has also ordered the CRTC to reconsider its earlier position against mandating wholesale mobile virtual network operator (MVNO) access to the radio access networks of wireless carriers.

On broadband access and wireline services, the CRTC will, as planned, initiate in 2020 a number of major reviews that will shape the competitive landscape, including a review of wireline wholesale services and interconnection, and a review of its approach to setting wholesale rates.

We also expect the CRTC to move forward as planned on consumer protection and public safety files, including: overseeing the implementation of a framework for reducing spoofed and nuisance calls; evaluating the implementation of next-generation 911; and monitoring the National Public Alerting System.

2020 will also see the operationalization of three previously announced funding mechanisms designed to achieve high-speed broadband coverage to 100 percent of Canadian homes and businesses by 2030:

a. The CRTC's industry-funded Broadband Fund of CA$750 million over five years, which will be directed at projects that meet the CRTC's universal service objective of 50/10 Mbps service;

b. The federal government's Universal Broadband Fund of CA$1.7 billion over 13 years that will provide Canadians in rural and remote communities with access to high-speed internet; and

c. CA$3 billion in investments over 10 years through the Canada Infrastructure Program and the Canada Infrastructure Bank.

Outside of the CRTC and the regulation of competition in telecommunications markets, network security and copyright-infringing website content will continue to test the existing statutory framework. It remains to be seen if in 2020, the federal government will take further action to reinforce network security, and decide in one way or other whether Huawei should continue to have a role in future network deployment. The Federal Court of Appeal will also hear appeals from a Federal Court order compelling Internet Service Providers (ISP) to block pirated content sites identified by Canadian content rights holders. At issue is whether telecommunications carriers (including facilities-based ISPs) must obtain prior CRTC approval before blocking or controlling access to online content.

Regulation of content

2019 witnessed numerous domestic and foreign calls to respond to growing citizen distrust of often borderless electronic communication services, arising from concerns with harmful or illegal online content and conduct, privacy practices, unfair or anti-competitive behaviour, and election meddling. In Canada, various Parliamentary Committees – the **Standing Committee on Industry, Science and Technology**, the **Standing Committee on Canadian Heritage**, the **Standing Committee on Access to Information, Privacy and Ethics** as part of the International Grand Committee on Big Data, Privacy and Democracy – and the Office of the Privacy Commissioner all issued recommendations concerning the regulation of electronic communications.

For its part, the CRTC had already weighed in on the issues within its remit with its May 2018 ***Harnessing Change*** report to the federal government. At the

time, the CRTC recommended that a new regulatory framework be developed for all services involved in providing audio and audio-visual content to Canadians, including those who have not, to date, had significant broadcast regulatory obligations, such as online content providers and ISPs.

Shortly thereafter, in June 2018, the federal government **tasked** the BTLR Panel with recommending legislative changes, with "a focus on choice and creativity while maintaining the core principles of national identity and cultural sovereignty that underpin Canada's cultural policy." Also included in the BTLR Panel's Terms of Reference were issues related to the preservation of trusted, accurate, and quality news and information in Canada.

Beyond cultural concerns, in the midst of the BTLR Panel's review, the Government of Canada released ***Canada's Digital Charter: Trust in a Digital World*** (Digital Charter), which outlined 10 principles addressing a wide range of entitlements and protections for Canadians, with the twin goals of building trust and promoting economic growth.

The themes contained in the Digital Charter are in line with the reforms being advanced by governments and legislators elsewhere in the world, such as the European Commission through its *General Data Protection Regulation*, and the UK's examination of new online rights to offset emerging online harms.

In the meantime, the Prime Minister has mandated the Minister of Heritage to introduce legislation by the end of 2020 that would "ensure that all content providers, including internet giants, offer meaningful levels of Canadian content in their catalogues, contribute to the creation of Canadian content in both Official Languages, promote this content and make it easily accessible on their platforms." Similarly, the Minister of Canadian Heritage has been asked to create new regulations for social media platforms, starting with a new regime for the removal of illegal content and measures to address various forms of harmful content.

The BTLR Panel will issue its report in the early part of 2020. This will be an important part of the initiatives to develop a new regulatory regime for audio and audio-visual content, as well as in relation to online harms. In 2020, businesses engaged in creating and distributing content in Canada should prepare for public consultations and new measures to regulate online audio and audio-visual content, news and information, and social media companies.

Consumer protection measures

In 2020, we expect more regulatory activity to strengthen consumer protection, with a trend towards eliminating sector specific codes in favour of a consolidated approach to addressing such matters.

The CRTC will initiate a public consultation process to consider the consolidation of its consumer protection codes of conduct, including the *Wireless Code*, the *Television Service Provider Code*, and the *Internet Code*. The existing codes contain some similarities, but also notable differences in terms of content and application.

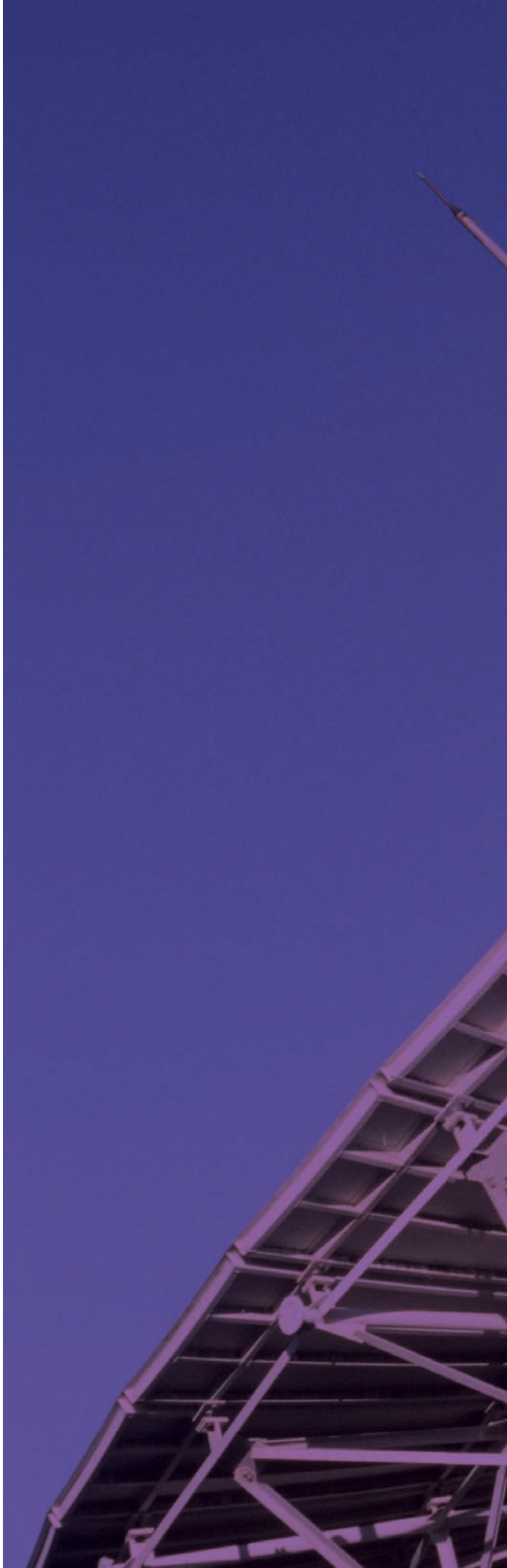
Regarding sales practices, both the federal government and the CRTC have signalled their intention to enhance the consumer protection regime, and the Commissioner of Competition has recommended that enhanced mandatory disclosures be prioritized. The federal government is seeking to create a new "Canadian Consumer Advocate" for the federally regulated banking, telecommunications and transportation-related sectors. The mandate and role of this consumer advocate is not yet known, but if the federal government intends to replace existing consumer complaint resolution processes, this would be a major undertaking.

We also anticipate the CRTC will begin to implement relevant aspects of the new *Accessible Canada Act*, which has as its objective the removal of barriers in the delivery of federal government services and in the federally regulated private sector. These initiatives could impose potentially onerous duties on broadcasting undertakings and telecommunications service providers regulated by the CRTC.

Conclusion

In 2019, there was widespread recognition that how we communicate has changed, and therefore, how we regulate communications must also change. Other governments are starting to overhaul their approaches. Notably, member states of the European Union must adopt the ***European Electronic Communications Code***, which is intended to respond to the "convergence of the telecommunications, media and information technology sectors," by December 2020.

Going forward, we expect legislative and regulatory changes in Canada across a number of information and communication statutes. What could legislative reform in the sphere of electronic communications mean, practically? It could mean new rules, new institutions, or familiar institutions with new roles, and new expectations. Certainly, approaching these activities through existing frameworks, confined neatly to one territorial jurisdiction and discrete legislative spheres, may no longer be tenable.



Trade

International trade law is likely to continue on a rocky path over the coming year. Below, we set out some of the key Canadian trends in international trade for 2020.

CBSA priorities, and antidumping and countervailing investigations

The Canada Border Services Agency (CBSA) recently updated its trade verification priorities, which identify goods that will be subject to heightened compliance and enforcement scrutiny. This included certain furniture, footwear, specified plastics and chemical products (see client alert **here**). These products will be priorities for the CBSA throughout 2020.

Throughout 2020, the CBSA will continue its ongoing investigations into antidumping and countervailing duties, including for **corrosion resistant steel** and **sucker rods**. Additionally, the CBSA will actively monitor heavy plate steel and stainless steel wire, both of which are subject to safeguard duties (responsive to the US s. 232 steel and aluminum tariffs), and now require import permits for entry into Canada. Based on recent legislative amendments, we anticipate that again, in 2020, domestic steel producers may seek the imposition of safeguard duties on imported steel.

Canada-United States-Mexico Agreement (CUSMA) ratification and implementation

The CUSMA is set to be ratified by all treaty parties and enter into force in 2020. On December 10, 2019, the parties to the CUSMA agreed to amendments to the initially signed treaty through a Protocol of Amendment (Protocol). The Protocol includes improved state-to-state dispute settlement provisions, additional labour protections and a rapid response mechanism directed at Mexico with respect to freedom of association and collective bargaining, additional environmental protections, the removal of certain intellectual property protections, and a clarification on steel and rules of origin (requiring that all steel manufacturing processes occur in one of the CUSMA parties).

The CUSMA parties must ratify the agreement and Protocol through their respective domestic procedures for the CUSMA and Protocol to enter into force. In particular, the CUSMA will enter into force three months after all three parties have notified each other of the completion of the domestic ratification procedures.

Brexit

Brexit appears poised to occur on January 31, 2020. Shortly after the December 12, 2019, UK election, the House of Commons passed the **Withdrawal Agreement legislation**, which is expected to pass through the UK legislative process before the January 31, 2020, deadline for leaving the EU.

The Withdrawal Agreement provides that after January 31, 2020, the UK and EU will enter into a transition period where they will negotiate a free trade agreement that will govern the trading relationship between the EU and UK. The transition period slated to begin on February 1, 2020, will last until December 31, 2020. During this period, the EU-UK relationship will remain the same as it was prior to Brexit.

Further, under the **Withdrawal Agreement**, the UK will continue to be bound with respect to third parties, such as Canada, by international agreements signed by the EU during the 2020 transition period. For example, in the context of the Comprehensive Economic and Trade Agreement (CETA), the UK will be required to continue providing CETA treatment for Canadians. Despite this, third countries are under no obligation to give preferential treatment to the UK after January 31, 2020, and in many cases, would need to pass or implement new laws or regulations to afford the UK such treatment.

The multilateral trading regime: The WTO crisis

Canada will continue to support the WTO against what many have viewed as attacks against the multilateral trading regime. On December 10, 2019, the terms of two Appellate Body members ended, leaving only one remaining Appellate Body member. The quorum for an Appellate Body panel is three members. New appointments to the Appellate Body have been continuously blocked by the United States with the result that the Appellate Body is no longer able to function. As a consequence, appeals from first instance dispute settlements cannot be heard by that body, the effect of which is to leave in legal limbo those first instance decisions.

In July 2019, Canada and the EU, and several other countries since that time, agreed to an ad hoc **interim arbitration process** under article 25 of the Dispute Settlement Understanding. Under this agreement, disputes between states that have agreed to such a process may be appealed to an ad hoc arbitration panel, which will decide the dispute in lieu of the Appellate Body. This solution will allow for finality of disputes between parties agreeing to an arbitration. However, it remains far from a satisfactory solution to the current impasse.

In brief, looking forward, we believe that 2020 will continue to present challenges to the international trading system that, until recently, has supported a vast expansion of global trade. At the same time, new opportunities will open as trade agreements come online or are negotiated.

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Economic sanctions

Over the course of 2020, sanctions will continue to be utilized by Western countries in response to rapidly evolving geopolitical developments. In this regard, we anticipate that 2020 will be yet another busy year for Canadian sanctions.

Country-based sanctions

Given recent events in Iran, Canada will continue to monitor Iran's non-compliance with the Joint-Comprehensive Plan of Action (JCPOA). We note that Germany, the UK and France recently issued a **Joint Declaration** referring to Iran's non-compliance with the JCPOA to the Dispute Resolution Mechanism set out in paragraph 36 of the JCPOA. If this process leads to the reinstatement of sanctions by EU countries, or other forms of retaliation against Iran, Canada is likely to coordinate and align with its European allies on such measures.

Canada is closely monitoring the situation in northern Syria, and any further incursions or actions taken by the Turkish government in that area. To date, Canada has stopped short of sanctioning Turkey for its recent military action in Syria. However, on October 15, 2019, Global Affairs Canada confirmed it has suspended all new exports permits for goods destined for Turkey. Many observers believe that official sanctions will be imposed by Canada should Turkey take any further action; this position would be consistent with actions taken by several of Canada's close allies.

Canada will also be monitoring Russia's actions relating to the Russian annexation of Crimea, and the democratic stability of Venezuela. Further Russian incursions into Ukraine, and acts by the Maduro regime that Canada deems to be antidemocratic, may also bring further sanctions to key officials from those countries.

Canada has also shown increasing concern over the actions taken by the government of Myanmar, and its treatment of the Rohingya people. Proceedings have been brought to the International Court of Justice by Gambia against Myanmar alleging that Myanmar has engaged in genocide. Canada, along with the Netherlands, **has pledged its support for Gambia's case**, which may result in sanctions against members of the Myanmar regime.

List-based sanctions

In addition to continued monitoring and enforcement of Canada's list-based sanctions, based on a recent election **promise, it is expected that the Liberal Government** will begin to develop an expansion of its existing Magnitsky legislation to include a framework for victim protection. This will include developing measures to transfer seized assets from those who commit grave human rights abuses to victims.

Foreign Extraterritorial Measures Act (FEMA) and Helms Burton Title III suits

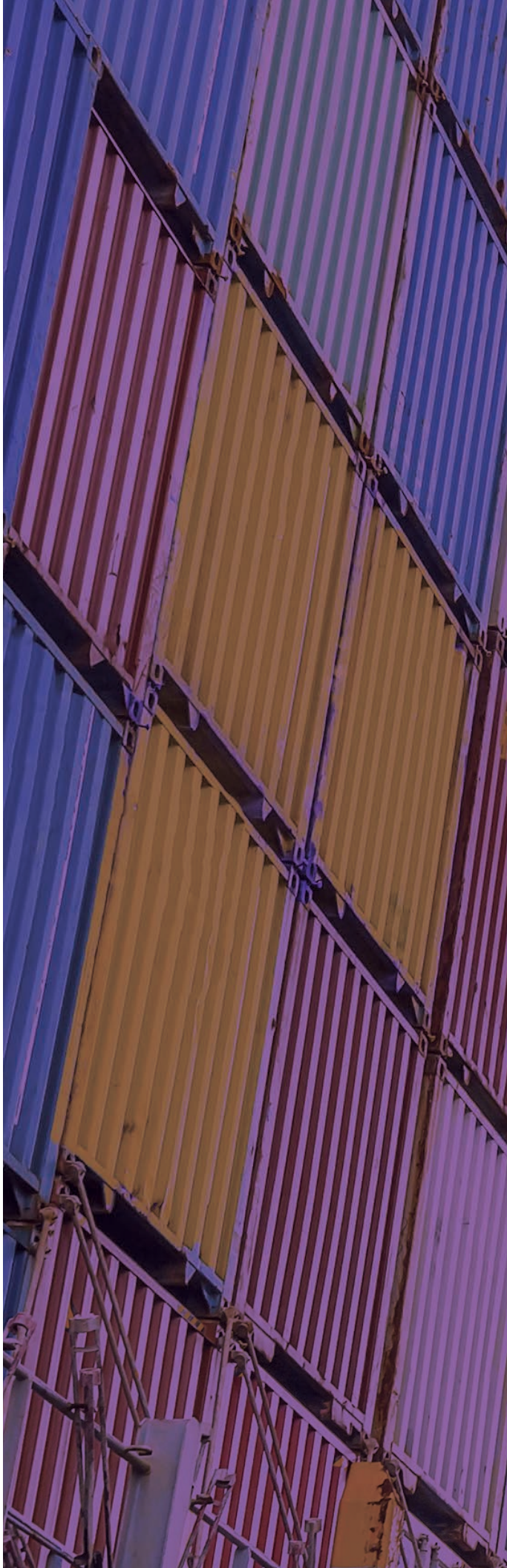
As of May 2, 2019, US nationals have been able to file lawsuits, under Title III of the *Helms-Burton Act*, seeking compensation from individuals or entities that have "trafficked" in property confiscated by the Cuban government on or after January 1, 1959. To date, suits have been filed in the US relating to the cruise ships, hotels and related booking agencies, and airlines, among others. Initial cases have yet to be resolved, and have yet to target any Canadian businesses. However, should these "test cases" prove successful, we anticipate numerous Canadian entities doing business in Cuba will be subject to such lawsuits.

Should this occur, Canadians might claim protection under Canada's blocking statute, the FEMA, which contains four principal countermeasures to protect Canadians against the extraterritorial application of the *Helms-Burton Act* (outlined **here**).

Canadian investigations and prosecutions

2020 will likely see the conclusion of the Royal Canadian Mounted Police's investigation into a Canadian lobbying firm that contracted with the Sudanese military to lobby US officials for increased military aid. The firm signed a US$6 million contract with Sudan to seek funding and military equipment from the US for Sudan's new military regime.

Additionally, 2020 will see a decision in the enforcement case against Nader Kalai, who has been charged and prosecuted on allegations of violating Canada's Syria sanctions by making a payment to a sanctioned Syrian company. In 2018, the Canada Border Services Agency laid the charge against Kalai, alleging he had violated the *Special Economic Measures Act (Syria) Regulations* by making a payment of 15 million Syrian pounds, the equivalent of approximately US$106,000, to a company called Syrialink on November 27, 2013. Kalai's trial is set to be heard by a judge over three days beginning May 25, 2020. If convicted, Kalai could face up to five years in prison.



Foreign investment review and national security

Foreign investors into Canada in 2020 will face an increasingly liberalized investment environment with fewer investments being subject to "net benefit to Canada" conditions for approval under the *Investment Canada Act*, Canada's foreign investment review regime. At the same time, foreigners need to remain alert to the possibility that investments could be subject to national security review. Given the diffusion of technology in all aspects of the economy, and the significance of data and communications networks, national security concerns have broadened well beyond traditional domains, such as the defence industry, creating some uncertainty for investors about when an investment will trigger a national security review.

In the cultural business sphere, ministerial approvals based on "net benefit to Canada" will continue apace in 2020. Investors in Canadian businesses that are engaged, even minimally, in cultural business activities – for example, the production, sale and distribution of books – will frequently be required to apply for a review by the Minister of Heritage Canada, as the review threshold for cultural sector acquisitions remains very low.

Net benefit review on the decline, except for "cultural businesses"

2020 may see fewer net benefit reviews as a consequence of the liberalization of the net benefit review thresholds each year. These reviews assess a transaction's impact on Canadian jobs, capital expenditures, competition, the location of head office functions, the participation of Canadians in senior management, and charitable and community contributions. The threshold for review for 2020 is expected to be CA$1.613 billion in the target's enterprise value for investors from trade agreement countries, and CA$1.075 billion for investors from World Trade Organization member countries. These thresholds contrast with a review threshold for WTO investors (including trade agreement countries) of CA$600 million in enterprise value only five years ago.

The number of countries to which the highest review thresholds apply continues to increase on an annual basis, which means that investors from fewer countries will be subject to the "net benefit to Canada" review, and will only have to file a four-page notification form post closing. In 2018-2019, the entering into force of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) brought private investors from Australia, Japan, New Zealand, Singapore and Vietnam under the higher trade agreement threshold. Other countries (e.g., Malaysia, Brunei, Chile and Peru) may also ratify in 2020.

The approval rate for "net benefit" reviews is high; of the nine non-cultural applications for review in 2018-2019, all were approved based on their net benefit to Canada. This contrasts to the previous year when the government rejected a significant proposed investment by Chinese SOE of a Canadian construction company.

By contrast, we can expect that cultural sector investments will regularly face "net benefit" reviews due to the very low threshold for direct acquisitions of control of Canadian cultural businesses (CA$5 million in a target's book value of assets). Cultural businesses include the production, distribution and sale of film and video products (including video games), newspapers, books and magazines, among other things. The approval process may, in turn, delay or restrict the investment. That said, Heritage Canada has instituted a more streamlined review process for businesses that carry on only ancillary cultural business activities (e.g., the sale of books in a convenience store).

We also anticipate that there may be less predictability regarding where the boundaries of "cultural products" lie in a digital world, in which content is available through multiple sources online and cannot always be easily categorized into traditional "buckets", such as books, magazines and periodicals. Technology may also blur distinctions between technological processes and content. Apart from content, modes of distribution have morphed in the digital world into forms not originally contemplated when the *Investment Canada Act* was written in 1985, which, in turn, may raise questions about what constitutes distribution.

Pivot to national security reviews

While the Canadian government has liberalized foreign investment in non-cultural businesses, its review efforts over the past few years have pivoted to assessing national security reviews arising from investments. National security reviews apply both to the establishment of a Canadian business and to acquisitions of even minority interests in Canadian businesses, regardless of the size of the transaction.

We expect that foreign investors and their advisors will be assessing the potential for national security review when planning investments in Canada in 2020, having faced enhanced national security scrutiny in many jurisdictions around the globe as national governments have become more sensitized to security risks with the rise of geo-political tensions that have disrupted longstanding political, social and economic equilibria. In addition, the traditional limits of national security risks (in the military or defence industries) have given way in the digitized economy to vulnerabilities relating to cybersecurity, networks and the transfer of critical technology, as well as data. We anticipate, however, that foreign investors will seek to address the uncertainty about national security risk by filing pre-closing and having early consultations with the Canadian government to avoid the draconian consequences (such as divestiture) of a post-closing national security review.

Moreover, in spite of the potential for broader and more frequent national security reviews, the actual number of **formal** national security reviews has been relatively modest. Although all notifiable and reviewable investments are subject to national security screening, there were only nine investments that received a notice of possible review in 2018-2019, and only seven of these investments were subject to formal Cabinet-ordered national security reviews, 0.72 percent of the 962 Investment Canada filings in 2018-2019.

In addition, we expect the Canadian government will continue to show greater sophistication in fashioning remedies to manage national security risks. The mix of outcomes from national security reviews has shifted over the past few years from cruder remedies, such as blocking investments entirely, to conditional approvals, to approvals without contingencies. This signifies that when the federal cabinet orders a national security review, this does not necessarily mean the investment is doomed to be rejected by the government, or will have to be contingent on the fulfillment of terms and conditions. To enhance a positive outcome, foreign investors would be well-advised to develop, early on and in conjunction with their advisors, a strategic plan to address potential risks of a national security review.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Anti-corruption

Building on the success of enforcement experienced in 2019, 2020 should see a continuation in the Canadian government's growing anti-corruption enforcement activity.

It was difficult to avoid news of the SNC-Lavalin (SNC) corruption proceedings in 2019. The proceedings and related matters hit the front pages of national media, was an issue in the recent election, and shone a spotlight on the newly-minted Canadian Deferred Prosecution Agreement (DPA) regime (called Remediation Agreements in Canada). The facts emerging from several court appearances relating to the charges of fraud and bribery against SNC and certain former executives proved to be gripping reading, yet ultimately, a trial was avoided without a DPA after SNC Lavalin Construction pleaded guilty in December 2019 to a charge of fraud. Significantly, the agreement resulted in a CA$280 million fine for the company, and a three-year probation order, under which its construction division will be subject to oversight by an independent monitor paid for by SNC. Most importantly, SNC will not be subject to mandatory debarment from any federal contracts, as the bribery charges filed against it under the *Corruption of Foreign Public Officials Act* (CFPOA) were dropped as part of the plea deal.

Just days prior to the approval of the SNC plea agreement, a former executive of SNC, Sami Bebawi, was personally found guilty for offences, including fraud, corruption of a foreign public official, and laundering proceeds of crime in relation to payments of more than CA$100 million to foreign officials in an effort to secure contracts in Libya for SNC. Mr. Bebawi was sentenced in January 2020, and received an eight-and-a-half-year term of imprisonment, sending a strong message that corruption will result in severe penalties for individuals.

Somewhat overlooked amidst the media focus of the ongoing SNC proceedings, was the fact that the Federal Crown secured two other CFPOA convictions in 2019. Robert Barra, former CEO of Cryptometrics Inc., and Shailesh Govindia, the company's former agent, were convicted and sentenced in March 2019 to 30-month jail terms for violating the CFPOA. The sentences handed to Barra and Govindia are significant, especially as the maximum possible sentence was five years for the charges in question. The *Govindia/Barra* decision was also noteworthy from a technical legal standpoint, because the court, in reaching its guilty verdict, found that an essential element of an offence under the CFPOA is that an accused knew, or ought to have known, that the recipient of the bribe was a foreign official. This was a somewhat unexpected aspect of the decision and may be a significant evidentiary hurdle in future CFPOA cases. For a more detailed analysis of this issue, see ***R. v Barra*: A timely but qualified success for Canada's corruption of foreign public officials regime**.

Despite a great deal of expectation and anticipation, 2019 did not see the first DPA being inked in Canada, and 2020 may, therefore, prove a critical year in the development of the regime. However, one noteworthy decision on DPAs emerging from the SNC case was the decision of the Federal Court, confirming (unsurprisingly) that a decision by the Crown to offer a DPA to a party falls squarely within the ambit of prosecutorial discretion. The Federal Court's decision confirmed that an accused who seeks to overturn a decision by a prosecutor not to offer a DPA will face the steepest of uphill battles.

Finally, 2019 saw amendments to Section 462.31(1) of the *Criminal Code* offence of laundering the proceeds of crime (money laundering). Specifically, the amendments introduced an alternative mental element

of "recklessness" to the offence, thereby lowering the threshold required to establish criminal liability for money laundering in Canada. For a more detailed analysis of the impact of this change, particularly in relation to transactional risk assessments by Canadian businesses, see our July 25, 2019 bulletin, ***Criminal Code* changes affecting money laundering in Canada: What your company needs to know**.

Overall, 2019 was, on balance, a busy and successful year for anti-corruption enforcement in Canada, despite a wave of media and other public criticism of the Prime Minister and his office regarding the handling of the SNC case. Going into 2020, the impetus to increase investigative activity may also be stimulated by the forthcoming visit to Canada by the OECD Working Group on Bribery, scheduled to begin in October 2020. A robust record of recent enforcement activity continuing through 2020 may go some way to mitigating or offsetting any potential criticism from the OECD's Working Group of the government regarding Canada's handling of the SNC file.

Despite a great deal of expectation and anticipation, 2019 did not see the first DPA being inked in Canada, and 2020 may, therefore, prove a critical year in the development of the regime.


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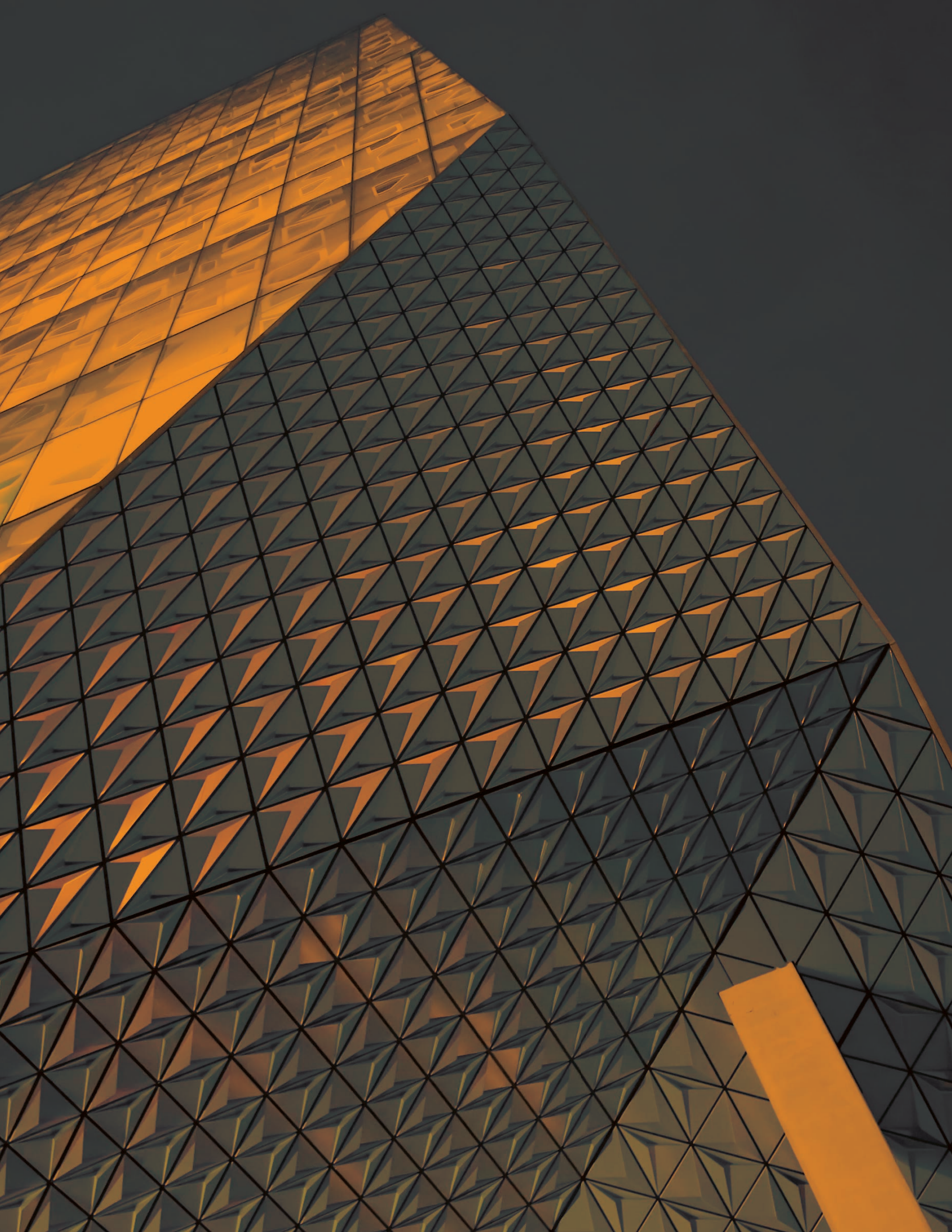

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