mccarthy tetrault

The New Normal:

A Roadmap for Business Leaders in a COVID-Continued World

mccarthy tetrault

This article is for general information only and is not intended to provide legal advice. For further information, please speak to one of our contacts.

Table of Contents

Introduction

As we approach the anniversary of Canada's pandemic declaration, changes that were originally seen as temporary disruptions are now taking on an air of permanence. Indeed, the pandemic has transformed the way we work, socialize and interact with others, accelerating our reliance on technology by perhaps a decade and transforming almost every sector. This paper will explore many of these emerging trends, the challenges they pose to your business, and how you can best position your business for success in this new normal.

Here's what we've seen so far:

Across industries, government support has helped, but cannot keep longer-term risks at bay. In an effort to combat the pandemic, every level of government implemented various restrictions on business operations, which have been adapted regularly as the situation has changed. In order to relieve the economic effects of these decisions, an unprecedented level of government support has been offered to individuals and businesses. While this support has softened the economic impact of the pandemic and measures designed to contain its spread, business is nonetheless still at risk. With such a wide scale and sustained interruption and no clear end date in sight, businesses continue to face a web of continuously changing legal, operational and financial risks. These threats range from consumer class actions and bankrupt suppliers to regulatory enforcement and trade barriers. Here, long-term planning is key to ensuring that your business takes advantage of all available supports while mitigating emerging risks.

The work from home phenomenon has changed the relationship between workers and their employers, potentially irreversibly. It remains to be seen how permanent this teleworking shift will be, with important lasting consequences from a labour and employment, immigration and real estate perspective. With talent retention and performance tracking key components of business success, employers will want to ensure that they are at the forefront of new ways of attracting, motivating and retaining their employees.

Staid industries are buffeted by the winds of change like never before. As citizens live ever more of their lives online, e-commerce has shifted from being an afterthought to an issue of prime strategic importance for retail business of all sizes, accelerating the need for enhanced online payment solutions and data privacy policies. Also, the hardening of border controls and the interruption of business operations has led to various supply chain issues, which, coupled with novel commercial contract disputes, has severely strained balance sheets. These topics raise discrete legal considerations, the consequences to your business of which we explore in greater detail in this white paper.

The overhaul of privacy legislation in the face of our accelerated technological reliance raises difficult questions. As we have become ever more reliant on technology, issues of data privacy and security have been at the forefront of the political zeitgeist. We will explore the changes discussed in the recent privacy legislation announcement and discuss a model framework developed by McCarthy Tétrault in connection with the Human Technology Foundation on the use of tracking software in COVID-19 related applications. These considerations are crucial for businesses looking to increase their digital capacities.

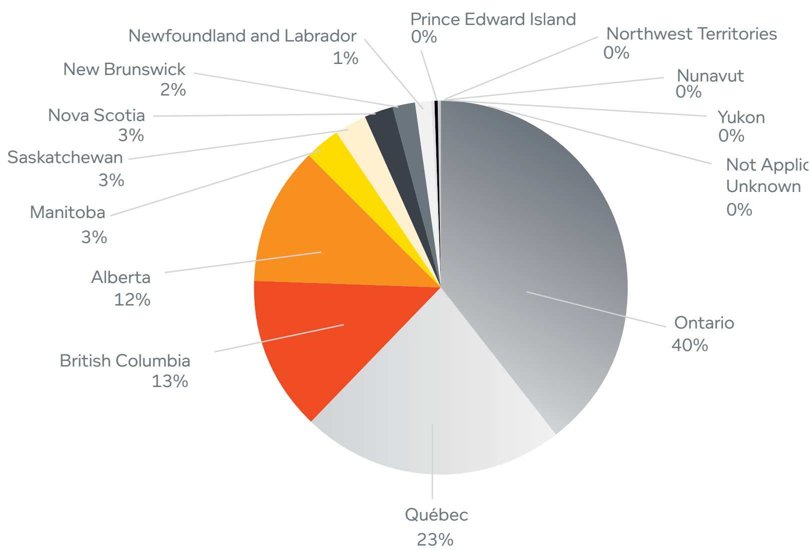
As we continue to live with the impacts of the COVID-19 pandemic on the economy and our businesses, unsure of where the horizon line is, businesses have had to adapt to a new normal. One of the challenges facing businesses going forward is to determine which changes are short-term, and which changes they need to adapt to permanently in order to remain competitive in the long-term.

Government Response

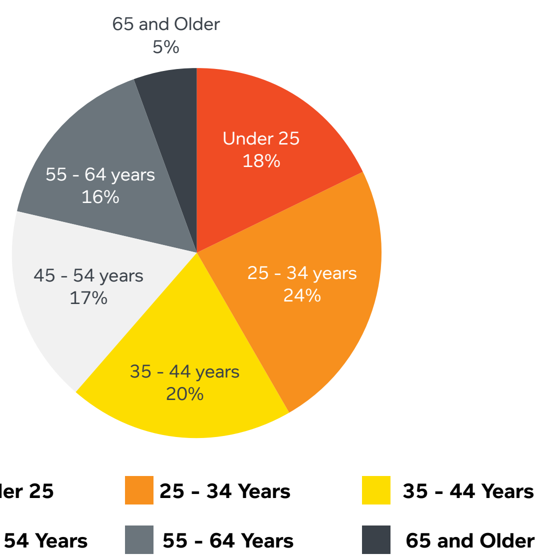
Programs for Individual Canadians

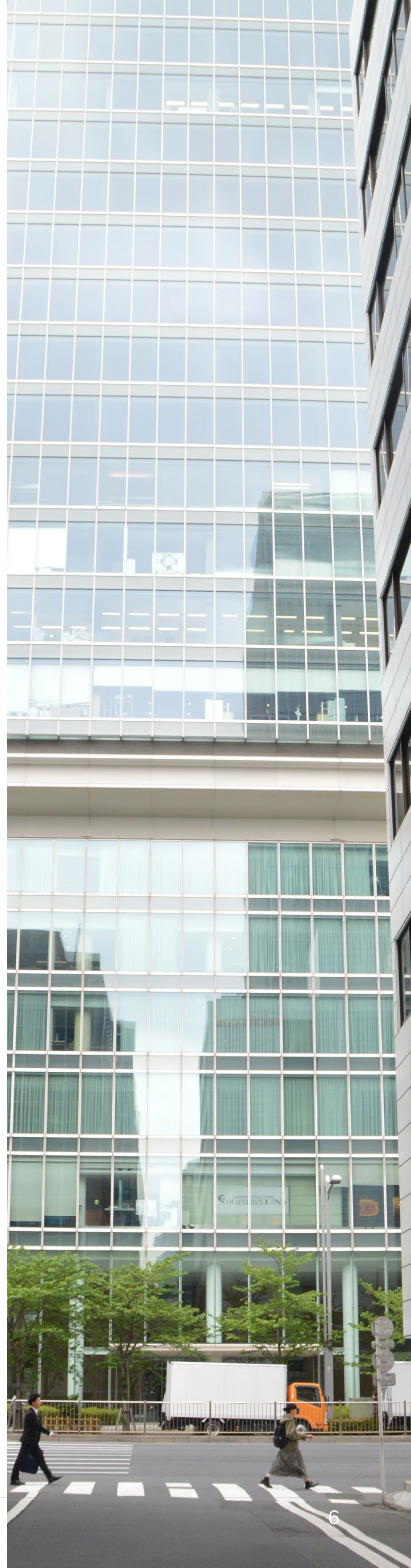
The federal government launched the Canada Emergency Relief Benefit ("CERB") offering Canadians income support of $500 per week.[1] CERB was available to eligible Canadians between March 15, 2020 and September 26, 2020.[2] Individuals were eligible for a maximum of thirteen (13) periods.[3] As of October 4th, 2020, almost 9 million unique applicants applied for CERB, totaling nearly $82 billion of benefits paid.[4] A summary of CERB benefits broken down by province and age group is shown below.

CERB Application by Province



CERB Application by Age Group





Although CERB has now ended, the federal government has implemented various recovery benefits retroactive to September 27, 2020 and available until September 25, 2021.[5]

- Canada Recovery Benefit (CRB)
- Canada Recovery Caregiving Benefit (CRCB)
- Canada Recovery Sickness Benefit (CRSB)

Several changes are also being made to Employment Insurance (EI) as of September 27, 2020 in an effort to help individuals with access to unemployment benefits. These changes include:[6]

- A higher unemployment rate will be used to calculate benefits if the region's unemployment rate is higher than 13.1%
- A reduction of insured hours to 120 hours
- Benefits will be at least $500 per week, or $300 per week for extended parental benefits
- Waiver of medical certificate requirement to apply for sickness benefit
- Earnings of 2018 to 2020 summer or winter seasons will be used to calculate fisher's benefits
- If CERB was received, the 52 week period to accumulate insured hours will be extended

CONSIDER...

How might these government programs impact wages and availability of employees

Programs for Businesses

Governments of all levels are trying to **keep Canadian businesses afloat** by back-stopping and providing loans. The diversity of businesses affected creates an immense challenge for governments creating assistance packages. Programs available to help businesses access credit include:[7]

- *Canada Emergency Wage Subsidy – available until June 2021*
- *Work-Sharing Program – available until March 14, 2021*
- *Extending lay-off periods*
- *Waiving tariffs on certain medical goods*
- *Canada Emergency Business Account (CEBA) interest-free loans – available until March 31, 2021*
- *Loan Guarantee for Small and Medium-Sized Enterprises – available until June 2021*
- *Co-Lending Program for Small and Medium-Sized Enterprises – available until June 2021*
- *Regional Relief and Recovery Fund (RRRF)*[8]
- *Canada Emergency Rent Subsidy (CERS) – available until June 2021*
- *Mid-Market Financing Program – available until June 2021*
- *Mid-Market Guarantee and Financing Program*

- *Black Entrepreneurship Loan Fund – available soon*
- *Large Employer Emergency Financing Facility (LEEFF)*

You can find more information about all of these programs on our COVID-19 Hub – see Economic relief measures announced to date.

CONSULT OUR TEAM FOR BUSINESS CONTINUITY PLANNING

The government has quickly implemented these programs for various types and sizes of businesses. However, these funds come with strings attached and will eventually come to an end. Our professionals have been engaged for long-term planning by organizations across Canada, from start-ups to multinational organizations. Consult our team and let us help you navigate through these unprecedented times.

Measures for the Overall Economy

In addition to the initiatives launched by the federal government, Bank of Canada (BoC) has been supporting the Canadian economy through its use of monetary policy, support to key financial markets and provision of liquidity to individual financial institutions. From a monetary policy perspective, interest rates were lowered from 1.75% to 0.25% in March 2020. BoC also implemented various programs to increase liquidity in core funding markets. These programs include: Government of Canada Bond Purchase Program (GBPP), Canada Mortgage Bond Purchase Program (CMBP), Bankers' Acceptance Purchase Facility (BAPF), Provincial Money Market Purchase Program (PMMP), Provincial Bond Purchase Program (PBPP), Corporate Bond Purchase Program (CBPP) and Commercial Paper Purchase Program (CPPP). In addition to these programs, BoC also offered financial institutions ready access to funding through its Standing Term Liquidity Facility (STLF), Contingent Term Repo Facility (CTRF) and Securities Repo Operations.

LOW INTEREST RATES UNTIL 2023

> **“The Governing Council will hold the policy interest rate at the effective lower bound until economic slack is absorbed so that the 2 percent inflation target is sustainably achieved. In our October projection, this does not happen until into 2023. To reinforce this commitment and keep interest rates low across the yield curve, the Bank will continue its QE program until the recovery is well underway and will adjust it as required to help bring inflation back to target on a sustainable basis. We remain committed to providing the monetary policy stimulus needed to support the recovery and achieve the inflation objective.”**
> *– Bank of Canada (December 9, 2020)*

TAKE ADVANTAGE OF LOW INTEREST RATES

Consult our Financial Services team to see how we can help you re-finance under these low rates.

Risk Management, Insurance and Disputes

Class Action Risk

As the toll from the COVID-19 pandemic continues, many businesses and individuals have sought compensation for losses related to illness, commercial interruption, and other indicators of financial health by filing class action lawsuits against various businesses and organizations.

FAILURE TO REFUND

The cancellation of events, flights, and other bookings in response to the pandemic was not always followed by a full refund, leaving some customers keen on exploring options for redress. Class actions against airlines, travel agencies, and insurance companies have received the most media attention, but claims have also been brought against universities,[9] banks' credit card programs,[10] and sporting event organizers.[11] At issue in many of these cases is whether the cancelling organization is responsible for the breach of contract or whether the pandemic was such an unforeseeable, overriding event as to void the contract under the doctrine of force majeure. Though civil courts in Québec have a relatively well developed body of law describing the operations and limits of this legal principle,[12] common law jurisdictions tend to rely on definitions found in the governing contract. It remains to be seen whether any of the ongoing failure to refund class actions will further develop the common law as it relates to this legal principle, which hasn't substantially changed in over 40 years.

i

WHAT ARE THE IMPLICATIONS OF YOUR CONTRACTUAL TERMS?

Chances are, drafters of your commercial contracts did not anticipate a global pandemic when drafting force majeure clauses. To know your rights and responsibilities, consult our team to clear up any ambiguities.

GOVERNMENT RESPONSE

Long-term care homes were particularly hard hit by the pandemic in the spring of 2020 and have contributed to a disproportionate share of its fatalities. In response, multiple class actions have been filed across the country broadly alleging that these homes failed to properly plan for the outbreak, putting their elderly residents at risk.

On August 6, 2020, the Order in Council No. 459 was passed in British Columbia, bringing into effect COVID-19 (Limits on Actions and Proceedings) Regulation[13] with retroactive applicability to January 1, 2020. Ontario soon followed with a similar bill, passing Bill 218, the Supporting Ontario's Recovery Act into law on November 16, 2020. Both laws provide liability protection against COVID-19

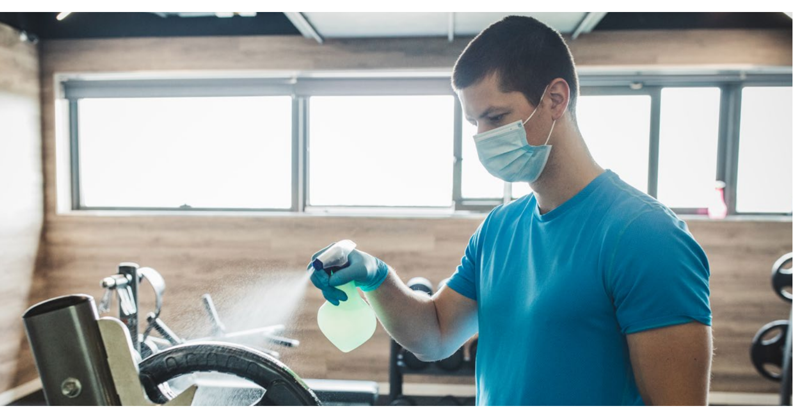
exposure-related lawsuits to individuals, businesses and other organizations that made a "good faith effort" effort to stop the spread of COVID-19 by following public health guidelines.[14] The Ontario law also acts retroactively, dismissing claims based on acts or omissions occurring on or after March 17, 2020.

Critics of such laws say it will shield long-term care homes from lawsuits and benefit insurers at the expense of consumers.[15] Indeed, Ontario Attorney General Doug Downey, in speaking about his province's proposed legislation, stated that "too many lawsuits from families who lost loved ones to COVID-19 in nursing homes would 'gum up' the legal system."[16] However, protections do not cover gross negligence, any act or omission that occurred while a law required operations to be closed or lawsuits brought by an employee against their employer.

The immediate impact of these laws is that care-home cases may be dismissed in Ontario and British Columbia unless claimants can argue that the care-home's acts or omissions fell within the protection exemptions detailed above. It remains to be seen whether these laws will spawn similar bills in other provinces.

EMPLOYEE ISSUES

Employers have a duty to provide a safe working environment and ensuring that workers are not put in harms way at work. Alleged breaches of this duty were brought by workers at Cargill's Alberta plant, who claimed that the meatpacking giant did not do enough to halt the spread of the virus, infecting over 1500 employees and resulting in 2 deaths.[17] Beyond legal risk, employers should also be wary of the reputational risks associated with managing working conditions which are non-compliant with the latest public health advisories.



CALCULATING DAMAGES

The unique and unpredictable nature of the pandemic and its economic impacts has led to challenges in projecting the profit incurred but for the act or omission of a defendant in a lawsuit. In stable economic conditions, damages are assessed by looking at the difference between the actual profit and "but for" profit of the affected party over the loss period. The pandemic and its attendant uncertainty has led to renewed interest in how such damages are calculated in a situation where the past performance of a business has little ostensible bearing on its future.[18]

Parties may find that consulting an economist provides a significant return on investment. Whether claiming or defending damages, economists are well positioned to model different economic conditions and growth trajectories (using an alphabet soup of recovery curves) for specific businesses or industries, greatly improving forecast accuracy and lending greater credibility to such evidence in court.

Damages experts have also been using higher discount rates to capture risk associated with economic uncertainty. This can be done by attaching risk premiums to the cost of equity, though this is somewhat offset by the reduction in the cost of debt and capital restructuring towards it.

OBTAINING JUST DAMAGES

In Ontario, expert reports on quantum of financial gain or loss are opinion evidence in court governed by the Chartered Business Valuator Institute and their delivery is subject to the Ontario *Rules of Civil Procedure*. The *Rules* are important when considering whether to file a preliminary report establishing a gain or loss scenario before the situation has crystalized. Such a report could help with motions or other strategic considerations. However, a preliminary report must eventually be updated, and the *Rules* may exacerbate the financial impact on the plaintiff by delaying the judicial process.[19] A careful cost-benefit analysis is essential if faced with this dilemma.

Time on plaintiff's lawyers' hands leading to novel class action lawsuits

The surge of potential legal liability brought on by responses to the pandemic has been reinforced by structural changes to the legal industry and the proliferation of contingent fee structures which have together markedly increased the volume of class actions filed in Canada.

As lockdowns reduced everyday activities such as driving, shopping and elective surgery, the legal industry saw a corresponding decrease in personal injury claims and an increase in practitioners broadening their practice into the rapidly growing class actions space. Specific to British Columbia, changes to the motor vehicle regime added a further reason for personal injury lawyers to switch their focus to class action work.

These practitioners have also tended to continue offering the contingency fee models ("no win, no fee") they had typically employed in their personal injury practice. This has invariably led to a proliferation of relatively low-quality, low-risk class action suits being filed against a multitude of defendants in what could be called a "see what sticks" approach to civil litigation.

Practitioners new to class actions have tended to file in co-counsel arrangements with more experienced class action counsel, lending credibility to the claims and necessitating a thorough defence. Canadian courts also tend to have a pro-plaintiff bent and several provinces, most notably British Columbia and Québec, make class certification particularly easy to obtain.

WHAT TO DO WHEN YOU'VE BEEN SERVED

For defendants, employing the services of an experienced class action practitioner is a smart investment. Our national team of class actions specialists bring a track record of success, whether at certification, at the negotiation table, or at trial on the merits.

Labour & Employment

Working from Home Expansion

At the height of the COVID-19 economic shutdown, 3.4 million Canadians began working from home.[20] Since then, the number has fallen to 2.5 million in August.[21] A research study done by the Angus Reid Institute shows that two-thirds of Canadians who work from home expect it to continue after the pandemic.[22] Working from home has become the new reality.

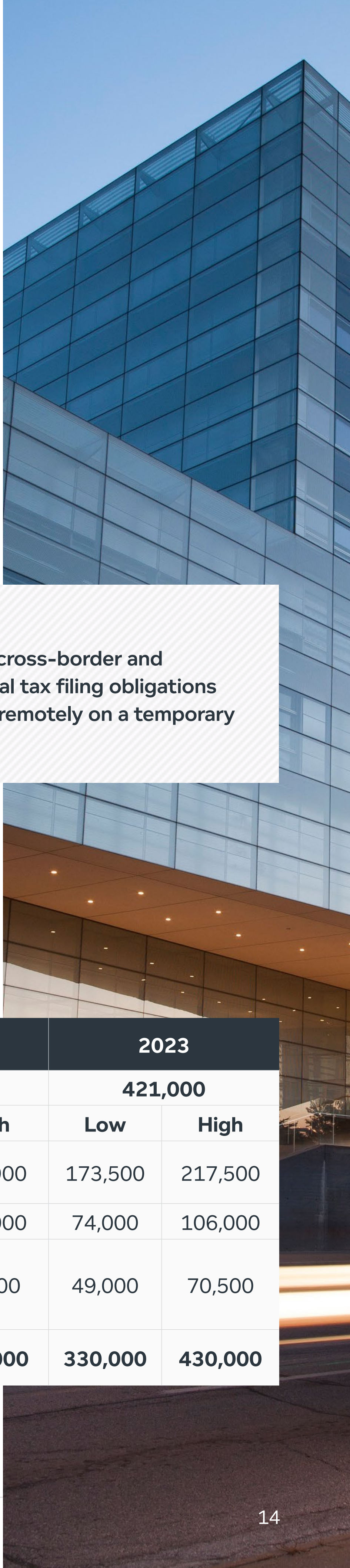
In the past, companies attempted to transition to an all-remote workforce with little success. For example, in 2013, Yahoo! CEO Marissa Mayer ended its company's remote working experiment claiming that the company needed to become "one Yahoo! again", and citing the need for increased productivity and a more connected culture.[23] Companies such as Best Buy and Hewlett-Packard have also abandoned or severely curtailed telecommuting due to the need for collaboration and innovation. Conversely, BigTech companies have fully embraced the remote working strategy and offered their employees the option of working from home permanently. For example, Facebook offered a permanent work from home policy with a corresponding salary adjustment based on cost of living. Other companies, like Twitter and Shopify, have allowed their employees to work from home permanently.

There are many practical considerations to be weighed by employers as they determine the extent of their working from home policy, post-pandemic:

Governing Law	Working from home may mean that your workforce is now borderless. This could bring additional labour and/or immigration issues associated with ensuring compliance in multiple jurisdictions.
Tax	A borderless workforce may bring additional issues related to payroll deductions, tax withholding, employee/contractor classification, or tax filing requirements in jurisdictions where your workforce is located. For more information concerning the tax implication of having members of your workforce relocate to different provinces within Canada, refer to our blog, Tax implications for employers whose employees work remotely from a different province. Businesses should proactively plan for an increasingly mobile, cross-border workforce as tax relief from local payroll deductions and cross border tax withholding may be available in certain circumstances. The Income Tax Act (Canada) allows certain home office expenses to be deducted by employees. Employers should consider what expenses it expects its employees to reasonably incur as well as the conditions of employment with respect to remote employees. For more information, refer to our blog, Home Office Expenses incurred during COVID-19: Can an Employee Deduct Them.
Policy	Existing corporate policies were drafted with a physical workforce in mind, these policies will likely need to be updated to reflect a work from home environment.
Technology	Current IT infrastructure will likely require enhancements to reflect the organization's need for digital capabilities.
Expense Reimbursement	Expense reimbursement policies may wish to consider expenses unique to the work from home setting, such as internet, equipment, technological infrastructure, mobile phone bills and software upgrades.
Data Privacy & Cybersecurity	A stronger confidentiality and privacy policy may be needed, which takes into consideration that individuals can work from their homes.
Accountability	Assessing workforce productivity will take place in a different format. Employers should consider ways of continuing to communication regular performance expectations.
Compensation	Employers should consider compensation offered, as it may no longer need to reflect regional differences. Additionally, employers must maintain the tracking of hours worked for overtime, rest period, and break purposes, despite having diminished control and insight into employees' days.
Corporate Culture	A different strategy will be required to maintain corporate culture in a virtual world.
Health & Safety	Health and safety policies may require modification to consider home workspaces. These spaces should be safe, free from hazards, and promote productivity.

> “CEOs and senior managers should think about work from anywhere is, if this becomes a more prevalent form of flexibility, then the best employees, for their own individual reasons, will start demanding this. And if you are a company that does not offer work from anywhere, there’s a real risk of losing your best employees”
>
> – Raj Choudury, Associate Professor at Harvard Business School

There are several additional considerations regarding a permanent workforce transition, consult our professionals, COVID-19 Update: The “New Normal” – Facilitating Work-from-Home Arrangements.



BUSINESS SECONDMENT OPPORTUNITIES

A member of the our tax team can assist your business in developing cross-border and secondment arrangements or determining your Canadian and provincial tax filing obligations if certain members of your workforce have relocated in order to work remotely on a temporary or permanent basis.

Immigration

Another topic related to the transformation of Canada’s workforce due to the pandemic is immigration levels. Based on the 2020 Annual Report to Parliament on Immigration released by the Immigration, Refugees and Citizenship Canada, the expected immigration levels for the next three years are.[24]

Expected immigration levels	2021		2022		2023	
Projected Admission – Targets	**401,000**		**411,000**		**421,000**	
Projected Admissions – Ranges	**Low**	**High**	**Low**	**High**	**Low**	**High**
Federal economic, provincial/ territorial nominees	153,600	208,500	167,600	213,900	173,500	217,500
Family Reunification	76,000	105,000	74,000	105,000	74,000	106,000
Refugees, protected persons, humanitarian and compassionate and other	43,500	68,000	47,000	68,000	49,000	70,500
Total	**300,000**	**410,000**	**320,000**	**420,000**	**330,000**	**430,000**

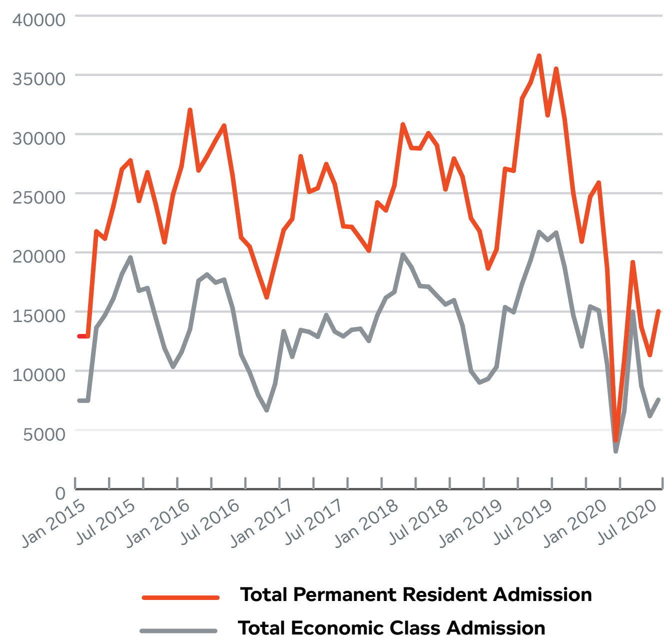
Despite the pandemic, these immigration targets appear higher than the projected plans released in 2019.[25]

Projected immigration plans released in 2019	2021		2022	
Projected Admission – Targets	**351,000**		**361,000**	
Projected Admissions – Ranges	**Low**	**High**	**Low**	**High**
Federal economic, provincial/territorial nominees	165,600	191,500	169,600	195,900
Family Reunification	87,000	98,000	87,000	98,000
Refugees, protected persons, humanitarian and compassionate and other	50,500	62,000	52,000	63,000
Total	**300,000**	**410,000**	**320,000**	**420,000**

The federal government seems confident in increasing immigration levels over the next three years. Based on prior years, economic immigration class is the largest source of permanent resident admission, at approximately 58% of all admissions in 2019.[26]

The proportion of economic immigration class as a percentage of permanent resident admission remained consistent for the past five years (as per the chart below). In fact, the number of individuals admitted under the economic class in 2019 is 5.5% higher than in 2018.[27] Of the 2019 permanent resident economic class admission, 90% of permanent residents belonged to a skilled worker class, federally or provincially.[28] This trend signals a growing skilled workers class for the Canadian economy going forward.

Permanent Resident Admission[29]



IMMIGRATION AND VISA PROCESS

As markets become global so will our workforce. The permanent resident admission increases over the next three years will give employers access to a greater source of diverse talent pool. There are various issues to consider, such as: temporary residence (i.e. work permits, study permits and temporary resident visa), permanent residence (i.e. Express Entry, provincial programs and family sponsorships) and citizenship. MT>iplus is a division of McCarthy Tétrault LLP dedicated to providing you with legal immigration support and personal attention tailored to client needs. Contact any member of our MT>iplus team to resolve your immigration issues here.

Real Estate

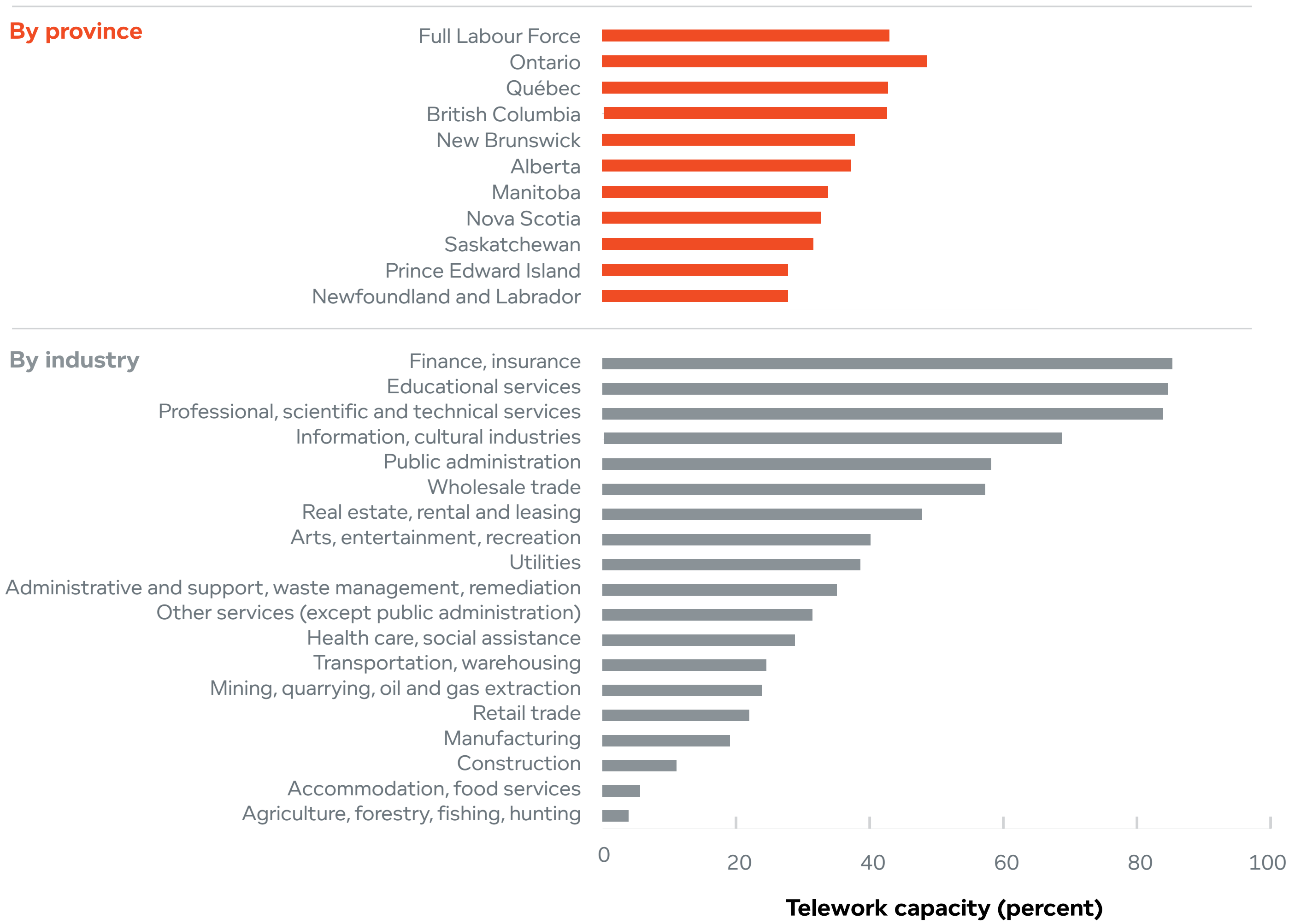
Another trend to pay attention to is the impact the pandemic will have on office space. Based on office statistics published by CBRE, summarized in the chart below, the office vacancy rate is currently at 12%, a fall from 11% a year ago. The increase in the office vacancy rate impacts downtown office space at a higher rate compared to suburban office space. [30]

	Downtown			Suburban			Total		
	Q3 2020	Q3 2019	YoY	Q3 2020	Q3 2019	YoY	Q3 2020	Q3 2019	YoY
Vacancy Rate	11.5%	9.8%	+1.7%	12.7%	12.6%	+0.1%	12%	11%	+2%

The outlook of office real estate is dependent on the working from home trend. A study performed by Statistics Canada indicates that approximately 4 in 10 Canadian workers have jobs that can plausibly be carried out from home.[31] The telecapacity of each industry and province is summarized below. It remains a question of whether the geographic and/or industry makeup of office retail will permanently change based on telecapacity.

4 in 10 Canadian workers have jobs that can plausibly be carried out from home. [31]

Telework Capacity in 2019, by Province or Industry[32]

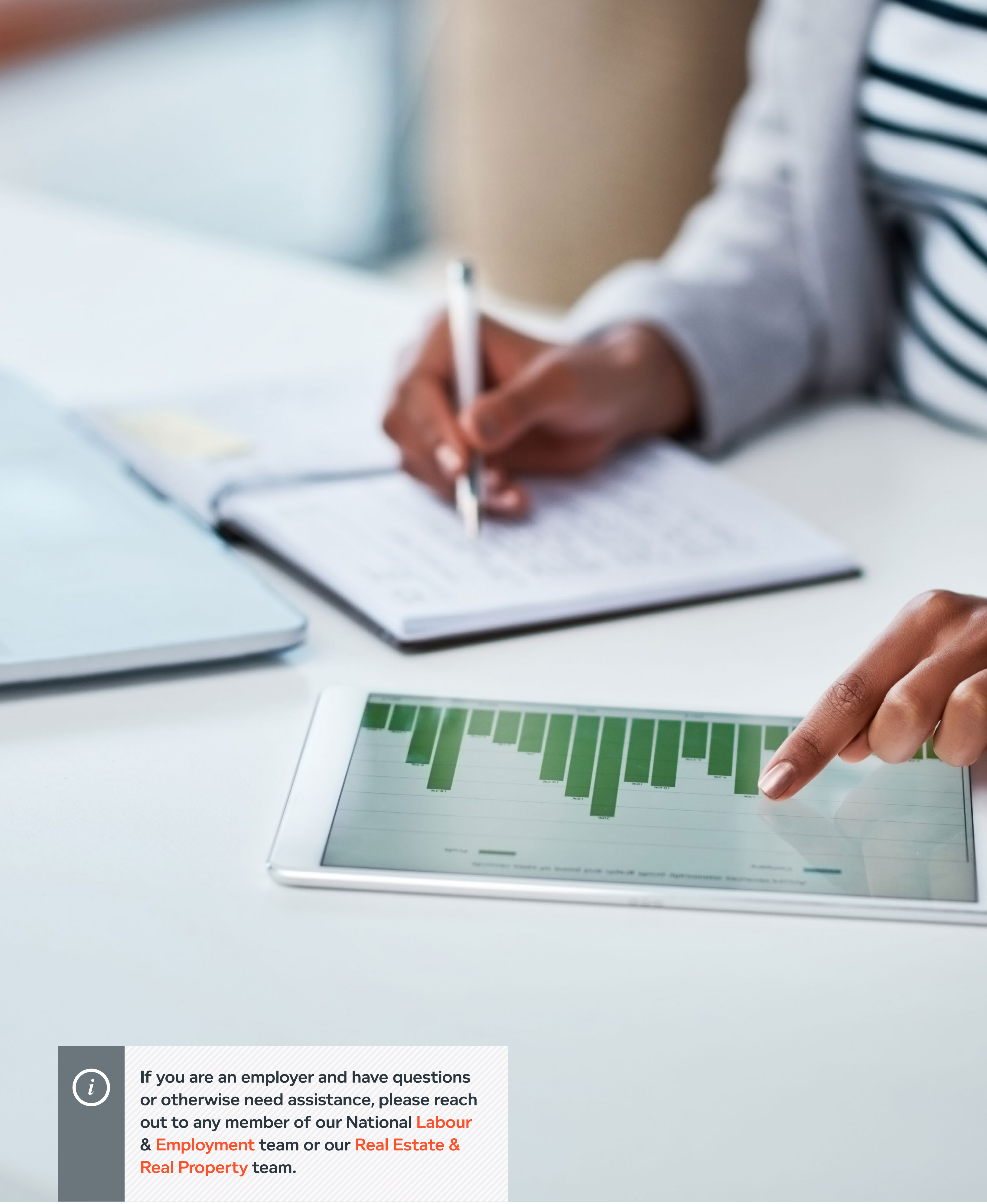


TELEWORKFORCE DEBATE

Vaccine rollouts are underway, providing future potential for most workforces to fully return to the office. Employers should consider whether this move is best for business from both a costs and company morale perspective.

In terms of costs, many companies heavily invested in teleworking arrangements. The greatest return on investment may come from allowing these arrangements to continue, either part time, or full time.

In addition to costs, company morale may increase by providing employees the flexibility to decide if and when they work from the office. The teleworking arrangements required due to the COVID-19 pandemic demonstrated that many employees can adequately perform their employment duties remotely. If productivity and performance have not been affected by teleworking, companies can consider implementing more flexible work arrangements.



If you are an employer and have questions or otherwise need assistance, please reach out to any member of our National Labour & Employment team or our Real Estate & Real Property team.

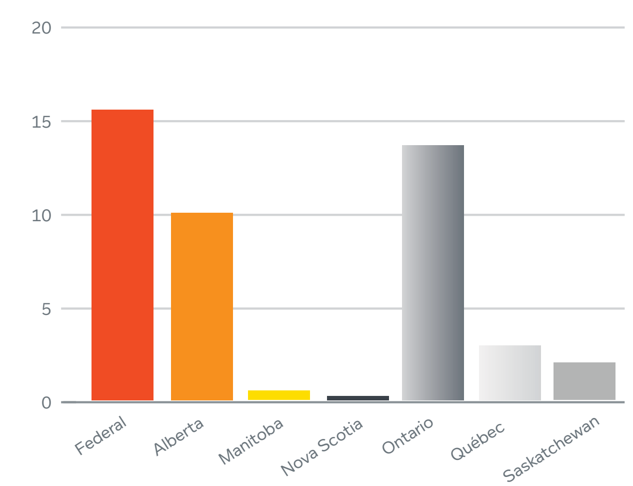
Focus on Industries

The pandemic has impacted certain industries more than others. One of sectors that received the most attention is infrastructure as the government tries to inject money and stimulate the economy. Another major change caused by the pandemic is the shift to e-commerce given new health guidelines. This change also impacted the banking sector as there is an increasing technological reliance. The reduction of international travel also raises questions regarding the future of foreign investment. We will explore these topics in the sections below and identify some of the hidden opportunities.

Infrastructure

As discussed in our previous whitepaper, *Business as Unusual: New Realities, New Possibilities- A Roadmap for Business Leaders*, infrastructure will be an important investment to boost consumer confidence and spending.

The federal and provincial governments have announced specific COVID funding targeted at infrastructure:



The federal government will invest up to $180 billion in unspent infrastructure funding that was approved before the pandemic. As part of this initiative, on October 1, 2020, the Canadian Infrastructure Bank (CIB) launched a $10 billion Growth Plan that is expected to create approximately 60,000 jobs across the country.[33] The CIB Growth Plan is also part of the $35 billion the federal government has committed during the pandemic to support infrastructure projects across the country. CIB's Growth Plan is a three year project that will connect more households and small businesses to high-speed internet, strengthen Canadian agriculture and help build a low-carbon economy. There are five major initiatives that it plans to invest in:

- $2.5 billion for clean power to support renewable generation and storage and to transmit clean electricity between provinces, territories and regions, including to northern and Indigenous communities;
- $2 billion to connect 750,000 homes and small businesses to broadband in underserved communities;
- $2 billion to invest in large-scale building retrofits to increase energy efficiency;
- $1.5 billion for agriculture irrigation projects; and
- $1.5 billion to accelerate the adoption of zero-emission buses and charging infrastructure.

CIB will also allocate $500 million for project development and early construction works. This initiative is expected to attract foreign investment, create jobs and stimulate the economy.

> **"Despite the economic fallout from the pandemic, international investors will show interest in the projects because Canada is seen as a stable place to secure long-term returns."**
>
> *– Michael Sabia, Chair of the Canada Infrastructure Bank*

In Ontario, the government is continuing its aggressive transit infrastructure building program in the Greater Toronto Area (including construction of the Ontario Line, as well as extensions to Lines 1 and 2 of the Toronto subway network and the Eglinton LRT).The province is also providing up to $1.05 billion in combined federal and provincial funding through the COVID-19 Resilience infrastructure stream to build or renovate health and safety related projects in long-term care, education and municipalities.[34] The most recent *P3 Market Update* (issued in September 2020) contains 40 major infrastructure projects valued at more than $60 billion. The update includes a commitment to build two new P3 justice projects: the Quinte Detention Centre and Brockville Correctional Complex/St Lawrence Valley Correctional and Treatment Center. Another interesting development in Ontario is the government's plan to repurpose surplus lands to add new beds and capacity in the long term care sector. The government recently announced a program to sell three provincial properties in Oakville, Aurora and Vaughan to support the creation of 896 new long term care beds.[35]

In Alberta, the provincial government's Recovery Plan has committed $10 billion to infrastructure spending.[36] Alberta infrastructure highlighted that it is focused on exploring public-private partnerships (P3s) for priority infrastructure projects.[37] The breakdown of the $10 billion infrastructure spending is as follows:[38]

- $6.9 billion Budget 2020 capital spending;
- $980 million accelerated for Capital Maintenance and Renewal;
- $200 million for Strategic Transportation Infrastructure Program and water infrastructure projects;
- $600 million in strategic infrastructure projects;
- $500 million in municipal infrastructure; and
- $1.5 billion for Keystone XL.

In Québec, after the pause on Bill 61 was announced in August 2020, the Quebec government has brought forward a new bill; Bill 66, *An Act respecting the acceleration of certain infrastructure projects*. The proposed Bill 66 will allow 181 public infrastructure projects to benefit from acceleration measures such as:

- **Expropriation:** simplifying the expropriation procedure to preclude the expropriated party from challenging the right to expropriate (though it can contest the quantum of compensation);
- **Land Use Planning:** allowing the province to bypass land use planning and development restrictions if a project is

designated as a “Government Intervention” within the meaning of section 149 of the Act; and

– **Environment Quality Act:** waiving the authorization requirement from the *Ministère de l’Environnement et de la Lutte contre les changements climatiques* for public bodies carrying out the public infrastructure projects included in Bill 66, provided that certain requirements are met and subject to certain exclusions;

There are also measures in the proposed Bill 66 allowing increased oversight of the *Autorité des marchés publics* and facilitating payment to enterprises that are parties to public construction contracts and related subcontracts. For more information, consult our blog, *Bill 66 : Restarting of the Quebec Economy 2.0*.

In British Columbia, on September 17, 2020, the government announced $600 million in new tax incentives and outlined how it will spend another $1.5 billion on economic recovery.[39] Of this COVID-19 relief, more than $300 million will go to community infrastructure.[40]

UNSOLICITED PROPOSALS FROM THE PRIVATE SECTOR

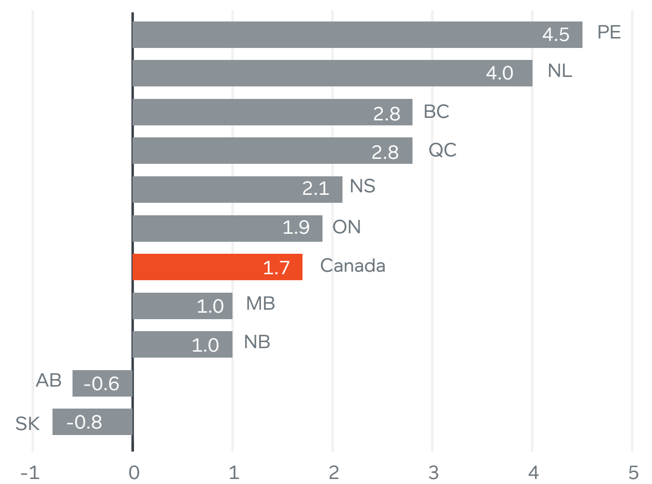
In a world of increasing pressure on government treasuries, there may be an opportunity for the private sector to step up and deliver infrastructure projects with a public benefit using a model that allows for greater private sector investment and control, such as revenue-based concessions. The most common example of such a project is a toll road, but such a model could also be used in a transit context or to facilitate construction of other types of infrastructure that are supported by a revenue stream. The Ontario government has opened an unsolicited proposals portal that allows the government to receive and evaluate such proposals, and the Alberta government has recently signaled that it is interested in receiving unsolicited infrastructure proposals.

Consult our Infrastructure team on creating an unsolicited proposal in the PPP sector.

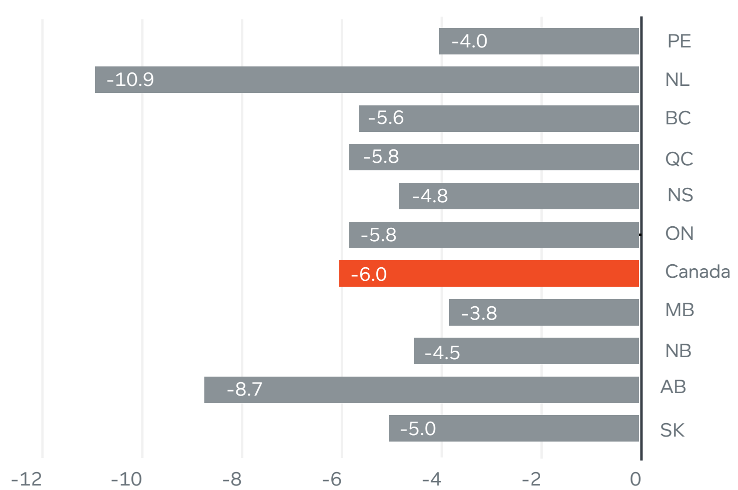
Retail

The Spring 2020 lockdown has shaken up the retail market as many retail stores were forced to close down. Real GDP growth in 2019 has been reversed in 2020 as shown below.[41]

2019 Real GDP Growth by Province (% change)

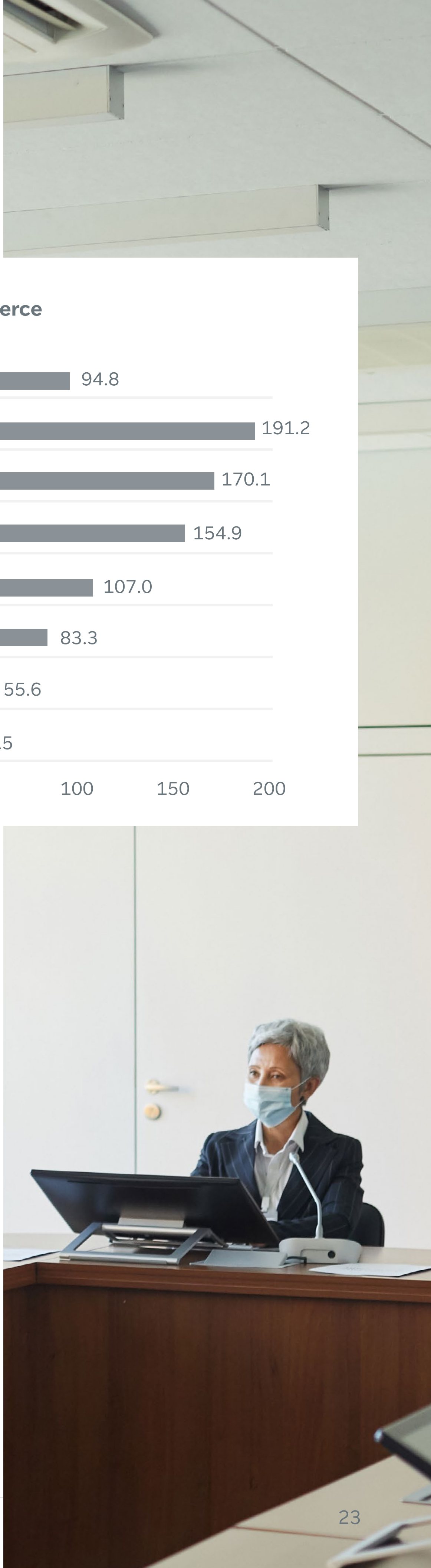


2020 Real GDP Growth by Province (% change)



The pandemic has accelerated the retail market's shift to e-commerce. From February to May 2020, physical, in-store retail sales fell 17.9% while retail e-commerce sales nearly doubled, 99.3%.[42] E-commerce sales as a portion of total sales in Canada have been increasing over the years from 2.4% in 2016 to 4.0% in 2019.[43] In May 2020, the proportion jumped to 10.0%.[44] We can see an overall shift from in-store to e-commerce sales by industry below.

Changes to In-Store and E-Commerce Sales during COVID-19 for Selected Subsectors, February to April 2020[45]



Based on the data above, the three sectors that experienced the biggest growth in sales since the pandemic are furniture and home furnishing stores, general merchandise stores (i.e. department stores) and sporting goods, hobby, book and music stores. The sectors that experienced the strongest migration patterns to e-commerce are electronics and appliance stores, clothing and clothing accessories stores and sporting goods, hobby, book and music stores.

Despite these trends, only 9 of the 11 subsectors' retail sales have recovered when comparing September 2020 data to September 2019 data.[46] The subsectors that have experienced the greatest increase based on their September 2020 and 2019 data are cannabis, building material and garden equipment and supplies dealers and miscellaneous store retailers (i.e. florists, office supplies, stationery and gift stores and used merchandise stores).[47] The two subsectors still trying to recover are gasoline stations and clothing and clothing accessories stores.

To further explore the clothing industry, in October 2020, the 2020 Luxury Law Summit (Europe) ("Luxury Law") gathered in-house counsel, external legal advisers, and brand leaders in the luxury space to exchange industry insights and discuss the opportunities and challenges specific to the luxury space. Luxury Law provided insights which are relevant not just for the luxury sector, but for the retail industry more broadly. Three key messages came out of the summit:

1. **The Intersection of Luxury and (Online) Customer Experience**: Even prior to the global COVID-19 shutdowns and quarantines, the focus was increasingly shifting to the online customer experience, and was accelerated by COVID-19 related retail closures. Online windows have increasingly become critical extensions of brand experience, as opposed to simply a supplementary sales channel or marketplace.

2. **The Value of Data**: Closely tied to the renewed and accelerated emphasis on deepening the online customer experience is the consequent data collection opportunities these online channels present. As articulated by one speaker at Luxury Law, "Next to your brand, your biggest asset is your data."

3. **Verifiable Corporate Social Responsibility**: In the midst of the COVID-19 pandemic - more than ever - consumers have adopted a more considered, deliberate and thoughtful approach to their purchases. Discretionary spending has been targeted at brands that reflect consumers' values and align with their principles. This has in turn been accompanied by a demand for transparency and accountability in relation to the causes that brands and retailers align themselves with publicly.

These findings are consistent with the findings from the Retail Council of Canada Holiday Shopping Survey 2020. The survey revealed that, in deciding which retailer to purchase from, two factors have increased importance compared to last year, "ability to buy online and pick up in store/curb side" and "compliance with health and safety protocols". [48] In contrast, "holiday sales and promotion" and "free shipping" have decreased their importance. [49] To learn more about our key takeaways from Luxury Law, please visit our blog, *Luxury Law 2020 – Key Takeaways and Trends*.

On the other land, the wholesale side of the retail industry has not experienced such positive results. Total wholesale sales for the first nine months of 2020 was 3.3% lower than in the same period of 2019.[50] Food and pharmaceutical and pharmacy supplies have experienced the greatest gains. Comparing September 2020 and 2019, the textile, clothing and footwear, metal service centers, construction, forestry, mining and industrial machinery, equipment and supplies and paper, paper product and disposable plastic products have experienced the greatest decline. In addition to losses directly related to the pandemic, another notable event, the Port of Montreal strike that ended in August 2020, cost wholesalers approximately $600 million in sales.[51] Overall, the wholesale clothing sector has mirrored the performance of the retail side and both have been negatively impacted by the pandemic.

CUSTOMER EXPERIENCE, DATA AND CORPORATE SOCIAL RESPONSIBILITY

The pandemic has changed the demand for certain industries, e.g. home improvement and clothing and clothing accessories stores. As these trends are coming to light, it is important to act before these patterns become permanent. Given the shift in demand, a new strategy is needed to attract consumers and come out of the pandemic as winners. Based on the discussions at Luxury Law, this strategy seems to be focusing on online customer experience, data and corporate social responsibility.

Consult our Retail and Consumer Markets team on expanding and enhancing your online presence. Also, refer to the "*Regulatory Compliance and Cyber-Security*" section below on the recent changes to the privacy legislation.

Financial Services

PAYMENTS

Canadian banks were already enhancing their online banking capabilities prior to the pandemic. However, with COVID-19, the need for technology enhancements are greater than ever. The pandemic has changed our shopping patterns and the payment industry is embracing this change. Some emerging trends include:

EMERGING TREND 1

Online payments and the cashless society: COVID has accelerated the ongoing transition to a cashless society. 42% of Canadians who shop in physical stores say they avoid shopping at places that did not accept contactless payments, and 52% tried not to exceed the contactless limit when buying something in-store.[52] In response to this, the Bank of Canada issued a statement encouraging retailers to continue to accept cash.[53] In addition, the Bank of Canada, along with central banks in other jurisdictions, has been exploring the concept of issuing a central bank digital currency (CBDC) in Canada.

To learn more, visit our blogs *Bank of Canada Issues Statement Asking Retailers to Continue Accepting Cash* and *Coming Soon? Developments in Central Bank Digital Currency*.

EMERGING TREND 2

Online point of sale lending: As of May 2020, online sales was at $3.8 billion, a 111% increase from May 2019.[54] Despite a surge in online sales, total retail sales in May 2020 experienced record decline with only $33.9 billion, a 26% decline from a year ago.[55] This trend has fueled the use of alternative payment solutions in an effort to increase sales, i.e. a “Buy Now, Pay Later” (BNPL) point of sale lending approach. A BNPL provider reported that its weekly gross merchandise volume has increased nearly 150% from early March to end of April.[56]

EMERGING TREND 3

Open banking/ consumer directed finance: "Open Banking" refers to an emerging financial services business model that focuses on the portability and open availability of customer data, including transactional information. The European Union, United Kingdom and Australia have implemented open banking and a number of jurisdictions globally have launched their consultation process. In Canada, the Department of Finance Canada recently launched its second round of consultation on open banking through November to December 2020.[57] Meanwhile, the Capital Markets Modernization Taskforce also released a report that recommended the introduction of a requirement for capital market participants to provide open data. Open banking could help further accelerate the digitization of financial services.

To learn more, visit our blog *Advisory Committee on Open Banking Releases Report on Consumer-Directed Finance* and *Modernization Taskforce Releases Interim Report*.

TECHNOLOGY RISKS IN THE BANKING SECTOR

In the context of this increasing reliance on technology in the banking sector, on September 15, 2020, the Office of the Superintendent of Financial Institutions (OSFI) released a discussion paper regarding technology risks in the financial sector. OSFI has requested stakeholder comments on the paper by December 15, 2020. These comments will likely form the basis for further consultations before OSFI tables any firm proposals. Any new guidance from OSFI purporting to regulate "technology and related risks" could therefore have wide ranging impacts on the financial sector, including in connection with the following:

- OSFI asks whether its approach of principles-based regulation continues to be appropriate in the area of technology risk management, or whether more prescriptive, rules-oriented guidance is desirable. The rapid rate at which emerging technologies are progressing raises questions not only about the appropriateness of prescriptive rules, but also the challenge of promulgating technologically neutral rules that can be operationalized, while not adversely stifling innovation in the financial sector. This is especially important as Canadian financial entities do business internationally. Canadian regulation has the potential to either help or hinder future competitiveness in the global market.
- OSFI notes other consultations affecting the use of digital technologies including the Digital Charter and proposed reforms of various privacy laws, including PIPEDA. British Columbia, Ontario and Québec are also proposing to amend their privacy laws. The convergence to modernize laws targeting evolving technologies raises questions about whether reforms will be coordinated or result in a multiplicity of new and potentially inconsistent laws administered by multiple regulators.

The discussion paper specifically focuses on three priority areas: cyber security, advanced analytics and third party ecosystems. To learn more about this paper, visit our blog, *OSFI's Consultation on Technology: Understanding the risks inherent in the technologies that power the financial industry*.

KEEP UP TO DATE ON THE LATEST DEVELOPMENTS

The financial services industry is experiencing many exciting new innovations as technology is being leveraged to deliver new solutions. To keep up to date on the latest trends, consult our FinTech group's page.

CONSUMER PROTECTION

The duties owed by financial institutions to their clients have been under heightened scrutiny by regulators and class action counsel over the past several years, with attention only increasing following the pandemic. Recent enforcement actions and class actions have been brought over conflicts of interests, COVID-related cancellations, and certain revenue-preserving business practices.

The Financial Consumer Agency of Canada (FCAC), a federal agency tasked with policing consumer protection matters regarding financial institutions, has been staffing up[58] in preparation for the proactive enforcement of Bill C-86, provisions amending the *Financial Consumer Agency of Canada*, which among other changes increases the size of monetary penalties for breaches of financial consumer protection requirements, and particularly market conduct obligations.

Consumer protection class actions targeting financial services firms are also on the rise, with claims challenging the non-payment of cash refunds, improper denial of insurance coverage, and overpayment of investment fund fees as common themes. Arguments include that the financial services firm is in breach of a fiduciary duty owed to customers, that standard terms are unconscionable or otherwise unreasonable, or that fairness should trump contractual arrangements.[59]

Navigating these corresponding risks will require financial services firms to be more proactive in mitigating risk by monitoring corporate conduct that has the potential to raise the ire of consumers or regulators.[60] For example, standard form corporate contracts need to transparently disclose fees, conflicts of interest and exclusions of liability for specific events - in other words, improving plain language disclosure to consumers. Bill C-86's market conduct regulations, which require that firms take into consideration their customers' circumstances when selling products or services, may additional require a broad rethinking about how some employees are compensated given new rules against remuneration practices which misalign incentives between clients and financial advisors.

Interest in and Scrutiny of Foreign Investment

The COVID-19 pandemic triggered a wave of reform amongst foreign investment regulators, as governments attempted to secure their economies for unprecedented fallout. In Canada, the pandemic and resulting economic crisis have reinforced the federal government's approach to foreign investment review under the Investment Canada Act, while also giving rise to trends that increase scrutiny.

Last spring, the government introduced a COVID-19 policy that provides for enhanced scrutiny of investments made by state-owned enterprises or related to public health or the supply of critical goods and services to Canadians or the government.[61] Last summer, pursuant to the *Time Limits and Other Periods Act (COVID-19)*, a Ministerial Order was issued that temporarily extended certain periods relating to the national security review process under the Investment Canada Act. As a result of the Order, until the end of 2020, the federal government had more time to exercise its national security powers before its jurisdiction expired.[62] Nonetheless, in its COVID-19 policy, the federal government maintained that foreign investment is "essential in ensuring that Canadian businesses are able to invest in innovation and to compete in the global economy" and it remains " open to investment that benefits Canadians".

With this in mind, the following were five top trends in foreign investment review in Canada in 2020.[63]

1. **Decline in the number of net benefit reviews:** After the Investment Canada Act was amended to introduce enterprise value thresholds in 2015, the number of transactions subject to review and approval declined precipitously.

2. **Increase in the number of national security reviews:** As fewer transactions are subject to net benefit reviews, there has been a pivot toward utilizing national security powers.

3. **State-owned enterprises subject to increased scrutiny:** The government has consistently imposed stricter review standards for investments involving state-owned enterprises.

4. **Longer review timelines:** Even though the statutorily extended national security review periods are no longer in effect, the COVID-19 policy has not been rescinded, so investors should prepare for the possibility of longer review timelines.

5. **Implications for transaction structures and agreements:** The increased risk of enhanced scrutiny under the COVID-19 policy raises a number of strategic considerations for transaction agreements, such as the use of exempt structures (e.g., debt investments) and, where a review is expected, contractual protections (e.g., through covenants or reverse termination fees).

These trends are generally expected to continue into 2021.

CONSULT A LEGAL PROFESSIONAL

Our Competition/Antitrust & Foreign Investment Group regularly advises on foreign investment and national security reviews, merger reviews, competition litigation, cartels and criminal Investigations, compliance and counselling, and advertising and marketing. We have one of the most experienced foreign investment review and national security practices in Canada, routinely assisting both foreign investors acquiring Canadian businesses and Canadian businesses that are being acquired by foreign investors. With respect to competition law, we provide our clients with a deep understanding of how the Competition Bureau operates. We help clients in every sector cut through the complexities of the law, whether that involves mergers, joint ventures and strategic alliances, monopolistic practices, distribution and other vertical agreements, misleading advertising, cartels, or competition law class actions.

Commercial Contracts and Supply Chain

Commercial Contracts

The COVID-19 pandemic is forcing businesses across sectors to reexamine how they manage contractual risk with existing and new contracts in the supply chain. The last few months have seen a proliferation of renegotiated terms as parties sought to strengthen their bargaining position prior to a second wave. These have included clauses linked to, among other things, the timing of a vaccine, raising new questions as to potential liabilities and responsibilities. Whether you have sought out such changes or not, having a strong contract management system is key to managing contractual risk, so that, for example, clients know their material contracts, supply chain contracts, and contracts at risk of termination. Other ways of managing risk include:

- Careful drafting of force majeure clauses, material adverse effect clauses and termination clauses;
- Documenting mitigation and compliance during supply chain disruptions, which is often a precondition to relying on a force majeure clause; and
- Data protection clauses in contracts and other cyber security strategies in light of the increase in online resource sharing due to COVID-19.

NEGOTIATION OVER LITIGATION

At the end of the day, the most effective strategy for many clients will be to move beyond the four corners of the contract and lean on relationships with their counterparties to find a mutually acceptable arrangement for navigating this unprecedented situation.

Supply Chain Resilience

TOP CHALLENGES

The pandemic is certain to impart severe and long lasting impacts on businesses' supply chains. The biggest challenges are related to the flow of goods – either fully manufactured goods for distribution and sale into the Canadian markets or their inputs that are imported into Canada for use for further manufacture. Though international trade flows have mostly stabilized following the severe lockdowns in the spring of 2020, businesses that weathered the storm with the steadiest hands did so in a number of creative ways:

- Controlling delays at the border with risk-based strategies – risk-weighing imports according to country of origin and quickly identifying substitutes where appropriate;
- Taking stock of domestic and foreign inventory supplies – auditing their own and supplier warehouses to get a holistic view of supplies readily available;
- Finding opportunities to exit non-essential product sourcing through contractual means, and / or finding alternative sources of supply to supplement procurement where foreign manufacturers are operating at a reduced pace, or entirely shut down;
- Securing relationships in the U.S. and other jurisdictions that may have not been at the forefront previously (on-shoring); and
- Ensuring that clients take advantage of duty remission and / or deferral opportunities at the border to save immediate costs on imported products.

SUPPLY CHAIN DISPUTES

The pandemic has given rise to a number of disputes and issues arising out of supply chain agreements, but parties – particularly where the relationship has been longstanding or because the need to maintain supply is more acute - have been seeking to resolve their differences outside a traditional courtroom or even beyond the dispute resolution mechanisms that are provided for in the agreement. To mitigate risk and best position themselves for success, organizations have fully leveraged their rights under their agreements by, for example:

- Following force majeure clauses, if available, strictly;
- Considering whether certain rights are accelerated or deferred on an event of default;
- Coordinating any changes to the terms of various agreements across the supply chain;
- Considering termination rights, if only because their invocation may allow the parties to revise the terms of the contract; and
- Invoking dispute resolution mechanisms in a timely way, particularly if there are express time and notice requirements.

Leading organizations also leverage rights before the scope of their agreements, such as:

- Considering whether the agreement has been "frustrated" or rendered impossible to perform and potential remedies;
- Considering whether there is insurance coverage to respond to their circumstances of loss; and
- For suppliers mandated by governments to provide PPE or other support, looking into compensation available in those circumstances.

COLLABORATION AND COMPETITION LAW RISKS

Just as individuals have been reaching out to their personal networks for support in these uncertain times, corporate counterparts may be inclined to do the same. However, competitor collaborations in respect of

GLOBALIZATION IN RETREAT?

Don't underestimate the danger in relying on only one source of supply when engaged in goods distribution in Canada. Trade diversification is going to become an essential element of procurement strategies moving forward. Beyond COVID-19, geopolitical forces are challenging shibboleths around ever increasing commercial interdependence. Trade wars are here to stay.

certain activities, such as agreements on the price of products or services, production levels and allocation of customers or markets can raise serious risk, including potential criminal liability, under the *Competition Act,* R.S.C. 1985, c. C-34.

Recently, the Competition Bureau indicated it may exercise its enforcement discretion in certain circumstances in light of COVID-19 in recognition of the fact that certain competitor collaborations may be necessary to ensure continued supply of "critical" goods and services. However, this guidance applies only to very limited industries and circumstances; collaboration must be limited temporally and limited to addressing that which is absolutely necessary to address the supply chain challenges during the pandemic.

Importantly, any relaxation of enforcement discretion by the Competition Bureau would not shield parties from the possibility of private litigation. As a result, companies need to continue to be mindful of antitrust laws to ensure they are not inadvertently creating a cure that may be worse than the disease.

DOING BUSINESS WITH COUNTERPARTIES FACING BANKRUPTCY

With looming financial challenges facing many companies, it is becoming ever more important for organizations to mitigate their risk of customers becoming bankrupt. In the event that a party in the supply chain becomes insolvent and subject to an insolvency proceeding, one important factor is the stay of proceedings:

- Stay from Terminating: If a supplier or other contractual counterparty becomes subject to an insolvency proceeding, you may be stayed from terminating contracts as a result of the insolvency filing and stayed from exercising other rights pursuant to the contract.
- Continued Supply: To the extent you are a supplier to an entity subject to an insolvency filing, you may be compelled to continue to supply (although you can require payment upon delivery unless you are named a "critical supplier").
- Contract Review: Carefully review contracts to see what provisions may assist (e.g. a termination provision that allows a supplier to get an early warning or terminate prior to an insolvency filing).

What should I do if I fear my supplier's finances may be wobbly?

The best approach is to carefully manage supply relationships, be aware of issues and take action prior to an insolvency filing. For instance, by reviewing contracts and considering 'pre-insolvency filing' termination provisions, monitoring financial information, and considering alternate supply arrangements to provide greater flexibility.

If a supplier or customer does or may become insolvent, we regularly work with our clients to consider creative approaches to manage the ongoing relationships in light of the facts in each particular case. We also assist our clients with understanding the governing court orders and/or insolvency provisions to ensure their rights are best protected in insolvency proceedings.

Fraud

Unique circumstances created by COVID-19 have broadened companies' exposure to employee and counter-party fraud. Fraud risk has increased due to budgetary constraints, use of new supply chain partners, a compromised ability to deploy traditional compliance and due diligence, reduced oversight of employees in light of work from home, and pressures associated with bringing products to market. However, our experience during the pandemic has been that courts across Canada remain ready, willing and able to consider urgent fraud-related relief, such as Mareva injunctions. Learn more about Mareva injunctions in our article, *Obtaining Marevas During Times of Increased Fraud*.

Regulatory Compliance and Cyber-Security

Data Privacy

Data privacy has always been a concern. With the pandemic, our reliance on digital technology has accelerated exponentially. As digital technology becomes increasingly pervasive in our society, our data has become valuable currency. The resulting increase in the collection, use, and disclosure of personal information for commercial ends, and consumers' increasing awareness of their privacy rights, has captured the attention of government, and bolstered the efforts of privacy regulators across Canada. With the recently proposed overhaul to Canada's federal private sector privacy law[64], Québec's private sector privacy law[65], the private sector privacy law consultation in Ontario[66] and the expected resumption of British Columbia's review of its privacy laws[67], change is on its way to Canada's patchwork of privacy laws. A driving force behind these proposed changes is bringing Canada's provincial and federal privacy laws into alignment with one another and with international privacy legislation, including the General Data Protection Regulation ("GDPR") in the European Union.

On November 17, 2020, Navdeep Bains, the Minister of Innovation, Science and Industry, introduced Bill C-11, the Digital Charter Implementation Act, 2020. Bill C-11 seeks to modernize Canadian privacy legislation through the introduction of the new Consumer Privacy Protection Act ("CPPA") and the creation of a new enforcement tribunal through the Personal Information and Data Protection Tribunal Act ("PIDPT"). This represents a significant overhaul of the existing Personal Information Protection and Electronic Documents Act ("PIPEDA") that governs privacy in the private sector.

Some key changes introduced by CPPA and PIDPT includes:

- A new tribunal that can impose significant penalties and fines'
- Private right of action;
- Enhanced consent;
- New grounds of processing without consent;
- Enhanced right of individuals;
- Transparency regarding trans-border transfers;
- AI/Automated decision systems; and
- De-identification of personal information.[68]

To read more about the proposed changes and for our insights into how they may impact your business, consult our blog, *TechLex*

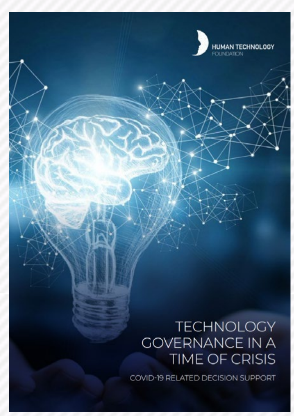
ACT NOW – UNDERSTAND YOUR COMPANY'S DATA PROCESSES

With these changes (which are imminent), it is now more important than ever to understand how your organization collects, uses, discloses, transfers and stores personal information, especially in digital form. In most instances, the last decade has seen the universe of personal information controlled by organizations expand rapidly and grow increasingly complex. Cyber-attacks and/or data breaches are also becoming a leading risk to organizations. In order to ensure that your organization can comply with increasingly sophisticated (and demanding) privacy laws, it is integral that it understand where, when and how digital information is flowing within and without.

Technology and the virus

The pandemic has accelerated our use of technology in society. Especially in healthcare, technology has been leveraged everywhere to accelerate scientific research, limit the spread of the current pandemic and now facilitate the reopening of businesses. For the first time ever, the federal and provincial governments had to contemplate the use of technology to track their citizens in an effort to limit the spread of COVID-19. Understanding the dangers and ethical questions that technology can bring, McCarthy Tétrault partnered with the Human Technology Foundation to develop a governance framework and conduct an assessment of anti-COVID-19 IT-based solutions. In June, 2020, the Human Technology Foundation published a report co-authored by McCarthy Tétrault lawyers containing a framework for decision makers using anti-COVID-19 IT-based solutions. There are three important factors to consider:

1. **Background and perspectives**: Focus on the anthropological, social and ethical aspects related to the IT-based issues and the means for exiting the health crisis. This pandemic has led to a real conflict in frameworks to determine the measures to be adopted. In a context where using IT-based responses can sometimes be unpopular with the general public or people within businesses, the question of temporality seems crucial for decision-makers. To prevent what is considered exceptional crisis measures from becoming the norm, governments and businesses must put in place a framework based on the principles of inclusive governance, dialogue, solidarity and equity, accountability and trust.
2. **Understanding the characteristics of technologies**: The choice of IT architectures and governance methods for devices are closely linked, so decisions need to be made with respect to this inseparable whole. Decision-makers must develop a critical view when selecting IT-based solutions since an informed choice requires knowledge of their underlying technical characteristics (e.g. the apparent dichotomy between a centralized or decentralized system). This knowledge should be shared through an appropriate educational initiative across an entire organization or population to foster buy-in. As technical measures alone cannot guarantee the protection of individuals, it is necessary for governments and businesses to bear in mind the importance of the legislative, social and political context in order to enact appropriate legal and regulatory provisions to safeguard individual freedoms and fundamental rights and to avoid discriminating against or stigmatizing certain groups.
3. **Defining a governance model**: Based on the analysis of eleven anti-COVID-19 IT-based solutions developed worldwide, decision-makers should consider the framework contained in the report which includes a governance methodology for the responsible deployment of such technology, and includes a multifactor risk impact assessment tool. To make the most appropriate choices and ensure the project is positively received, a method based on some form of participatory governance and a multi-factor analysis method implemented by a multidisciplinary team is key.



To learn more about this framework, access the publication, *Technology Governance in a Time of Crisis*.

CONTACT TRACING APPLICATIONS

One way that Canadian governments have leveraged technology is by adopting COVID-19 contact tracing applications. Earlier this year, the Alberta government became the first Canadian jurisdiction to implement a contact tracing app, called “ABTraceTogether”. In October 2020, the federal government launched its own exposure notification app called “COVID Alert”.

Contact tracing applications can help flatten the curve by informing users of possible exposures before symptoms appear. They can be faster, more accurate and less labour-intensive than other methods of contact tracing, and can be used in tandem with manual efforts.

But, while contact tracing applications can help limit the spread of COVID-19, they also raise privacy and cybersecurity concerns. Notable considerations when using a contact tracing app include:

1. The possible use and storage of personal data by the service provider or health authority;
2. Discriminatory effects due to unequal access to smartphone technology; and
3. Cybersecurity risks associated with the functionality of the application.

On May 26, 2020, leading privacy and technology lawyers from McCarthy Tétrault discussed the implications of contact tracing applications on a two-part podcast published by McCarthy Tétrault. You can also learn more in our recent article on how Contact Tracing Applications Flatten the Curve and Raise Privacy Issues.

RE-OPENING THE WORKPLACE

As vaccine rollouts begin, many companies may consider re-opening the workplace. In order to do so safely, measures need to be put in place to track vaccinations and COVID-19 exposures. Depending on the scale, this could be done efficiently using technology. As this process will involve personal health data, specific privacy concerns need to be addressed. Consult our team of professionals before implementing such measures.

Digital Identity

Another increasingly popular topic, as people's reliance on technology grows, is the feasibility of implementing a digital identity. On October 19, 2020, the Ontario government unveiled its new Digital Identity Project, one of the more than 30 initiatives included in Ontario Onwards: Ontario's COVID-19 Action Plan for a People-Focused Government. With this plan, prepared by the Future State Modernization Committee, the Ontario government has the ambition to bring major changes to the ways in which it designs and delivers services. The Ontario government will begin consultations with industry regarding Digital Identity in January 2021 and hopes to introduce Ontarians to this new way of accessing and receiving government services by the end of 2021. This program launched by the Ontario government could be the beginning of a national trend. To learn more about this initiative, visit our blog, *Ontario Announces Digital Identity Project to Facilitate Access to Government Services*.

New Challenges, Future Opportunities

We hope this white paper has provided valuable insight and actionable considerations for you and your business.

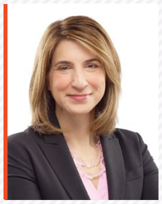
In highlighting these trends, risks and key considerations for Canadian businesses, we drew on the expertise of dozens of thought leaders throughout the firm who are actively engaged in making Canadian business more resilient and protecting client interests.

At this stage in the pandemic, we all realize that we are heading towards a new normal. The rollout and mass adoption of a vaccine will not take away from the importance of equipping your business with the tools it needs to embrace these changes.

Opportunity rarely looks how we thought it would, but opportunity abounds, and we are we are here to help you seize it.

If you have any questions or would like to discuss any of these issues, please reach out to any one of our team members.

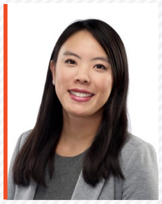
FOR MORE INFORMATION, PLEASE CONTACT:



Lara Nathans
Partner, Industry Strategy Leader,
National Retail and Consumer
Markets Group Leader
lnathans@mccarthy.ca
416-601-8470

Trevor Lawson
Partner, Labour & Employment Group
tlawson@mccarthy.ca
416-601-8227

KEY CONTRIBUTOR:



Vivian Sy
Articling Student
vsy@mccarthy.ca
416-601-7700

ADDITIONAL CONTRIBUTORS:

- Hovsep Afarian
- Ana Badour
- Jonathan Bitran
- Jade Buchanan
- Marissa Caldwell
- Ellen Yifan Chen
- Shane D'Souza
- Martha Harrison
- Miranda Lam
- Thomas Lamoureux
- Heather Meredith
- Nicole Naglie
- Anca Neacsu
- Brad Nicpon
- Fred Purkey
- Debbie Salzberger
- Justin Shoemaker
- Daniel Siracusa
- Alain Tardif
- Jill Yates

Endnotes

1 Government of Canada, "Questions and Answers on the Canada Emergency Response Benefit" (8 October 2020), online: <https://www.canada.ca/en/services/benefits/ei/cerb-application/questions.html#payment >.

2 Government of Canada, "Canada Emergency Response Benefit (CERB) with CRA" (19 October 2020), online: <https://www.canada.ca/en/revenue-agency/services/benefits/apply-for-cerb-with-cra/eligibility-periods.html>.

3 Government of Canada, "Canada Emergency Response Benefit (CERB) with CRA" (19 October 2020), online: <https://www.canada.ca/en/revenue-agency/services/benefits/recovery-benefit/crb-periods-apply.html#h-3>.

4 See generally, "Canada Emergency Response Benefit statistics" Government of Canada (updated as of October 4, 2020), online: https://www.canada.ca/en/services/benefits/ei/claims-report.html.

5 Government of Canada, "After CERB: Transitioning to new benefits" (21 October 2020), online: <https://www.canada.ca/en/services/benefits/ei/cerb-application/transition.html>.

6 Government of Canada, "Employment Insurance – COVID-19" (23 October 2020), online: <https://www.canada.ca/en/services/benefits/ei/notice-covid-19.html>.

7 See generally, https://www.canada.ca/en/department-finance/economic-response-plan.html.

8 Regional Relief and Recovery Fund (RRRF), FEDNOR, online: https://fednor.gc.ca/eic/site/fednor-fednor.nsf/eng/h_fn04591.html.

9 *Elizabeth Odessa Cheeke v. University of Victoria*, Case No. VIC-S-S-201579, in the Supreme Court of British Columbia, Canada

10 *Nathalie Nasseri v. Royal Bank of Canada*, Case No. 500-06-001086-202, in the Superior Court of Québec, District of Montreal, Canada.

11 *Joanne Picard v. Ironman Canada Inc. et World Triathlon Corporation*, Case No. 500-06-001093-208, in the Superior Court of Québec, District of Montreal

12 Recently reaffirmed in *Hengyun International Investment Commerce Inc. v. 9368-7614 Québec Inc.*, 2020 QCCS 2251

13 *COVID-19 (Limits on Actions and Proceedings) Regulation*, BC Reg 204/2020.

14 Bill 218, Supporting Ontario's Recovery and Municipal Elections Act, 2020 (accessed on November 18, 2020), online: https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-218

15 Coronavirus: Critics say Bill 218 will shield Ontario long-term care homes from lawsuits (November 16, 2020), online: https://globalnews.ca/news/7466535/coronavirus-ontario-bill-218-long-term-care-homes/

16 Too many lawsuits from families who lost loved ones to COVID-19 in nursing homes would 'gum up' the legal system, Ontario Attorney General Doug Downey says (October 27, 2020), online: https://www.thestar.com/politics/provincial/2020/10/21/too-many-lawsuits-from-families-who-lost-loved-ones-to-covid-19-in-nursing-homes-would-gum-up-the-legal-system-ontario-attorney-general-doug-downey-says.html

17 Class-action lawsuit alleges Cargill failed to take COVID-19 precautions (July 10, 2020), online: https://www.theglobeandmail.com/canada/article-class-action-lawsuit-alleges-cargill-failed-to-take-covid-1/

18 COVID-19 and the assessment of economic damages: Part one (August 26, 2020), online: https://www.thelawyersdaily.ca/civillitigation/articles/20691?utm_source=rss&utm_medium=rss&utm_campaign=section

19 COVID-19 and the assessment of economic damages: Part two (September 1, 2020), online: https://www.thelawyersdaily.ca/articles/20726/covid-19-and-the-assessment-of-economic-damages-part-two?article_related_content=1

20 Statistics Canada, "Labour Force Survey, August 2020" (4 September 2020), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/200904/dq200904a-eng.htm>.

21 Statistics Canada, "Labour Force Survey, August 2020" (4 September 2020), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/200904/dq200904a-eng.htm>.

22 Angus Reid Institute, "So long, office space? Two-thirds of Canadians who work from home expect it to continue after pandemic" (11 June 2020), online: <http://angusreid.org/coronavirus-work-from-home/>.

23 Jenna Goudreau, "Back To the Stone Age? New Yahoo CEO Marissa Mayer Bans Working From Home" (25 February 2013), Forbes, online: <https://www.forbes.com/sites/jennagoudreau/2013/02/25/back-to-the-stone-age-new-yahoo-ceo-marissa-mayer-bans-working-from-home/?sh=562b27191667>.

24 Immigration, Refugees and Citizenship Canada, "2020 Annual Report to Parliament on Immigration" (30 October 2020), online: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/annual-report-parliament-immigration-2020.html>.

25 Immigration, Refugees and Citizenship Canada, “2019 Annual Report to Parliament on Immigration” (9 July 2020), online: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/annual-report-parliament-immigration-2019.html>.

26 Immigration, Refugees and Citizenship Canada, “2020 Annual Report to Parliament on Immigration” (30 October 2020), online: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/annual-report-parliament-immigration-2020.html>.

27 Immigration, Refugees and Citizenship Canada, “2020 Annual Report to Parliament on Immigration” (30 October 2020), online: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/annual-report-parliament-immigration-2020.html>.

28 Immigration, Refugees and Citizenship Canada, “2020 Annual Report to Parliament on Immigration” (30 October 2020), online: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/annual-report-parliament-immigration-2020.html>.

29 Government of Canada, “Permanent Residents – Monthly IRCC Updates” (30 September 2020), online: <https://open.canada.ca/data/en/dataset/f7e5498e-0ad8-4417-85c9-9b8aff9b9eda>.

30 CBRE, “Canada Office and Industrial Quarter Stats Q3 2020” (28 September 2020), online: <https://www.cbre.ca/en/research-and-reports/Canada-Office-and-Industrial-Quarter-Stats-Q3-2020>.

CBRE, “Canada Office and Industrial Quarter Stats Q3 2020” (26 September 2019), online: < https://www.cbre.ca/en/research-and-reports/Canada-Office-and-Industrial-Quarter-Stats-Q3-2019>.

31 Zechuan Deng, René Morissette & Derek Messacar, “Running the economy remotely: Potential for working from home during and after COVID-19” (28 May 2020), StatCan Covid-19, online: < https://www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00026-eng.htm>.

32 Zechuan Deng, René Morissette & Derek Messacar, “Running the economy remotely: Potential for working from home during and after COVID-19” (28 May 2020), StatCan Covid-19, online: < https://www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00026-eng.htm>.

33 Canada Infrastructure Bank, New Release, “Prime Minister announces infrastructure plan to create jobs and grow the economy” (1 October 2020), online: <https://cib-bic.ca/en/the-canada-infrastructure-bank-announces-a-plan-to-create-jobs-and-grow-the-economy/>.

34 Ontario, New Release, “Ontario Launching COVID-19 Resilience Infrastructure Stream” (28 October 2020), online: <https://news.ontario.ca/en/release/58972/ontario-launching-covid-19-resilience-infrastructure-stream>.

35 Ontario, New Release, “Ontario Selling Surplus Properties to Build Three New Long-Term Care Homes” (3 November 2020), online: <https://news.ontario.ca/en/release/59047/ontario-selling-surplus-properties-to-build-three-new-long-term-care-homes>.

36 Alberta, New Release, “Building vital public infrastructure” (4 September 2020), online: <https://www.alberta.ca/building-vital-public-infrastructure.aspx>.

37 Alberta, New Release, “Building vital public infrastructure” (4 September 2020), online: <https://www.alberta.ca/building-vital-public-infrastructure.aspx>.

38 Alberta, New Release, “Water infrastructure projects support jobs, economy” (26 October 2020), online: <https://www.alberta.ca/release.cfm?xID=74551F6B79737-A1F0-F832-B7E0DDF91F642A58>.

39 British Columbia, New Release, “Water infrastructure projects support jobs, economy” (26 October 2020), online: <https://www.alberta.ca/release.cfm?xID=74551F6B79737-A1F0-F832-B7E0DDF91F642A58>.

40 British Columbia, New Release, “Water infrastructure projects support jobs, economy” (26 October 2020), online: <https://www.alberta.ca/release.cfm?xID=74551F6B79737-A1F0-F832-B7E0DDF91F642A58>.

41 RBC Economics, “Provincial Economies: Diverse yet Together in Experiencing Historic Recession” (10 September 2020), online: <https://thoughtleadership.rbc.com/provincial-economies-diverse-yet-together-in-experiencing-historic-recession/?utm_medium=referral&utm_source=economics&utm_campaign=provincial>.

42 Jason Aston et al., “Retail e-commerce and COVID-19: How online shopping opened doors while many were closing” (24 July 2020), online: <https://www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00064-eng.htm>

43 Jason Aston et al., “Retail e-commerce and COVID-19: How online shopping opened doors while many were closing” (24 July 2020), online: <https://www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00064-eng.htm>

44 Jason Aston et al., “Retail e-commerce and COVID-19: How online shopping opened doors while many were closing” (24 July 2020), online: <https://www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00064-eng.htm>

45 Jason Aston et al., " Retail e-commerce and COVID-19: How online shopping opened doors while many were closing" (24 July 2020), online: <https://www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00064-eng.htm>.

46 Statistics Canada, "Retail trade, September 2020" (20 November 2020), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/201120/dq201120a-eng.htm>.

47 Statistics Canada, "Retail trade, September 2020" (20 November 2020), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/201120/dq201120a-eng.htm>.

48 Retail Council of Canada, "RCC Holiday Shopping Survey 2020" (10 November 2020), online: < https://www.retailcouncil.org/research/rcc-holiday-shopping-survey-2020/>.

49 Retail Council of Canada, "RCC Holiday Shopping Survey 2020" (10 November 2020), online: <https://www.retailcouncil.org/research/rcc-holiday-shopping-survey-2020/>.

50 Statistics Canada, "Wholesale trade, September 2020" (17 November 2020), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/201117/dq201117b-eng.htm>.

51 Statistics Canada, "Wholesale trade, September 2020" (17 November 2020), online: < https://www150.statcan.gc.ca/n1/daily-quotidien/201117/dq201117b-eng.htm>.

52 Peter Evans, "Retail sales bounced back 18% in May but are still 20% below where they were before COVID-19" (21 July 2020), CBC News, online: <https://www.cbc.ca/news/business/canada-retail-sales-may-covid-19-1.5657094>.

53 Bank of Canada, "Update: Bank of Canada asks retailers to continue accepting cash" (28 May 2020), Bank of Canada, online: <https://www.bankofcanada.ca/2020/05/bank-canada-asks-retailers-continue-accepting-cash/>.

54 Payments Canada, "COVID-19 pandemic dramatically shifts Canadians' spending habits" (13 May 2020), Payments Canada, online: <https://www.payments.ca/about-us/news/covid-19-pandemic-dramatically-shifts-canadians%E2%80%99-spending-habits>.

55 Payments Canada, "COVID-19 pandemic dramatically shifts Canadians' spending habits" (13 May 2020), Payments Canada, online: <https://www.payments.ca/about-us/news/covid-19-pandemic-dramatically-shifts-canadians%E2%80%99-spending-habits>.

56 Wayne Pommen , "COVID-19 Report: PayBright Sees Rapid Adoption of "Buy Now, Pay Later" in 2020" (21 June, 2020), PayBright Industry Insights, online: <https://blog.paybright.com/en/industry-insights/covid-paybright-sees-major-changes-canadian-retail-ecommerce-buy-now-pay-later>.

57 Isabelle Kirkwood, "Following Delay, Federal Government to Reopen Virtual Consultations on Open Banking" (4 November 2020), online: <https://betakit.com/following-delay-federal-government-to-reopen-virtual-consultations-on-open-banking/>.

58 Financial Consumer Agency of Canada Business Plan 2020-2021 (April 30, 2020), online: https://www.canada.ca/en/financial-consumer-agency/corporate/planning/business-plans/business-plan-2020-2021.html

59 Mitigating the risks of litigation and enforcement action: strategies for financial institutions (October 21, 2020), online: https://www.torys.com/insights/publications/2020/10/mitigating-the-risks-of-litigation-and-enforcement-action

60 ibid

61 For further information about the policy's implications for investors, refer to our article, Canadian Government announces enhanced review measures under the Investment Canada Act in response to COVID-19.

62 For the details, see our article, Minister Extends Time Frame for National Security Reviews.

63 To learn more about these trends, visit our article, Top 5 Trends in Foreign Investment Review.

64 See McCarthy Tétrault's blog post, "CPPA – How Companies Will Need to Manage Their Information", available at: https://www.mccarthy.ca/en/insights/blogs/techlex/cppa-how-companies-will-need-manage-their-information

65 See McCarthy Tétrault's blog post, "Bill 64: An Overhaul of Québec's Privacy Law Regime – Implications for Business", available at https://www.mccarthy.ca/en/insights/blogs/techlex/bill-64-overhaul-quebecs-privacy-law-regime-implications-business

66 See McCarthy Tétrault's blog post, "Privacy developments: OPC Privacy Guide for Businesses and Ontario privacy consultation", available at https://www.mccarthy.ca/en/insights/blogs/techlex/privacy-developments-opc-privacy-guide-businesses-and-ontario-privacy-consultation

67 See McCarthy Tétrault's blog post, "BC Privacy Law Reform Update: Commissioner Calling for Changes to BC's Personal Information Protection Act", available at: https://www.mccarthy.ca/en/insights/blogs/techlex/bc-privacy-law-reform-update-commissioner-calling-changes-bcs-personal-information-protection-act

68 See McCarthy Tétrault's blog post, "Hello CPPA & PIDPT: The Federal Government Proposes Dramatic Evolution of PIPEDA", available at: https://www.mccarthy.ca/en/insights/blogs/techlex/hello-cppa-pidpt-federal-government-proposes-dramatic-evolution-pipeda

VISIT OUR COVID-19 RECOVERY HUB:

www.https://www.mccarthy.ca/en

FOLLOW US ON TWITTER:

@McCarthy_ca

About Us

McCarthy Tétrault LLP is a premier full-service Canadian law firm advising on large and complex transactions and disputes for domestic and international clients. The firm has offices in every major business center in Canada, and in New York and London. The firm's industry-based team approach and depth of practice expertise helps our clients achieve exceptional commercial results.

> **"They have a rare combination of pragmatism, business sense and expertise."**
>
> – *Chambers Global*
> Client Interview

mccarthy tetrault

VANCOUVER
Suite 2400, 745 Thurlow Street
Vancouver BC V6E 0C5

CALGARY
Suite 4000, 421 7th Avenue SW
Calgary AB T2P 4K9

TORONTO
Suite 5300, TD Bank Tower
Box 48, 66 Wellington Street West
Toronto ON M5K 1E6

MONTRÉAL
Suite 2500
1000 De La Gauchetière Street West
Montréal QC H3B 0A2

QUÉBEC CITY
500, Grande Allée Est, 9e étage
Québec QC G1R 2J7

NEW YORK
55 West 46th Street, Suite 2804
New York, New York 10036
United States

LONDON
1 Angel Court, 18th Floor
London EC2R 7HJ
United Kingdom

www.mccarthy.ca
email: info@mccarthy.ca