2020 vision? U.S. election impacts for Canadian law and business

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Even after the polls have closed and votes are being tallied, considerable uncertainty remains as to the ultimate result of the 2020 United States presidential election.

As election-related litigation begins in several states, it appears that some level of ambiguity as to final election results will persist for the foreseeable future. There are considerable differences between the policies enacted by the Donald Trump administration since 2016 and promises of the Joe Biden campaign platform. BLG has compiled a series of initial reactions to the U.S. election, outlining the policy differences, potential opportunities and associated risks for Canadian law and business with either a Trump or Biden victory.

Trade

The U.S. is Canada's largest trading partner, and the result of the U.S. election will have dramatic impact on Canada.

Trump re-election

In the case of a Trump victory, we expect a continuation of U.S. protectionist policies. This will mean retrenchment of U.S. support for international institutions (the WTO, the WHO and NATO, to name a few), unilateral trade actions such as tariffs on Canadian steel and aluminium, continued pressure on specific Canadian sectors including lumber and supply-managed agriculture, and potential withdrawal of benefits Canadian businesses have from U.S. procurement opportunities.

Despite a growing discussion on "green" trade rules with enforceable environmental obligations, we expect that a Trump administration would reject any climate-focused trade policy, given the U.S. withdrawal from the 2015 Paris Agreement and the current administration's support for maintaining the U.S.'s status as a net exporter of energy products. In fact, a second Trump administration would vigorously respond to any initiative from Canada, or any other country, to apply climate-based trade policies.

Biden election

A Biden administration would not result in a complete reversal of U.S. trade policy toward Canada. We expect a more conciliatory tone towards Canada, with less reliance on protectionist executive orders and more bilateral discussion on trade issues. We also expect that a Biden administration would consider using trade to combat climate change by potentially applying tariffs on high carbon imports, or imposing new environmental regulations, both of which could have an adverse impact on Canada's oil and gas sector.

A prominent feature of the Biden campaign was "Buy American" plans aimed at reshoring production and featuring domestic content and government purchasing preferences, which risks excluding Canadian manufacturers.

Internationally, a Biden administration may take a constructive role in efforts to reform the WTO and end the Appellate Body impasse. Canada would benefit from a functioning WTO dispute settlement system. A Biden administration would likely also bring new life to multilateral efforts to establish new rules on the taxation of international digital services under domestic tax law.

Environment and energy

Trump re-election

While the Trump campaign has not released an official environmental platform, a second term for Trump would likely result in continuation of the deregulation that has been a hallmark of his administration's approach to environmental policy. Regulations which have been repealed, rolled back or delayed since the 2016 election include limits on greenhouse gas emissions from power generation, fuel economy mandates, and rules which limit and require reporting of methane emissions from oil and gas production.

The Trump administration has reduced barriers to fossil fuel production and use, including by lifting bans on oil and gas exploration in the Arctic National Wildlife Refuge and coastal waters. Many of the regulations repealed under Trump were founded on a shared understanding developed between the Trudeau government and Obama administration, and their delay or repeal has resulted in knock-on effects in the Canadian regulatory landscape.

The Trump administration has consistently supported the Keystone XL pipeline. President Trump has twice issued permits authorizing Keystone XL, most recently in March 2019, in response to a federal court ruling that held that the project inadequately considered environmental impacts, and prior to this in 2017.

While a Trump re-election cannot guarantee Keystone XL's eventual completion, it would nevertheless bode well for the pipeline and for Alberta Premier Jason Kenney's government, which recently committed to $1.5 billion in direct investment and $6 billion in loan guarantees for the project.

A Trump administration appears set to approve further cross-border resource infrastructure: in September 2020, President Trump issued a permit authorizing a potential cross-border rail link, which could eventually move freight including bitumen from Alberta to Alaska.

On a global scale, the Trump administration signaled its intention to withdraw from the Paris Agreement in November 2019 effective the day after the 2020 election. The U.S. withdrawal from the agreement creates a risk of putting Canadian exporters and manufacturers at a disadvantage when compared to their American counterparts. This is due to stricter emissions regulations and environmental standards imposed in order to fulfill Canada's Paris obligations. These issues were first raised within a number of industries following President Trump's 2016 election and little has been done by Canada's federal government to ameliorate these competitive concerns since.

Biden election

The Biden election platform includes far-reaching proposals on the environment. Among these is a promise to cancel the permit issued by President Trump authorizing the construction of the Keystone XL pipeline. The cancellation of Keystone XL would represent a blow for Canada's energy sector, Alberta in particular. Despite Biden's promise to cancel the project, Premier Kenney has indicated that diplomatic efforts to save the pipeline in the event of a Biden victory continue.

Biden's platform also includes promises of renewed engagement in international climate agreements. In particular, a Biden administration would rejoin the Paris Agreement on "Day 1." Whether this would give rise to a broad-ranging U.S. federal Greenhouse Gas emissions law, or the re-emergence of state-based programs such as the Western Climate Initiative, remains to be seen.

A Biden victory could see the United States employ diplomatic and economic pressure to push countries to join the U.S. in toughening their climate objectives. It may do this by implementing a worldwide ban on government subsidies for fossil fuels, as well as employ efforts to extend California's carbon intensity fuel standards nationally and internationally, which may well exceed certain requirements under the coming Canadian Clean Fuel Standard.

Economic pressure may include "carbon-adjustment fees," or tariffs on imports from countries that fail to cut emissions under the Paris Agreement. Given that Canada will most likely miss its 2030 targets by a significant margin, and as addressed above, the imposition of these tariffs could represent a challenge for U.S.-Canada trade.

Biden's platform further promises to revitalize regulations which have been repealed, rolled back or delayed since 2016. For example, the Biden campaign has promised to re-establish methane pollution limits for new and existing oil and gas, which were rescinded by the U.S. Environmental Protection Agency in September 2020.

Originally the result of an agreement between the Obama and Trudeau governments in March 2016, these reporting requirements were delayed in the U.S. following the 2016 election. Canada followed suit in order to avoid subjecting domestic oil and gas producers to more stringent requirements than those faced by American competitors.

While the Canadian version of these regulations was eventually implemented in January 2020, the current schedule does not foresee the full implementation of methane monitoring requirements until 2023. Re-establishing these regulations on the American side of the border, which would be consistent with Biden's election platform, could shorten this implementation period and mean that Canadian oil and gas producers would be subject to these regulations far sooner than originally expected. The re-establishment of other regulations south of the border imposing stricter fuel economy standards could have similar effects on standards here in Canada.

Tax

Trump re-election

We expect that a Trump win will mean a continuation of current U.S. corporate tax rates and trade policies. The 2018 reduction of the U.S. corporate tax rate under the *Tax Cuts and Jobs Act* (TCJA) largely eliminated the previous Canadian corporate tax rate advantage.

When state-level taxes are layered onto the U.S. federal corporate rate of 21 per cent, the U.S. rates are generally similar to the Canadian federal-provincial general corporate tax rates (currently between 23 and 27 per cent). The continuation of a low U.S. corporate tax rate should constrain Canada's consideration of corporate tax rate increases, despite pressure from Canada's left-leaning political parties to impose higher taxes on businesses in order to pay for social programs.

The Trump campaign proposed 100 per cent expensing of capital expenditures to "bring back manufacturing," but it isn't clear what industries will be impacted. Depending on how it is implemented, such a move may increase pressure on Canada to enhance its accelerated capital cost allowance programs to help Canadian industries remain competitive.

Canada's federal carbon tax system, enacted in 2018, does not currently contain a border adjustment mechanism to protect Canadian industry against imports from countries without comparable carbon pricing regimes. Many experts argue that Canada needs a carbon border adjustment mechanism for both economic and environmental protection reasons, particularly as the Canadian price on carbon emissions is set to increase over time.

A border adjustment mechanism could take the form of import tariffs and/or export rebates applicable in cases where the foreign country does not have equivalent carbon pricing. Although the EU is reviewing such proposals, it seems challenging for Canada to contemplate similar measures while a Trump administration is in power. Any proposal resulting in tariffs imposed on U.S. imports would no doubt result in trade disruption.

Biden election

The Biden election platform included a number of tax proposals, including a general corporate tax rate increase. If the U.S. federal corporate rate is increased from its current 21 per cent to Biden's proposed 28 per cent, Canada may regain some of its pre-*Tax Cuts and Jobs Act* corporate tax advantage. However, a U.S. rate increase may provide scope for Canada's federal government to yield to pressure from left-leaning political parties to increase the corporate tax rate in order to pay for social programs.

Biden’s plans also included a number of anti-offshoring policies which may discourage U.S. investment into Canada, including the proposed 10 per cent “made in America” tax credit, the surtax on certain imported goods and services, and strengthening of the anti-inversion rules. We expect that Biden’s proposed tax changes will only be possible if the Democrats retain control of the House and gain control of the Senate.

The Biden campaign committed to bringing in climate change policies and to integrate those policies within the U.S. foreign trade policy. If the U.S. implements a carbon tax system, it may reduce the competitive disadvantage currently experienced by Canadian industries subject to the Canadian carbon tax regime. A U.S. carbon tax policy may also help pave the way for Canada to consider the addition of a carbon border adjustment mechanism, which would arguably improve Canada’s competitiveness outside of the North American market.

Many experts argue that a carbon border adjustment mechanism, which is currently under consideration in the EU, is required for reasons of both economic and environmental protection, particularly as the Canadian price on carbon emissions increases over time. Such a mechanism could take the form of import tariffs and/or export rebates applicable in cases where the foreign country does not have equivalent carbon pricing. Without U.S. movement towards carbon pricing, such measures would have been problematic for Canada to consider, as any proposal resulting in tariffs on U.S. imports would no doubt result in trade disruption.

Conclusion

While the above opinions represent our current understanding of the opportunities and challenges associated with either a Trump or Biden victory, we recognize that the considerable uncertainty surrounding the American electoral cycle has affected almost every business in some way.

As the vote counts and court challenges continue, BLG remains apprised of the effects of political and legal developments in the United States on business and law in a Canadian and cross-border context and will continue to provide updates.

BLG's lawyers are available to answer any questions you may have about these issues and how they may apply to your business. Reach out to any of the authors or the key contacts below for assistance.

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