

2021 Legal Year in Review – Introduction

DECEMBER 23, 2022 10 MIN READ

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Authors: [Jacqueline Code](#), [James R. Brown](#)

When the year began, we hoped that we would not be writing the 2021 edition of this publication while still grappling with the effects of the COVID-19 pandemic. With the pandemic approaching the end of its second year, 2021 has, like 2020, been a year like no other. In spite of the continued pandemic, we are pleased to offer updates on many important legal and business developments across a wide variety of industries and practice areas, many of which do not relate to COVID-19. We take this as a positive sign of a return to at least some aspects of pre-pandemic life.

In fact, many of our colleagues chose to write about the “new normal” or the “return to normal.” But what does that mean in a year such as 2021? On the one hand, with continued lockdowns and restrictions and fluctuating case counts, many employees have continued to work remotely. Return to office, or RTO, has begun, but slow progress is being made due to the persistence of COVID-19 variants, notwithstanding the rapid rollout of vaccines. Yet, this hasn’t affected transactional activity. On the contrary, mergers and acquisitions activity has been unprecedented and capital markets activity extraordinary, with one of the busiest IPO markets in Canadian history. Despite these unexpectedly high transaction activity levels, many businesses have continued to face significant challenges as a result of the ongoing pandemic. Against this backdrop, we are pleased to offer our collective thoughts on the most important legal and business developments from the past year in our eighth annual *Legal Year in Review*.

As we began to prepare this year’s publication, several key themes emerged. The first is the evidence that Canadian businesses are getting “back to business.” Heightened transaction volumes and significant growth in new sectors of the economy (including, for example, technology, cryptocurrency and artificial intelligence) are hallmarks of 2021. The second theme relates to the challenges that Canadian businesses continue to face – major supply chain disruptions, workforce retention issues, debates over mandatory vaccination policies and challenges in bringing a disparate workforce back to the office safely. Third is the remarkable and heightened focus of businesses, investors and governments on the importance of Environmental, Social and Governance (ESG) considerations. Finally, governments and courts returned to legislating and adjudicating – leading to major regulatory developments and key decisions discussed in a number of our articles.

As Stephen Poloz, our esteemed Special Advisor and the former Governor of the Bank of Canada, [notes](#), the pandemic has had a dramatic impact on the Canadian economy which is experiencing many changes as a result. These include changes of a transitory nature – such as supply chain disruptions and corresponding rises in prices for many goods – and changes that are likely more permanent – such as a shift in how employees carry out their employment. In some sectors, employees may never fully return to working in an office. It remains to be seen how the Canadian business and legal landscape will be affected in the long term.

The extraordinary deal-making activity witnessed in 2021 was driven by ripe economic conditions. At the same time, several important decisions have been issued or are pending that are likely to have significant implications for M&A practice in Canada, including, in particular, those pertaining to “busted deals.” Many important developments also arose in capital markets and securities, with Canadian regulators pushing to advance their burden reduction initiatives, while at the same time reacting to dramatic increases in capital markets activity levels.

Many issuers sought to become public or take advantage of financing windows to raise capital. In particular, technology issuers led the charge in initial public offerings, including healthcare technology. In healthcare, clinical businesses also encountered significant interest in consolidation by domestic and foreign buyers. At the same time, other issuers, such as juniors in the mining industry, continued to face challenges in raising capital, both due to market dynamics and regulatory limitations. Facing increased competition from public equity markets, private equity has responded with new products and fund structures designed to provide fund managers with greater flexibility and investors with broader choices.

The prominence of technology issuers in the capital markets was mirrored by greater attention to the importance of innovation to the Canadian economy, leading to notable developments in several areas. With a dramatic rise in interest in cryptocurrencies around the world, regulators took material steps towards regulating cryptoasset businesses offering their products or services to Canadians. Other areas of the innovation economy have also made important strides in 2021, including, in particular, artificial intelligence. The ownership of intellectual property developed by artificial intelligence raised interesting questions for legislators around the world. The acquisition of artificial intelligence businesses also gives rise to important and unique diligence considerations and deal terms for potential acquirors.

As businesses pushed to get back to work, employers began to plan their RTO strategies. While some have deferred a return to office, even on a partial basis, until 2022, many employers were able to begin bringing their employees back to the workplace in earnest. Principally driven by the mass rollout of COVID-19 vaccines and widespread availability of testing, employers and employees alike are beginning to return to office towers in downtown cores. However, RTO raises important legal questions for employers. Aside from these COVID-19 related concerns, regulators and courts implemented changes and made decisions that will be important to the workplace going forward. Employers must also grapple with important compensation questions that are likely to have an impact on behaviour and performance, particularly for executives.

Meanwhile, businesses and consumers faced significant headwinds, particularly with disrupted global supply chains and resulting increases in the price of goods. Suppliers and customers encountered major challenges in sourcing and securing consistent and timely supplies. In challenging supply environments, there is increased exposure and vulnerability to potential criminal activity. Businesses must be ever vigilant and focused on implementing and maintaining robust compliance programs to stave off potential corruption risks.

Border restrictions, supply chain issues and political disagreements have certainly had an impact on Canadian trade. However, for the most part, governments sought to preserve the status quo by expanding existing trade agreements, continuing their negotiations of new agreements and expanding sanctions and human rights rules.

Notwithstanding ongoing challenges, many took the opportunity this year to focus on change and betterment. Environmental, social and governance considerations seemed to be on everyone’s mind in 2021, with increased attention on all aspects of ESG from governments, businesses, investors and consumers. ESG matters permeated corporate

disclosure issues, environmental (climate change) considerations, the promotion of sustainable finance (particularly for pension funds) and corporate governance. In the latter area, the Rogers Communications boardroom saga also drew increased attention to corporate governance considerations in the context of dual class share structures.

With the Canadian federal government's Greenhouse Gas Pollution Pricing Act being upheld by the Supreme Court of Canada and the re-elected government emphasizing climate change as a priority, we can expect a greater focus on climate initiatives in 2022 and beyond. A key element of the government's climate strategy is imposing restrictions on greenhouse gas emissions from oil and gas projects in Western Canada. Energy transition, including the use of new and growing technologies, such as carbon capture and hydrogen, will be critical to achieving progress towards the federal government's stated goals.

Another important goal for the federal government has been reconciliation with Canada's Indigenous peoples. Despite the shadow caused by the tragic discovery of unmarked graves at former residential school sites, there has been some progress in advancing relations with Indigenous peoples. The granting of royal assent to the federal bill to adopt the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is a material step forward. In addition, several key decisions are likely to have significant impacts on infrastructure and resource development, requiring meaningful consultation regarding Aboriginal and treaty rights and promoting partnerships with Indigenous groups in the coming years.

Governments across the country have also advanced regulatory initiatives in other key areas. Combined with important decisions from a variety of courts, these developments are likely to have significant effects on businesses and consumers going forward.

One area that attracted significant attention in 2021 is the advancement of robust privacy legal reform. Québec's Bill 64 is the most advanced of these initiatives. Due to come into force on a staggered basis over the next three years, it will significantly revamp the approach to privacy in the province. In particular, it – as well as other measures under consideration at the provincial and federal levels – could expose companies across the country to significant penalties, risks and compliance costs. A proactive response to ensure that businesses implement robust privacy compliance mechanisms is now more important than ever.

Québec is also advancing major changes to French language laws in the province. If and when enacted, Québec's Bill 96 could also impose onerous obligations on those carrying on business in the province of Québec.

Regulatory changes also occurred in the gaming space. The federal government's decision to legalize single event sports betting was a significant amendment, which came at exactly the right time for private gaming operators who are positioning themselves to take advantage of Ontario's new iGaming market. Ontario's iGaming initiative, poised to launch in early 2022, will be the first in Canada to permit private operators to deliver online gaming to players under provincial regulatory oversight. It is hoped that the new model will pave the way for similar initiatives by other provinces.

Nationally, significant regulatory developments are taking shape in the financial services sector. This includes changes to anti-money laundering rules, payments regulation and modernization, open banking and cryptocurrencies. A key theme of financial services regulation in 2021 was the convergence of various different reforms and initiatives aimed at regulating discrete parts of the financial ecosystem that had been previously unregulated or lightly regulated.

International tax reform reflects a major undertaking for governments around the world as

they struggle with the appropriate sharing of tax revenues in a post-pandemic world in which many governments are seeking to pay for economic initiatives. We saw some progress on these initiatives in 2021. The Supreme Court of Canada also rendered several important decisions involving cross-border taxation, and may have the opportunity to weigh in again in 2022. These cases provide important guidance for businesses in relation to future tax planning.

Key judicial decisions in a number of other areas may also affect businesses. In addition to those noted above, 2021 saw noteworthy judicial and administrative regulatory decisions in insolvency and capital markets enforcement.

The courts were also extremely active in the class actions arena. Notably, the courts recognized a number of tools that provide for meaningful screening of unmeritorious privacy class actions at or before the certification phase. In securities class actions, courts have also been willing to engage in meaningful assessment at early stages of the proceeding, in particular by affirming the utility of the statutory leave requirement for secondary market misrepresentations as a robust gatekeeping tool. Finally, important developments occurred in British Columbia, where the courts confirmed that defendants should be entitled to move to dispose of or narrow unmeritorious cases through motions to strike or jurisdiction motions prior to the determination of class certification.

As you can see, 2021 has proven to be an incredibly eventful year in many different sectors. In 2022, we continue to hope for further progress back to a more “normal” existence (whatever that may mean), as vaccination rates continue to increase, case loads continue to decrease, third doses are introduced and as more and more businesses look to establish the new rules of the game. What that looks like remains to be seen, but we trust that next year will present more interesting and challenging legal and business developments.

We hope you enjoy reading this year's *Legal Year in Review*. As always, we would be pleased to discuss these developments with you.