

# Our impressions of the year's most important developments

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In 2022, we mark a significant milestone: after two editions of our Legal Year in Review summarizing legal and business developments heavily focused on the effects of the pandemic, we are finally able to present a publication containing only a handful of mentions of COVID-19. Several of this year's discussions view the pandemic in the rear-view mirror. Others address laws or developments that occurred, in some part, because of the pandemic, but that now have some permanence or life of their own. As we move past the pandemic, we are pleased to bring you our reflections on the notable developments in the Canadian legal and business landscape in 2022.

2020 and 2021 were marked by virtually unprecedented levels of transactional activity in both mergers and acquisitions and capital markets. In 2022, however, there was a dramatic slowdown in public capital raising activity. In particular, initial public offerings ground to a virtual standstill. While buyers and sellers continue to demonstrate their interest in transacting across a variety of industries, M&A activity levels are not what they were. This slowdown has been driven by global economic and geopolitical uncertainty, an unfortunately persistent theme that is echoed in a number of this year's articles. This uncertainty is the product of a variety of drivers, including the Russian invasion of Ukraine, significant supply and demand imbalances in global supply chains, stubbornly high inflation, rising interest rates and the increasing threat of a worldwide recession.

Issuers, investors, governments, regulators and many others paused in 2022 to regroup. Legislators and regulators moved from a reactionary approach to the pandemic to focus on advancing key policy or legislative reform initiatives, including taking steps to build out prior frameworks. Moreover, issues related to the pandemic that gave rise to challenging disputes and ultimately litigation resulted in important judicial decisions in 2022. Some of these decisions will have a meaningful impact on businesses going forward.

For many businesses, the focus in 2022 was on returning to the workplace. A full return to pre-pandemic workplace attendance has been challenging for many employers given persistent supply chain disruptions, a pronounced shortage of skilled labour and ongoing workforce retention issues. Many employees showed interest in returning to the workplace, but did not want to sacrifice all of the advantages of remote work they had become accustomed to. Many employers are now contending with a hybrid work model out of necessity.

Environmental, Social and Governance (ESG) considerations continue to be frequent topics for discussion. ESG concerns permeate a number of important developments this year, including in relation to climate change, energy transition, diversity on corporate boards and the ever-elusive "social" category that seems to escape clear or consistent definition.

These themes recur across a number of different sectors and inform many, although not all,

of the articles in this year's Legal Year in Review. Here is a snapshot of what we saw this year.

Legislative reform has continued to advance in the highly dynamic Canadian privacy arena. The first wave of privacy reform is being led by Québec, with parts of Bill 64 coming into effect earlier this year. With additional provisions coming into force on a staggered basis over the next two years, the legislation will significantly impact privacy regulation in the province, exposing parties to potentially substantial penalties for breach and to private rights of action.

Not to be outdone, the Government of Canada introduced its *Digital Charter Implementation Act*. If enacted, it will create a new federal statutory framework governing personal information practices in the private sector. Like the Québec private sector law, this framework also exposes parties to potentially material penalties for breach. The federal government also proposed legislation addressing artificial intelligence and data telecommunications cybersecurity. While privacy reform continues to progress slowly in other provinces, extensive changes are anticipated in the coming years.

Major reform of French language laws in Québec began to take effect. Bill 96 can easily be characterized as the most impactful piece of legislation in respect of language rights in Québec since the initial adoption of the *Charter of the French Language* in 1977. The bill imposes broad and often onerous requirements regarding the use of the French language in Québec in many areas, including contracting and employment, to name only a few. It introduces a host of new requirements and creates new sources of liability for a failure to comply with these requirements, including a private right of action.

Among the more dramatic regulatory developments to unfold in 2022 are the wide-ranging sanctions the Canadian federal government imposed following the Russian invasion of Ukraine. The coordinated, rapid actions of Canada and its allies in imposing and continually updating comprehensive restrictions on the Russian government and its leadership continues to affect a wide variety of persons and activities. At the same time, other important developments occurred in international trade, with the first decision rendered pursuant to the newly-adopted state-to-state dispute resolution process under the Canada-United States-Mexico Agreement. The decision was unfavourable to Canada's supply management system for dairy. In addition, new anti-slavery legislation targeting forced labour continues to progress through Parliament.

The Government of Canada has also been advancing important regulatory changes in the financial services sector. Anti-money laundering (AML) regulatory changes were introduced as temporary emergency measures in response to funding techniques adopted by participants in blockades and protests in Ottawa. However, these changes, which extend the reach of AML measures to new types of businesses, have since become permanent fixtures in the Canadian legal landscape. The government progressed in building out its payment modernization initiatives. The new real-time payments system, Real-Time Rail, after several delays, is now expected to launch midway through 2023. The federal government also began taking steps to implement the recommendations from the Advisory Committee on Open Banking. In addition, important progress is being made to assist participants in the financial market to transition from the current Canadian benchmark rate, the Canadian Dollar Offered Rate (CDOR), to the Canadian Overnight Repo Rate Average in advance of the June 2023 deadline when CDOR will be discontinued.

Meanwhile, cryptocurrencies and the regulatory oversight of crypto businesses continued to draw significant attention. The market experienced the so-called "crypto winter" with the failure of several notable crypto businesses, which drew many investors and businesses into the fray. The bankruptcy and collapse of several cryptocurrency exchanges continue to unfold in dramatic fashion, with questions arising about regulatory oversight in the face of

rumours of substantial losses. At the same time, the Canadian registration framework for cryptoasset trading platforms solidified, bringing welcome clarity to the regulatory regime for crypto businesses in Canada. Further regulatory developments related to crypto and other digital assets are all but a certainty.

Additional securities regulatory changes in 2022 focused on continuing to try to reduce the regulatory burdens for issuers and investment funds to make it easier to both raise capital and carry on business, while simultaneously protecting investor interests. Among other capital markets changes are the adoption of a well-known seasoned issuer model for prospectus filings and progress towards an access equals delivery model. Several important consultations remain outstanding, with significant new developments likely in 2023 and beyond. These include a broad consultation regarding the securities law disclosure requirements for mining issuers.

Beyond mineral project disclosure, mining attracted considerable attention globally with a focus on critical minerals. In Canada, the federal government and several provincial governments have developed or are developing critical minerals strategies, broadly encouraging project exploration and development, and advancing critical minerals value chains. Critical minerals are essential for the push towards energy transition and a net-zero future. Under the scope of its national security review power, the federal government adopted a policy enhancing the net benefit factors in respect of an investment by a foreign state-owned enterprise in Canada's critical minerals sector. Relatedly, divestiture orders have been issued regarding three separate investments in Canadian critical minerals companies, both within and outside of Canada.

The federal government has also been active in advancing potential reform to the *Competition Act*, with significant amendments taking effect earlier this year and a broader consultation now underway. Competition litigation also attracted a great deal of attention through three high-profile merger cases, including the pending hearing over the proposed acquisition of Shaw Communications by Rogers Communications.

A number of regulatory initiatives are advancing net-zero and other ESG goals. Proposed domestic and global standards for climate-related disclosure are slowly taking shape and shareholder activism targeted at climate matters is increasing. As the world turns its focus away from the pandemic and back to the effects of climate change, these drivers are likely to play an increasingly prominent role going forward. On the governance side, a number of corporate law changes came into effect in 2022 that address the election of public company directors, private company decision making and other ways in which corporations are governed, with further changes on the horizon. Encouragingly, progress was made in 2022 with respect to gender diversity on Canadian public company boards, although work remains to be done to achieve greater representation for racialized individuals, persons with disabilities and others.

In the landmark 2021 decision in *Yahey*, the Supreme Court of Canada found that the cumulative impacts of industrial development in traditional Indigenous territory amounted to a breach of treaty rights. In 2022, a number of claims were filed on the basis of cumulative impacts. Cumulative impact claims have the potential to delay or halt changes to operating projects and the assessment and approval of proposed projects. The prospect of such a claim reinforces the importance of engaging with local Indigenous communities and groups early in the planning stages of a project that is proposed in an area over which Indigenous communities assert rights.

Courts released a number of other notable decisions in 2022 across a variety of sectors. During the pandemic, several prominent transactions were terminated, with buyers asserting breaches of material adverse effect conditions or interim operating covenants due

to the actions taken by the target in response to the pandemic. Decisions in these cases were finally released at the end of 2021 and through 2022. These judgments held buyers to their contractual commitments, despite the impacts of the pandemic.

In a similar vein, the Ontario Superior Court of Justice released an important decision regarding the availability of the doctrine of *force majeure* and the impact of the pandemic on a payment obligation. The decision confirms *force majeure* will not be available to a party to refuse performance where a contract has become significantly more economically onerous to perform. This case is currently under appeal. Other noteworthy decisions addressing key issues for public M&A activity were issued, including a decision from the Alberta Securities Commission regarding disclosure requirements in respect of toehold accumulation strategies.

Two notable decisions affirm the availability of reverse vesting orders in insolvency transactions, providing important guidance on the use of these structures in the menu of options for restructuring an insolvent company. This structure is of particular interest for restructuring companies that operate in highly-regulated environments. Furthermore, in the Just Energy proceedings, we now have the first example of a reverse vesting order transaction being recognized under the U.S. *Bankruptcy Code*.

Class action litigation was the subject of its fair share of key judgments. On the securities side, courts provided some welcome clarity on the statutory secondary market cause of action. Several securities class action decisions were issued by courts taking seriously their “gatekeeping role” in denying leave, serving as critical reminders of the burden on plaintiffs to adduce admissible and cogent evidence at the motion for leave stage. Much-needed clarity was provided in the privacy sphere in the recent Ontario Court of Appeal decisions confirming the “intentionality” requirement for the intrusion upon seclusion tort and affirming that the tort is not available for a mere failure to prevent a data breach. As with securities class actions, courts in privacy class actions have also meaningfully exercised their gatekeeper role at the certification stage, requiring evidence that the proposed plaintiff(s) were actually affected by the alleged breach of privacy before allowing the case to proceed.

Securities regulators also progressed their agendas with respect to enforcement matters. With the bifurcation of the regulatory and adjudicative functions at the Ontario Securities Commission and the combination of the Mutual Fund Dealers Association of Canada and the Investment Industry Regulatory Organization of Canada, there was a push toward increasing regulatory efficiency and independence in decision making. While enforcement activity appeared to slow in 2022, important decisions were nevertheless issued. Enforcement activity in the area of white-collar crime continued in 2022. Two remediation agreements, or deferred prosecution agreements, were entered into during the year, demonstrating their viability as an alternative path for corporate criminal matters.

A decision is expected from the Supreme Court of Canada in an important case regarding the application of the general anti-avoidance rule under the *Income Tax Act* (GAAR), even as the federal government is undertaking a consultation about whether and how to modernize the GAAR. This year, the federal government also released draft tax legislation to adopt significant amendments to align with the OECD’s BEPS recommendations. These and other proposals will affect a wide range of tax issues, both domestic and international.

Important decisions were also released with respect to labour and employment matters, with several decisions upholding the enforceability of vaccination mandates. Additionally, changes to employment laws were made, including the introduction of the new “disconnecting from work” and “electronic monitoring” policy requirements for Ontario employers and the expansion of paid sick leave in British Columbia. Securities law and stock exchange requirements are having an impact on the design and disclosure of executive

compensation arrangements.

Regulatory developments were also implemented with respect to the delivery of virtual care, a mode of healthcare delivery that became prevalent during the pandemic. As more users and practitioners turn to virtual care services to deliver healthcare at a time when the Canadian healthcare system remains under immense pressure, providers must understand the different legal and regulatory frameworks that exist across the country.

Finally, as businesses continue to draw their employees back to the workplace, important trends can be seen in real estate planning. In 2022, governments reacted to the urgent need for more housing and there was a push towards densification to accommodate much-needed growth.

Undoubtedly there have been a number of important legal and business developments this year. Many will have immediate implications for many of our readers. However, it is important to recognize that just as many have laid the foundations for even more ambitious developments in the coming years. The year ahead promises to be another interesting one for the legal and business community.

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