

2020 Legal Year in Review – Introduction

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Without a doubt, 2020 has been a year like no other. Inevitably, the COVID-19 pandemic and its effects is a theme that flows through many of the articles in our seventh annual Legal Year in Review publication. At the same time, the business of our clients and the laws that regulate those businesses have evolved in ways that are unrelated to the pandemic and despite the pandemic. In some cases, the challenges presented by COVID-19 have accelerated changes that were already in process, creating benefits or opportunities that may extend well beyond the pandemic. We are pleased to offer our consolidated views of the most important legal and business developments from the past year.

2020 has highlighted a clear and unfortunate dichotomy in our economy. The [economic overview](#) by Stephen Poloz, our esteemed Special Advisor and the former Governor of the Bank of Canada, speaks of the “K-shaped” recovery. The top branch of the “K” represents those parts of the economy that experienced declines in the early days or weeks of the first lockdowns, but are rebounding or have already rebounded. This group includes intellectual capital businesses that have remained largely unscathed throughout the pandemic, often due to their capacity to transition to remote work or service delivery environments. While parts of this economy could experience a “double dip” as the second wave of the virus leads to new lockdowns and restrictions, it is resilient and will undoubtedly recover. At the other end of the economic spectrum are those businesses that fall within the lower branch of the “K” – retail, restaurants, bars, airlines, hotels and other businesses that require “in-person” interactions. These businesses may be irreparably damaged. In many ways, this economic overview forms the backdrop to many of the developments discussed by our authors.

For example, [the bricks-and-mortar retail sector](#) generally falls in the bottom of the “K”. With government-mandated shutdowns, many retailers have not been able to operate in a manner that can be profitable, or at all. While some have shifted to other delivery mechanisms, such as curbside pickup or e-commerce, many retailers have been unable to adapt. Even with extensive government support, many businesses have been forced to restructure or shut down entirely. By contrast, in the top half of the “K”, [Canada’s mining sector](#) experienced declines early on in the pandemic, but subsequently benefited (significantly) from dramatic increases in commodity prices and a flight to the safety of gold in particular.

The other major force driving change in 2020 is social – namely, the unprecedented increase in focus on diversity and inclusion – and it is entirely unrelated to the COVID-19 pandemic. This has been driven, in large part, by horrific events in the United States that re-energized the Black Lives Matter movement and, in turn, the fight to end anti-black racism in the United States and Canada.

While this has not (yet) led to significant change in the law in Canada, the formation of the Canadian Council of Business Leaders Against Anti-Black System Racism and its BlackNorth Initiative have spurred extensive discussions about systemic racism and positive actions to eradicate it. The BlackNorth Initiative's CEO Pledge, which requires a commitment to specific targets for hiring of persons who are black, Indigenous and people of colour, is but one example of measures implemented to foster broader diversity in the Canadian business and legal community.

Meanwhile, as discussed in our [Corporate Governance article](#), efforts to increase gender diversity around the boardroom table have met with modest success, though very little progress has been made towards achieving broader diversity. Moreover, recent changes to the *Canada Business Corporations Act* regarding diversity disclosure seem to have had limited effect in 2020.

Apart from the (largely temporary) provincial emergency orders imposing lockdowns or similar restrictions, most of the legal developments in 2020 associated with the COVID-19 pandemic have not taken the form of statutory or regulatory change. Instead, there have been widespread adjustments of practices within the existing legal framework or transactional changes seeking to address the effects of the pandemic.

A key adjustment has been the shift from an in-person to a virtual environment. [Courts](#) and other tribunals across the country shifted to accommodate virtual hearings, depositions and other processes. Lockdown restrictions prevented in-person annual shareholder meetings, accelerating the trend towards electronic shareholder meetings, and moving even further to provide for [virtual-only shareholder meetings](#). The electronic execution of documents and electronic signatures, although increasingly commonplace in the pre-pandemic world, suddenly became the centre of attention – by necessity. Virtual notarization and commissioning of documents quickly followed. Clearly [technology](#) has played a key role in ensuring that significant areas of the economy, including the legal industry, are able to continue operating.

Technology has also been a focus of the capital markets, as technology companies became the “market darlings”. Payment company Nuvei Corp. completed the largest technology IPO in Canada in a year with several other notable successes, including a U.S. IPO for Lightspeed POS Inc. and significant stock support for Shopify Inc. Similarly, technology issuers have had [significant success](#) raising private capital and completing sale transactions as investors seek to take advantage of growth opportunities.

With technology in high demand and playing such a fundamental role in the COVID-19 environment, it isn't surprising to see law firms increasing their [focus on innovation](#) through technology to better serve their clients. In particular, the significant growth in alternative legal service providers, who principally rely on technology – such as Osler Works and Osler Workshop – is expected to continue to play an important role in the provision of legal services both during the pandemic and beyond.

COVID-19 has created obstacles as well as opportunities. The onset of the pandemic led transacting parties to reassess their obligations in light of new uncertainties. For a number of [M&A transactions](#), whether due to genuine changes caused by the pandemic or (perhaps) buyers' remorse, acquirors sought ways to retreat from their commitments to buy. Some buyers claimed that the target had breached its interim period operating covenants in complying with applicable pandemic lockdowns. Others claimed that the target had undergone a “material adverse effect” or “material adverse change” that allowed the buyer to terminate its obligations. Although “MAC” clauses have been litigated to some extent in the United States, there is limited case law interpreting similar provisions in Canada. M&A practitioners, in particular, will be interested in the outcomes of these cases, including, most

notably, the pending litigation between Cineplex and Cineworld.

Commercial contracting parties faced and are facing similar issues. In relation to existing contracts, certain parties sought to invoke force majeure clauses as a means of obtaining relief from performance. The standard to establish *force majeure* is, however, high and it is generally necessary to show that the alleged *force majeure* event made it impossible to perform the particular contractual obligations that the counter party seeks to avoid. In a similar vein, the effects of the COVID-19 pandemic on their businesses and their finances forced many issuers to seek relief or waivers from their lenders from covenants that could not be complied with, given business shutdowns arising from government-imposed lockdowns and other pandemic-related economic pressures. Contract negotiations began featuring discussions of available means for protecting a contracting party against a potential counterparty insolvency.

Although it initially appeared that regulatory authorities were concerned about the prospect of “opportunistic” foreign investment transactions, particularly in essential industries for the health and safety of Canadians or for economic stability, the Canadian government has not taken steps to lower the thresholds for or expand the scope of mandatory foreign investment reviews. As a policy matter, regulators indicated that enhanced scrutiny may be given to such transactions within existing parameters.

Businesses have had to adjust to the way in which healthcare and health regulatory matters have become top of mind in all sectors, not just the healthcare industry, and in many aspects of operations. From the critical status of front line health care workers to the use of digital healthcare delivery services, from supply chain issues for personal protective equipment to significant health measures to prevent the spread of COVID-19, healthcare and related regulatory issues garnered more attention in 2020 than ever before.

These considerations have also permeated (among others) the employment relationship, as well as the laws and standards applicable to that relationship. Employers must grapple in new ways and at new levels with issues relating to the health and wellbeing of employees both in the physical and remote workplace. Employers must also contend with finding ways to incentivize management in a world where traditional compensation metrics have been dramatically impacted. COVID-19 pandemic-related shutdowns have also threatened employee livelihoods and forced employers to navigate complex federal and provincial support programs. Health, labour and employment issues will clearly continue to be areas of considerable focus for the foreseeable future, especially as our society navigates second and maybe subsequent waves of the pandemic, and then looks ahead to vaccine roll-out.

Government programs developed to support employees and employers through this difficult period, as Stephen Poloz notes, deserve much of the credit for preventing a much deeper downturn in the Canadian economy – perhaps even the dreaded “L”. Governments are looking ahead to measures to rebuild the economy, focusing on historic levels of investment and expenditure, particularly in infrastructure, which has often proved to be a tried-and-true means to stimulate economic growth. All across the country, significant governmental programs targeted at construction and infrastructure have been established, including in developing areas, such as renewable power generation in Alberta which was already a focus prior to the pandemic.

There is no denying that COVID-19 has influenced many aspects of the business and legal landscape, not to mention the very fabric of our lives. It is, unfortunately, not over yet. However, not everything in 2020 has been about the pandemic. In some areas, it has been “business as usual” – laws have changed either incrementally or materially, cases have been decided and legislative consultations and regulatory investigations continue, albeit in a virtual environment.

For example, the provinces and the federal government continue to be in fundamental disagreement regarding environmental regulation – particularly in relation to measures directed at slowing climate change – and the constitutional authority of the federal government to design a “one size fits all” solution to a national environmental problem. More litigation may be on the horizon, depending on the Supreme Court of Canada’s decision in the climate change cases currently before it.

Among other developments that we discuss in this year’s publication are:

- extensive changes in the regulation of financial services, largely directed at regulatory burden reduction and consumer protection;
- important international tax reforms and the results and implications of material tax litigation;
- proposed new approaches to the regulation of cryptoasset platforms, presenting a potentially safer environment for Canadian investors looking to invest in these assets;
- changes to corporate and securities rules both north and south of the border, including those associated with corporate governance and diversity disclosure requirements and a continued focus on reducing burdensome regulation;
- increasing use of flexible and, in some cases new, tools to assist distressed companies in restructuring their operations;
- notable successes in patent litigation relevant to life sciences and software patent protection;
- unprecedented change to privacy laws at both the federal and provincial level, including new potentially harsh enforcement tools;
- new hybrid debt instruments for financial institutions;
- the increasing use of representation and warranty insurance in Canada and the impact of the pandemic on such policies;
- potential shifts in Canada/United States trade relations flowing from the U.S. election; and
- changes to securities enforcement practices, as well as enforcement response to white-collar crime (particularly arising from the COVID-19 pandemic).

Of particular note is the consultation report from the Ontario Capital Markets Modernization Taskforce (the Taskforce). The Taskforce proposed draft recommendations over the summer that could have significant impacts on both the Ontario capital markets and the Canadian capital markets at large. The Taskforce is due to present their final recommendations by year end. The preliminary proposals elicited extensive (and often contradictory) feedback. It remains to be seen how the Taskforce and, ultimately the Ontario Government, will respond to competing viewpoints for the advancement of capital markets regulation. This is a key area to watch in 2021.

When we indicated in last year’s Legal Year in Review that 2020 was poised to be an eventful year, we certainly couldn’t have predicted the year we have had. All signs indicate that 2021 is likely to be just as eventful, although we are hopeful for positive developments as we collectively work back toward a sense of normalcy.

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