



**BLG's TOP 10
BUSINESS ISSUES
WITH LEGAL
IMPLICATIONS 2011**

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Looking ahead into 2011, BLG's commitment and drive to understand our clients and to achieve the best possible results for our clients is top of mind. We are dedicated to anticipating issues and sharing effective, timely solutions in a constantly changing regulatory and business environment. And this is what we forecast.

1. The Big Bang – collision of public companies and Social Media – has happened. Now what?

This year, we can expect to witness the continued explosive proliferation of social media use in Canada, and certainly, the investor relations world is not isolated from it. That creates challenges for organizations that don't want to run afoul of proper disclosure regulations.

Several months before Twitter was even created, Bill 198 was passed in Canada giving investors a statutory right to act against public companies, for material misrepresentations made in public disclosure and for failure to disclose material changes in a timely manner. In a post-Twitter world, in which many companies actually use the 140-character tweets as a formal communication channel, managing public disclosure is exponentially more complex. The nature of social media is mostly quick, interactive and short, and it sometimes provides material out of context, creating a potential for reflexive, off-the-cuff responses. That's a perfect recipe for a disclosure disaster.

Given that the social media genie is not going back in the bottle, what public companies need to do to protect themselves and to ensure they are treating their shareholders fairly when it comes to disclosure is going to be key this year. BLG lawyers can describe the issues, and prescribe the necessary behaviour, online and off.

2. There's gold in them hills, and people too. How much do you talk before you dig?

There's no doubt about it: mining is a necessity. Where it all gets tricky is balancing the rights of those who live in communities affected by extraction activities and those who own the rights to do the extracting.

Community activists have become much more effective at challenging big projects with big environmental impacts. They have had success winning injunctions and stop work orders. They have also had success winning support on Parliament Hill, barely missing with a Private Members Bill in 2010 that would have placed new conditions on mining companies.

Community consultation processes are now essential for companies that hope to win local support – and prevent strong opposition – for their projects. BLG lawyers have extensive experience in designing and implementing community consultation processes that create real partnerships.

3. From America with love – the rise of the class action lawsuit

Once thought to be largely a product of the U.S., the class action lawsuit continues to gain in popularity in Canada. The class action, a form of lawsuit in which a number of people collectively bring a claim to court, has been used in Canada to address all kinds of perceived offences, whether unpaid overtime, claims that products are shoddy, complaints by franchisees against franchisors and claims by investors under securities legislation. Canadian class actions are often driven by events in the U.S. such as product recalls, regulatory investigations, as well as jury verdicts and settlements in multidistrict litigation and class actions.

The key issues to watch in the year ahead are the potential exposure of corporations to what are called waiver of tort claims and exposures to international or national Canadian class actions. Plaintiffs bring waiver of tort claims to get a disgorgement of revenue or profit from the business unit or product line under attack in a class action. The existence and scope of the waiver of tort claim is before the court in several Canadian jurisdictions.

At the same time, plaintiff's counsel are attempting to bring class actions on behalf of international classes or national Canadian classes. U.S. counsel and clients are often surprised by the breadth of cases certified as class actions in Canada. In 2011, it is important to follow the development of these Canadian class actions with multi-jurisdictional scope.

In the U.S., class actions have tied up enormous resources, and resulted in even more enormous awards. Is Canada headed in the direction of a day in court for every Canadian, or at least a court-ordered settlement for every Canadian? BLG lawyers can explain the nuances of class action suits, as well as the changing legal landscape in Canada.

4. He said, she said we need (or don't need) a National Securities Regulator

Ottawa's plan to create a national securities regulator faces challenges. Québec and Alberta say they are adamantly opposed to the plan to replace Canada's 13 provincial and territorial regulators with a single entity that would police the buying and selling of stocks and bonds.

The plan is before the Supreme Court of Canada, which must decide if Ottawa has the authority to create a national regulator, and all the provinces are lining up to participate in a hearing on the matter that is scheduled for April 2011.

Meanwhile, it seems that when major events occur in the Canadian securities markets, the call goes up again from the investment community. That was the case with the attempted hostile takeover of Potash Corp., which led to calls once again for a national securities regulator; looking ahead to 2011, other potential foreign investment in Canada could raise the issue again. Foreign sovereign funds (notably China) will be resource shopping in Canada. We might also see movement in telecom and aviation.

It takes experienced, top-tier securities lawyers to navigate all the issues, opinions and existing regulations, in order to make this story make sense. That's what BLG has.

5. The year of uncertainty, if you're trying to raise capital

The housing market imploded, the credit markets froze, and the global economy hit rock bottom and scraped along for a while. Portugal, Italy, Greece, Spain and Ireland cast doubts on the survivability of the European Union. All things considered, it's a very nice time to be Canadian. But with the global debt crisis (including sovereign and consumer debt), currency uncertainty, the inflated bond market, the state of the U.S. housing market, and the continuing inflation vs. deflation debate, capital markets are understandably weary.

Consequently, this year promises to be a challenging one for issuers, investors and their advisors. The current state of the capital markets has created new obstacles for issuers seeking to raise money in the capital markets, but deals are getting done.

BLG's capital markets lawyers can tell you how and why those deals are getting done.

6. This just in: you CAN patent a method of doing business

In the rapidly evolving worlds of online, mobile and social commerce, the Federal Court of Canada has ruled that a company can patent a method of doing business. Its decision, overturning a Patent Office ruling, opens a door that will trigger a variety of novel business method patent applications and may generate some high-profile conflicts.

The Federal Court's decision related to a request by the online retailer Amazon.com, which sought patent protection for its "1 click" purchase method, but it is applicable to new types of e-commerce, insurance, banking, tax compliance etc. The patents have become important intellectual property for inventors and major corporations, and having a patented business process could become a powerful competitive advantage.

BLG can help explain why business method patents are here to stay and how companies can get (or stay) ahead of the pack.

7. Public-Private Partnerships will continue making news and infrastructure in 2011

Canada is one of the world's most active markets in public-private partnerships. And, although there is no unanimity across the country in terms of the acceptance and endorsement of the P3 model, this market is robust and growing. The federal government has established a \$1.257-billion fund for P3s. PPP Canada, which manages that fund, expects to invest approximately \$100 million in P3 initiatives in fiscal 2010-11, which will be used to leverage projects worth many billions of dollars.

In light of the growing acceptance and endorsement of the P3 procurement model by Canadian governments, we can anticipate growing investment opportunities in Canadian P3 projects over the next year and beyond. BLG lawyers can interpret the trends and provide unique perspective.

8. Arbitration and Mediation on the Rise: More business disputes being resolved out of court

Canada has long been a leader in the use of mediation and other forms of assisted negotiation to resolve disputes. Late in 2010, Ontario became the second province, with Nova Scotia, to adopt mediation regulations that enable parties settling a commercial dispute through mediation to register their settlement agreement with the court, thus having the settlement treated like a judgment for enforcement purposes.

For disputes that simply cannot be resolved through mediation, more and more businesses are taking advantage of the flexibility of commercial arbitration to tailor dispute-specific processes that reflect the business priorities of the parties to the dispute. Commercial arbitration can emulate court litigation if that is what the parties want, or if their arbitrator or their counsel are not familiar with the process. But as corporate counsel and external advisors become more experienced in using arbitration effectively, in addition to providing a private and neutral forum, arbitrations can be structured to be faster, more final and more cost-effective than long journeys through the court system. Although no centralized statistics are maintained, anecdotal information, and the experience of BLG's very active group of commercial arbitration counsel, indicates that arbitration using creative approaches is definitely on the rise in Canada.

The wider acceptance of commercial arbitration and the growth in the number of experienced arbitrators and arbitration counsel represents an opportunity for Canadian businesses to more effectively manage their dispute resolution budgets. To reap the potential benefits, businesses should devote more time and attention when the deal is being made to the provisions of the agreements that deal with dispute resolution; the care spent in doing so will pay large dividends if disputes arise. If disputes arise that cannot be resolved through negotiation, advisors who understand and can exploit the advantages of mediation and the differences between arbitration and court-style litigation should be engaged. BLG lawyers can help businesses to reap the potential benefits.

9. Economic growth will push energy demands, inside and outside of Canada

With Canada's abundance of hydro power, oil and gas and nuclear, there is never a shortage of energy-related transactions and conflicts, domestically and internationally. We expect that will only increase as the domestic and global economies continue to rebound in 2011, driving greater energy demand.

Additionally, with an increasing shift to renewable energy and the problems of an aging energy infrastructure, the competitive environment is constantly shifting. BLG lawyers handle a wide range of specialized issues in the electricity sector, with deep knowledge of business, regulatory and financial issues facing developers, generators, electricity distributors and their shareholders, transmitters, electricity marketers, lenders, equity providers, and major consumers in connection with the legal and business issues and opportunities facing the electricity sector across Canada.

10. Insolvency and restructuring aren't going away

As noted above in #5, credit markets are still tight, and that is keeping the pressure on both borrowers and lenders. Each must understand the implications of refinancing, renegotiating and restructuring. Lenders must be able to identify and negotiate key provisions in financial covenants that will help them avoid losses and maximize recoveries. Each must be able to take advantage of new financing vehicles; and recognize and respond to warning signs. BLG lawyers can provide unique insights and commentary into these issues, on both a macro-economic level and as relates to specific insolvencies.

About Borden Ladner Gervais LLP

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