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# Litigation and Dispute Resolution in Canada: 2022 year in review and future trends

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# Overview

1. Class actions (privacy, product liability and employment)
2. Preserving privilege
3. Settlement disclosure obligations
4. Environmental litigation
5. Supply chain issues
6. Securities Regulatory Litigation
7. Update on Professional Negligence
8. Increased scrutiny of administrative tribunals
9. Arbitration trends



# 1. Class actions (privacy, product liability and employment)

- Product liability class actions
  - ***Coles v FCA Canada Inc.***: Defendants should consider what proactive steps they can take to remedy negligent design issues and compensate potential plaintiffs to mitigate the risk of certification
  - ***Rebuck v Ford Motor Company***: Defendants are not liable for misleading advertising where the underlying representation complies with government regulations
  - ***Kirsh v Bristol-Myers Squibb***: In a multi-jurisdictional landscape, overlapping or duplicative class actions may not be stayed as abusive



# 1. Class actions (privacy, product liability and employment)

- Privacy class actions
  - Tort of intrusion upon seclusion being relied on in the class action context
  - Increased gatekeeping function of courts at certification
  - ***Stewart v Demme***: patient information accessed by nurse to take narcotic drugs was not highly sensitive and patients were not materially harmed by the accessing of information
  - **Ontario Court of Appeal trilogy**: tort of intrusion upon seclusion not available as a cause of action in class actions involving “Database Defendants” – claims fail where no material facts are pleaded that allege the respondents acted in consort with, or were vicariously liable for, the conduct of hackers



# 1. Class actions (privacy, product liability and employment)

- Rise in claims involving wrongful dismissals, discrimination, harassment and wages in class action context and beyond
- ***Ari v Insurance Corporation of British Columbia***: defendant was vicariously liable for the rogue employee's theft of personal information; when setting policies that limit how employees can use customers' personal information, organizations should establish monitoring and enforcement mechanisms
- ***Lewis v WestJet Airlines Ltd***: BC Court of Appeal certified class action based on harassment claim; employer's failure to uphold anti-harassment workplace policies may leave them vulnerable to class actions



## 2. Preserving privilege

- Legal privilege identifies and classifies relationships and communications that are presumptively protected from disclosure, including communications between a lawyer and client, communications and documents prepared for the dominant purpose of litigation and communications between parties exploring settlement.
- ***Canada (Transportation Safety Board) v Carroll Byrne***: Order of disclosure of airplane black box contents to civil litigants and their experts, consultants, insurers and lawyers in a passenger class action



### **3. Settlement disclosure obligations**

- Partial settlement agreements that change the adversarial landscape of the litigation must be immediately disclosed to the non-settling defendants
  - Failure to do so will result (in Ontario) in an automatic stay of the litigation

## 4. Environmental litigation

- Climate change-based claims a growing trend
- Increase in climate change-related litigation against governments
  - Failure to regulate, infringement of claimed rights, failure to enforce are common grounds for claims
- Claims against industry likely in future - potential future legislation to provide basis
- Climate-based private law claims will encounter causation challenges and pure economic loss issues
  - ***Rieger v Plains Midstream Canada ULC***: Claims for economic losses unconnected to physical injury to the claimant or physical damage to the claimant's own property (including loss of use and enjoyment) cannot succeed except in specific and very limited circumstances



# 5. Supply chain issues

- Wide-reaching supply chain issues continue, and may lead to contractual disputes
- Supply chain disputes are global in nature and are influenced by claims/decisions in foreign jurisdictions

## Key Takeaways:

1. Deal with price increases in contracts by including fluctuation/escalator clauses
2. Change in law/force majeure remains critical to include in supply chain contracts
3. ESG related disputes are on the rise. Green washing and human rights dispute can be limited with supplier due diligence and key contractual provisions

## 6. Securities Regulatory Litigation

- Regulatory focus on crypto assets and their risks will increase
- Continued regulatory and plaintiff focus on disclosure-related issues (including ESG related disclosure), trailing fees, suitability and conflict of interest issues
- The New SRO rule book and fee structure may be rolled out later this year, along with a new name for the unified regulator
- The OSC awards nearly half a million dollars to a whistleblower for information and assistance that led to a successful OSC enforcement action



# 7. Update on Professional Negligence

- ***Jinnah v Alberta Dental Association and College***: Colleges have the onus to prove that there is a “compelling reason” to award costs against a regulated member in a misconduct hearing
- ***Ashraf v Zinner***: Once a lawyer’s client has taken steps to remedy the lawyer’s negligent action, the lawyer is no longer considered to be the “but for” cause of any damages sustained from that point forward
- ***Goodwin v Alberta College and Association of Chiropractors***: Individuals subject to an administrative disciplinary process are required to first exhaust the remedies before the administrative tribunal before applying for court intervention, including matters involving a *Charter* claim

# 7. Update on Professional Negligence

- ***Tanase v College of Dental Hygienists of Ontario***: In Ontario there is a “bright-line” prohibition of any form of sexual relationship between a health practitioner and a patient, except for parties that are married or have been in a conjugal relationship for a minimum of three years
- ***Koroluk v. KPMG Inc., 2022 SKCA 57***: The Saskatchewan Court of Appeal has ruled that a proposed class action against auditors for duties allegedly owed to corporate shareholders can survive a liquidation claim under Saskatchewan’s Business Corporations Act



## 8. Increased scrutiny of administrative tribunals

- ***Abrametz v Law Society of Saskatchewan***: Delay in administrative proceedings, without more, will not constitute an abuse of process, and a stay of proceedings will only be granted in the most significant of cases
- ***SOCAN v Entertainment Software Association***: Creation of a new, rare category of correctness in judicial review – concurrent jurisdiction
- ***Cavendish Farms Corporation v Lethbridge (City)***: For an administrative decision to be upheld as reasonable, where reasons are required, they must disclose an internally coherent, rational chain of analysis that led to the result
- ***Normko Resources Inc v Alberta (Minister of Environment and Parks)***: Full disclosure is required when producing the record of decision in judicial review

## 9. Arbitration trends

- ***Enrox Energy and Mining Group v Saddam***: Local enforcement of an arbitral award possibly amounting to double recovery does not automatically meet the threshold to establish that enforcement of an international arbitral award would be contrary to Canadian public policy
- ***Peace River Hydro Partners v Petrowest Corp***: Pre-insolvency arbitration agreement to which Petrowest had freely agreed was not binding on its court-appointed receiver because it would compromise the integrity of the receivership proceedings
- ***Tall Ships Development Inc v Brockville (City)***: A “question of law” for the purpose of the statutory appeal provision of the *Arbitration Act* means only an “extricable question of law” and not “questions of mixed fact and law”



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