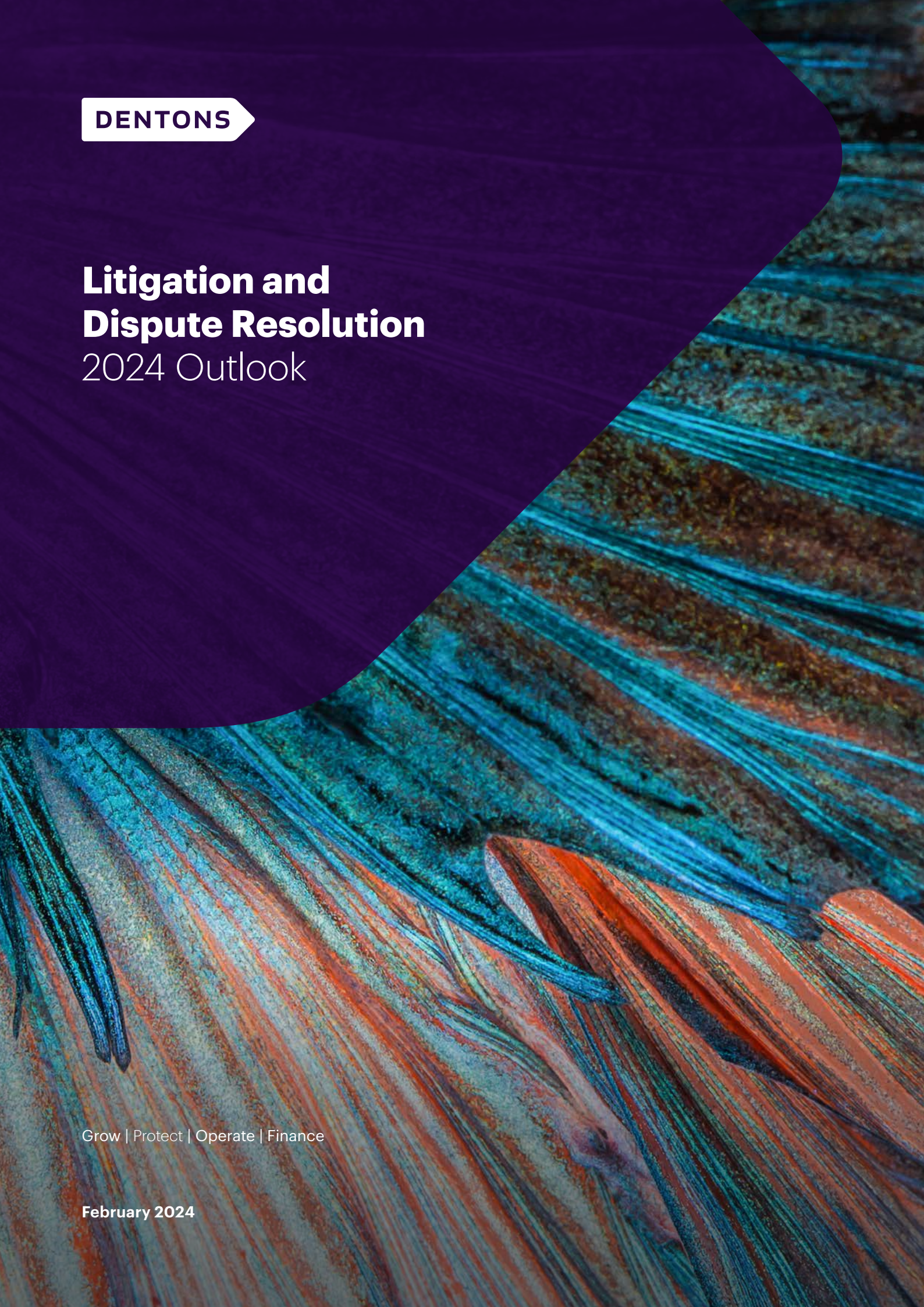
DENTONS

Litigation and Dispute Resolution
2024 Outlook



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February 2024

Litigation and Dispute Resolution

2024 Outlook

Global financial instability, high inflation, central bank rate hikes and geopolitical uncertainties have significantly impacted the Canadian legal landscape, giving rise to new industry trends and a noticeable increase in litigation cases filed across the country. This influence is underscored by *BTI Consulting Group's* report, where in-house counsel surveyed anticipate a substantial 54% increase in their legal spend budgets allocated for dispute resolution in 2024.

Our National Litigation and Dispute Resolution team covers the latest trends and developments on our Commercial Litigation Blog to help you manage and mitigate legal risks to your business. This outlook draws on the culmination of insights observed throughout 2023 to provide a forward-looking perspective for executives and in-house legal teams to prepare and protect business interests in 2024.

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Privacy

Vicarious liability for privacy breaches as a result of a rogue employee is gaining attention in the courts

A recent decision in a class action, based on merits, has reinforced the trend of holding employers vicariously liable for cyber breaches by rogue employees. In *Ari v. Insurance Corporation of British Columbia* (ICBC), the Supreme Court of British Columbia found ICBC vicariously liable for its employee's unlawful disclosure of customer information (link to our post on this decision **here**). Despite having internal policies prohibiting the use of information for purposes beyond employment-related matters, ICBC lacked monitoring or enforcement measures to prevent or detect misuse.

ICBC appealed the decision to the British Columbia Court of Appeal, arguing that the judge erred in concluding that the customer information was private, in imposing vicarious liability, and in finding that general damages could be determined on a class basis. In dismissing the appeal, the Court of Appeal clarified that the *Privacy Act* does not limit the *Class Proceedings Act's* ability to grant aggregate awards based on non-individualized evidence provided by the plaintiff. The violation of privacy under the *Privacy Act* can be determined on a class-wide basis, and so can general damages for breach of privacy. Regarding differences across the class, the Court of Appeal stated that the trial judge correctly assessed aggregate general damages based on the lowest-common-denominator circumstances of the class, which was the violation of privacy. Finally, the Court of Appeal supported the trial judge's decision to allow subclass members to prove additional damages on an individual basis in a later phase of the trial, aligning with the requirements under the *Class Proceedings Act*.

The class action certification of *Burke v Red Barn at Mattick's Ltd*, 2023 BCSC 367, further provides guidance on the elements that a court may consider in determining vicarious liability. The court concurred that vicarious liability can be established when an employer creates an environment that allows their employees to engage in wrongful actions, intentionally or inadvertently, that violate the privacy of others.

Here are some proactive measures that organizations can take:

1. Review and update data privacy protection policies that are in force both internally and externally. Policies can dictate an employee or customer's reasonable expectation to privacy, which the Court will consider in finding a breach of privacy.
2. Implement best practices, such as limiting data access to employees, screening employees, and providing privacy training for employees to demonstrate compliance in the event of a breach. Organizations are responsible for safeguarding the personal information collected and stored within their control.
3. Monitor employees' access to personal information and enforce standardized disciplinary penalties for employees' privacy breaches. Organizations can be held responsible for their employee's privacy violation, even if such contraventions were not specifically foreseeable by the organization and were contrary to the interests of the organization.

Read more: Class action privacy breach trial: How internal employee policies and early notification impact later litigation

Read more: Vicarious liability for an employee's privacy violation: The BC Court of Appeal chimes in

Read more: BC court finds employer's "structural environment" sufficient to ground vicarious liability claim for privacy violations

Artificial Intelligence (AI)

Emerging risk of litigation regarding generative AI

Developers of generative AI systems will undoubtedly face unique challenges and risks from a product liability perspective, but businesses also face risks associated with *using* these products. While Canadian courts have not yet released any decisions on generative AI, careful consideration and assessment of generative AI inputs and outputs are crucial to mitigate potential risk and liability.

Here are three core disputes that may arise:

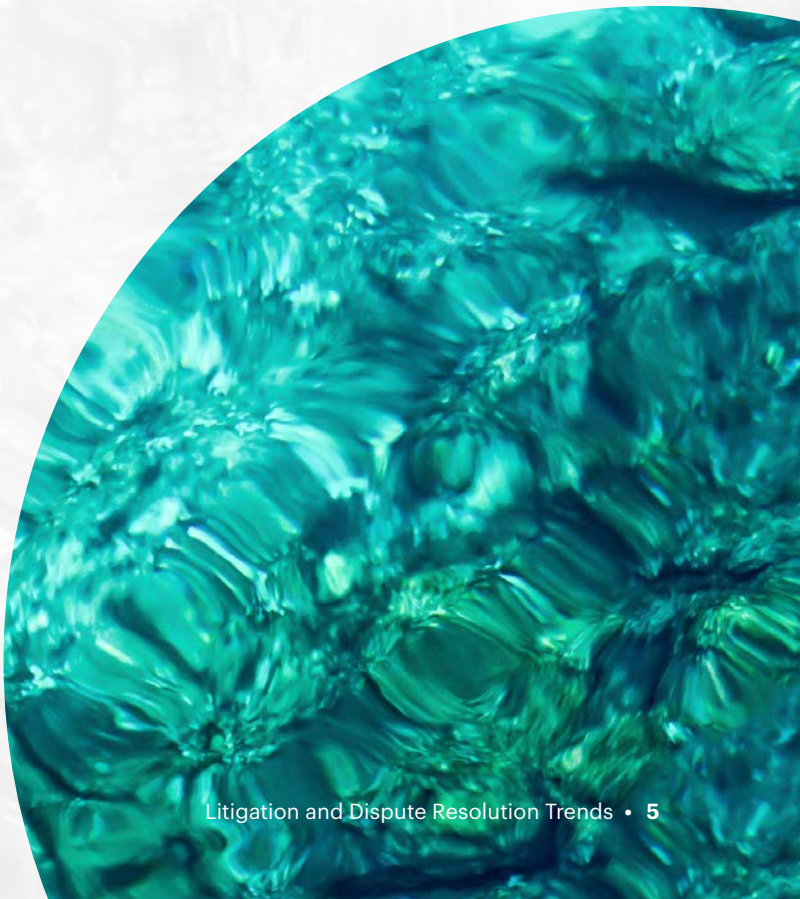
Contractual disputes: Ownership issues related to the work product and data gathered by AI systems can lead to conflicts between licensors and licensees, particularly when asserting rights to proprietary data inputted into AI systems. Further, risks of leaking confidential information inputted into a generative AI program will continue to increase as more employees use generative AI services to improve their productivity, which may also lead to vicarious liability for employers.

Tort-based disputes: Potential negligence claims may arise against service providers who do not properly use generative AI platforms, or who do not review the output, particularly in professional services settings. The challenge lies in establishing the standard of care for users relying on generative AI, given the perceived opacity of AI algorithms, contributing to uncertainties in litigation. The absence of clear precedents and ongoing developments in AI systems further amplify the legal risks associated with the use of generative AI.

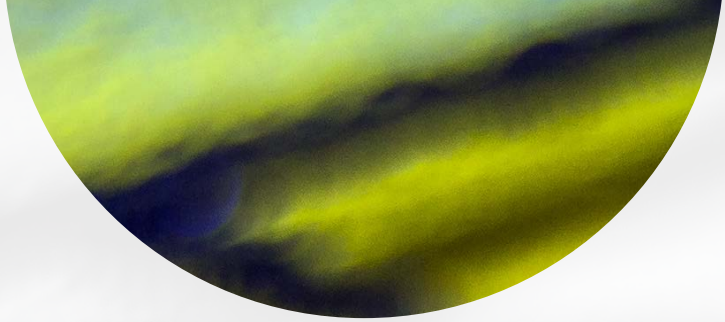
Copyright and other intellectual property disputes: The unresolved matters of authorship and ownership of AI-generated content pose significant challenges, considering the degree of human involvement in the generative process, which plays a crucial role in determining authorship. Until legislative changes occur, users of AI-generated content must navigate uncertainties, examining terms of use and seeking clarification to ensure compliance and mitigate potential infringement claims.

Read more: Generative AI – Navigating commercial and civil liability

Read more: Generative AI: Key considerations on copyright law



Class actions



Global dynamics present emerging risks for organizations operating in the United Kingdom (UK) and the European Union (EU)

Class action trends observed abroad can influence legal precedents in Canadian courts, impact cross-border transactions, revise regulatory standards and shift consumer expectations – underscoring the importance for those with global operations to proactively monitor these trends to mitigate risk.

In the UK, the landscape of group claims has witnessed a notable diversification beyond traditional domains, such as product liability and financial services, to include data breach, vehicle emissions/environmental, and competition claims. This surge in group claims is further propelled by the substantial growth in litigation funding, which has become a driving force behind the expansion of these collective legal actions. Representative actions, group litigation orders, and collective proceedings stand out as the primary avenues for bringing group claims in England and Wales, each offering distinct approaches and requirements.

The European Union Directive, enacted in 2020, has significantly impacted cross-border mass litigation claims by enabling international partnerships among consumer associations. However, challenges arise from the opt-in regimes in certain jurisdictions, which allow consumers to join actions until the final stage, making it difficult for organizations to gauge economic risks associated with potential adverse decisions. As a proactive measure, organizations should closely monitor the implementation of the Directive across Europe, particularly in jurisdictions where their operations are the most extensive.

The Dentons Transparency Directive Tracker offers a comparative analysis on the status of the implementation of the Directive across various EU jurisdictions, and details the changes being made by the local governments to adapt their national legislation. It also offers drafting tips to help organizations revise their employment contracts to the new provisions.

Dentons Transparency Directive Tracker: EU Directive on transparent and predictable working conditions (EUDirective 2019/1152)

Read more: Developments in class actions: Perspectives from the UK, Europe and Canada

Heightened hurdles result in jumps to different jurisdictions

Many plaintiffs are filing class actions in jurisdictions with more favourable class actions legislation, moving away from Ontario to provinces like British Columbia, which offers a 'no costs' regime for proposed class actions. The Ontario court's shift towards a more rigorous analysis for class certification in Ontario, illustrated in the *Banman v. Ontario*, 2023 ONSC 5246 (*Banman*), may very well continue this trend. The courts are emphasizing factors such as judicial economy, behaviour management, and access to justice, focusing on whether a class action is the preferable method for addressing claims. This shifted analysis imposes a higher bar for meeting the preferable procedure criterion, introducing a stricter methodology compared to the previous framework. The unique institutional abuse context in *Banman* set a precedent for a heightened preferability threshold. This shift is expected to influence class action evaluations in 2024 across diverse factual contexts.

Read more: Ontario court applies new preferable procedure analysis for first time

Challenging the boundaries of arbitration clauses in consumer class actions

A push by plaintiffs' class counsel tests the limits of the application of arbitration clauses in consumer actions. Some provinces, such as Ontario, have legislation limiting the application of arbitration clauses in consumer contracts, while other provinces do not. Specifically, in British Columbia, arbitration clauses can, in certain circumstances, be enforceable in consumer contracts, with the exception of claims brought under the applicable consumer protection legislation. To date, British Columbia courts have declined to declare consumer-friendly arbitration clauses invalid or unconscionable. However, plaintiffs' counsel continue to explore potential arguments to avoid mandatory arbitration clauses and, as of January 2024, there are three consumer cases and one employment case, seeking leave to appeal to the Supreme Court of Canada on this issue.

The strategic imperative of recall programs in mitigating product liability class actions risks

In recent legal developments, there is a rising trend emphasizing the strategic importance of proactive measures, such as recall programs, in mitigating against the risk of a product liability class actions. The *Coles v. FCA Canada Inc.*, 2022 ONSC 5575 (*Coles*), decision refused certification of a product liability class action because the defendant's recall program was the preferable procedure to resolve the plaintiffs' claims, and not the proposed class action. While the plaintiff's burden on a certification motion is considered relatively low, *Coles* demonstrates that the preferable procedure aspect of the certification test can nevertheless be a battleground. Corporate defendants faced with, or at risk of, product liability class actions should consider what proactive steps they can take to remedy negligent design issues and compensate potential plaintiffs to mitigate the risk of class action certification.

Read more: Class actions are not a preferred procedure to recall programs: A case comment on *Coles v. FCA Canada*

Securities litigation

Centralized trading platforms (CTPs) create potential liability for businesses

In Canada, centralized trading platforms (CTPs) are generally subject to securities laws, whether the crypto assets offered for trading on the platform are securities or commodities. Canadian securities regulators have assumed jurisdiction in this area on the basis that most CTPs do not immediately deliver a purchased crypto asset to their customer, but instead provide the customer with a contractual right to that asset, which remains in the custody of the CTP, or a third party retained by the CTP for this purpose. This contractual right constitutes a security and/or a derivative.

The introduction of the CTP Staff Notice creates potential liability for non-compliant CTPs, subjecting them to enforcement actions by Canadian Securities Administrators (CSA) members. This development adds complexity and uncertainty to the operation of CTPs, which may lead to disputes over jurisdiction, scope, and interpretation of the law in relation to various crypto assets and contracts. On the positive side, the CTP Staff Notice offers increased protection for investors trading on CTPs, enhancing oversight, transparency, and safeguards.

Read more: The Canadian Securities Administrators introduces changes to enhance Canadian investor protection– New requirements for crypto asset trading platforms

Securities commissions continue to enforce monetary penalties and collect debts owed by respondents

The Supreme Court of Canada recently heard the appeal of *Poonian v. British Columbia Securities Commission*, 2022 BCCA 274 (*Poonian*). In *Poonian*, the British Columbia Court of Appeal held that an administrative monetary penalty levied by the British Columbia Securities Commission related to fraud or false pretenses survives bankruptcy as an exception to the "fresh start" principle set out in section 178 (1) of the *Bankruptcy and Insolvency Act*. This decision appears to conflict with the Alberta Court of Appeal decision, *Alberta Securities Commission v. Hennig*, 2021 ABCA 411 (*Hennig*), where the Court viewed the exceptions under section 178 (1) narrowly, so that an administrative monetary penalty levied by the Alberta Securities Commission would not survive bankruptcy. The Alberta Securities Commission was granted leave to intervene before the Supreme Court of Canada and made submissions on why an administrative monetary penalty from a securities regulator arising out of fraud or false pretenses should survive bankruptcy.

The Supreme Court's resolution of the findings in *Hennig* and *Poonian* will provide much needed guidance to securities regulators across the country in addition to other tribunals and adjudicative bodies with similar powers under legislation to order monetary penalties.

Read more: The Supreme Court of Canada considers whether a debt owed to the British Columbia Securities Commission survives bankruptcy under an exception to the 'fresh start' principle

Court's expanded definition of 'change' in securities-related cases raises disclosure standards

Decisions in *Markowich v. Lundin Mining Corporation*, 2023 ONCA 359, and *Peters v. SNC-Lavalin Group Inc.*, 2023 ONCA 360, by the Ontario Court of Appeal highlight a trend in the expansive interpretation of "material change" under Canadian securities legislation. The Court emphasized that changes affecting a company's resources, technology, products or market, even if not resulting in a significant physical impairment, could qualify as a material change. This broadened interpretation raises the bar for reporting issuers, emphasizing the need for immediate disclosure of internal decisions or developments that impact the business, operations, or capital. These decisions underscore the importance of considering a generous approach to the definition of "change" in securities-related cases.

Read more: Ontario Court of Appeal clarifies the meaning of "material change" and discusses disclosure obligations in context of securities class actions

Mergers & acquisitions (M&A)

Leveraging earn-outs to address valuation discrepancies

A significant trend in recent M&A deals is the increased use of earn-outs to address valuation discrepancies, particularly during economic uncertainties. In our recent report, Beyond Borders Private equity fund managers' survey of current topics in cross-border M&A, 99% of respondents confirmed that earn-outs were crucial in their latest M&A transactions.

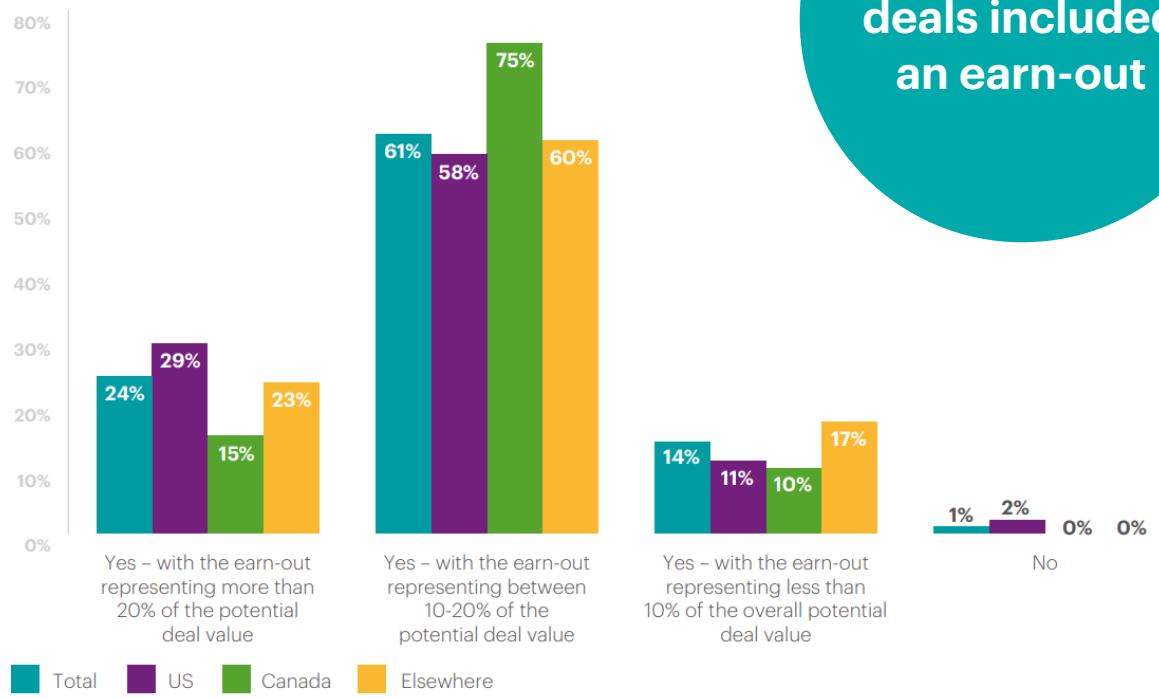
The survey revealed that 61% of earn-outs constituted 10%-20% of the potential deal value, and 24% surpassed the 20% mark, indicating a substantial reliance on this mechanism. Interestingly, Canadian respondents tended towards moderate-sized earn-outs, while US respondents generally used larger earn-outs. Metrics for earn-outs frequently depended on EBITDA/adjusted EBITDA/net income (59%), demonstrating a focus on financial performance post-closing. Additionally, earn-outs based on revenue (44%) were prevalent, which, while also a measure of financial performance, may allow for an easier calculation. Notably, earn-outs featuring covenants favouring sellers to maintain business practices or adhere to a specific plan were observed by 39% of respondents, providing a nuanced approach in cross-border transactions, particularly when the buyer is unfamiliar with the target region. Overall, this trend signifies a strategic alignment of M&A deals with performance metrics and risk mitigation through earn-out structures.

Clear drafting around quantifying the earn-out target can help reduce disputes risk, and setting clear parameters for what the purchaser can (and cannot) do post-closing, as it concerns the ability to meet the earn-out target, is also important. Parties should consider how to incent both the purchaser and seller to achieve the earn-out threshold. In assessing disputes risk relating to earn-out provisions, parties should also consider who is to decide whether the earn-out target is met, and the process for such determination, including whether the process will be an expert determination, arbitration or court proceeding. While these clauses are often boilerplate, giving thought to what disputes may arise and how they could best be resolved is prudent at the drafting stage.

Read more: Beyond Borders Private equity fund managers' survey of current topics in cross-border M&A

Did your most recent M&A deal include an earn-out?

99% of M&A deals included an earn-out



Arbitration

The emerging trends in arbitration for 2024 will undoubtedly continue to center around the benefits of arbitration as an alternative to our court systems. With an increased arbitration case load, we can also expect to see more enforcement and set aside applications. In addition, we await the outcome of a significant Ontario Court of Appeal ruling on the topic of arbitral duty to disclose.

Model Law set asides

The Ontario Court of Appeal decision in *All Communications Network of Canada v. Planet Energy Corp.*, 2023 ONCA 319 confirms that set asides will generally succeed only in cases involving breaches of procedural fairness, or actions contrary to public policy involving illegal acts or acts repugnant to the orderly functioning of the forum.

Read more: Ontario Court of Appeal decision highlights high threshold for interference with international arbitrations

Meticulous drafting of arbitration clauses in contracts can lead to speed in final relief

The case of *EDE Capital Inc. v. Guan, 2023 ONSC 3273*, highlights the efficiency and finality that arbitration agreements can bring to commercial disputes. The Ontario Superior Court of Justice dismissed an application to set aside an arbitral award arising from a dispute under a shareholder agreement. The Court underscored that it had no jurisdiction to set aside the award because the award was neither unreasonable nor incorrect. The Court's concern, rather, is with ensuring that arbitrators act fairly in the course of making decisions.

Read more: Arbitrator award upheld in a shareholder agreement dispute

Fresh evidence permitted when a court "decides the matter" of jurisdiction

In *Russian Federation v. Luxtona Limited*, 2023 ONCA 393, the Court of Appeal for Ontario addressed an application under Article 16(3) of the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on International Commercial Arbitration (Model Law) in the context of examining whether to admit new or "fresh" evidence on appeals from jurisdiction decisions made in arbitration proceedings. This is an important development for parties who might be facing applications on jurisdiction early in an arbitration, before all of the evidence is in the record. While new evidence may be adduced on application to a court to decide the matter of jurisdiction under Article 16(3) of the Model Law (regardless of whether the courts are being asked to decide jurisdiction resulting from a preliminary award or an award on the merits), introducing fresh evidence is not without caution. It remains prudent to consider the evidence relevant to challenging an arbitrator's decision when the issue first comes before the arbitrator. Even if new evidence can be tendered when the court decides the matter, the same weight may not be afforded to that evidence.

Read more: Fresh evidence ruling provides a fresh clarification on how a court "decides the matter"

ESG

Misleading the green: Rise in greenwashing litigation

Canadian companies are increasingly focusing on environmental, social and governance (ESG) compliance. Portraying inaccurate or misleading information regarding an organization's environmental practices or impact pose significant risks to the "E" in ESG, specifically concerning climate change disclosures and accusations of "greenwashing." As regulatory oversight intensifies and environmental concerns gather momentum through activism, the litigation risks facing Canadian companies and their directors and officers are on the rise.

Read more: Overlapping proceedings causes consortium to lose carriage fight: A case comment on *Buis v Keurig Canada Inc.*

Read more: Environmental, social and governance risks for agriculture and food businesses in Canada

Read more: Canvassing the fundamentals of federalism in Reference re Impact Assessment Act

The Courts

Clashing approaches in theory interpretation leave room for uncertainty

In a pivotal judgment on October 13, 2023, the Supreme Court of Canada addressed constitutional challenges to the federal *Impact Assessment Act* (IAA) raised by the Province of Alberta. The 5-2 split decision ruled that, while the federal government has the authority to establish a federal impact assessment regime, the current "designated projects" scheme under the IAA exceeds this authority, rendering it unconstitutional.

However, a noteworthy challenge arises when differently constituted Supreme Courts articulate diverse theories of interpretation. This challenge is manifested in the considerable uncertainty that lower courts face in addressing such issues, accompanied by a significant degree of flexibility in how they approach them.

Read more: Canvassing the fundamentals of federalism in Reference re Impact Assessment Act

Read more: Good faith or blind faith: Demystifying good faith requirements in commercial contracts

Uncertainty in judicial reviews present challenges for regulated industries

There is a divergence in Canadian regulatory law concerning the ease with which businesses can challenge government regulations through court proceedings. Recent decisions from the Federal Court of Appeal and the Alberta Court of Appeal present opposing views on this matter, and in 2023, courts in other provinces, including Ontario and British Columbia, are anticipated to contribute their perspectives.

This ongoing legal debate holds significant implications for businesses in regulated industries, influencing their capacity to contest regulations that adversely affect them. Specifically, the discussion centers around the judicial review of regulations, a process where individuals and businesses can challenge government regulations in court. The varying standards of review applied by different jurisdictions, influenced by decisions like *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (*Vavilov*), add complexity to the landscape. While the Federal Court of Appeal adopts a less deferential standard of review post-*Vavilov*, facilitating challenges to regulations, the Alberta Court of Appeal maintains a highly deferential approach.

As other jurisdictions, such as British Columbia and Ontario, are expected to weigh in on this issue in 2024, businesses contemplating legal challenges to regulations should closely monitor these developments and seek expert advice for strategic decisions.

Read more: Words, words, words ... are not enough to constitute reasons. The Alberta Court makers on notice in recent judicial review case

Read more: A floodgate of correctness? The Supreme Court of Canada creates a new category of correctness in judicial review

Read more: No secret note passing - Alberta Court of Appeal confirms full disclosure in judicial review

Read more: Can the government immunize certain regulatory decisions from judicial review? Federal Court of Appeal and Supreme Court of Canada set to weigh in

Key contacts

From our offices in six of Canada's major financial centers, our team responds rapidly and seamlessly delivers local and national innovative litigation and alternative dispute resolution services. To explore in-depth insights into the trends outlined in this report or discuss how we can best support your legal needs, please feel free to connect with any member of our Litigation leadership team. Your success is our priority.

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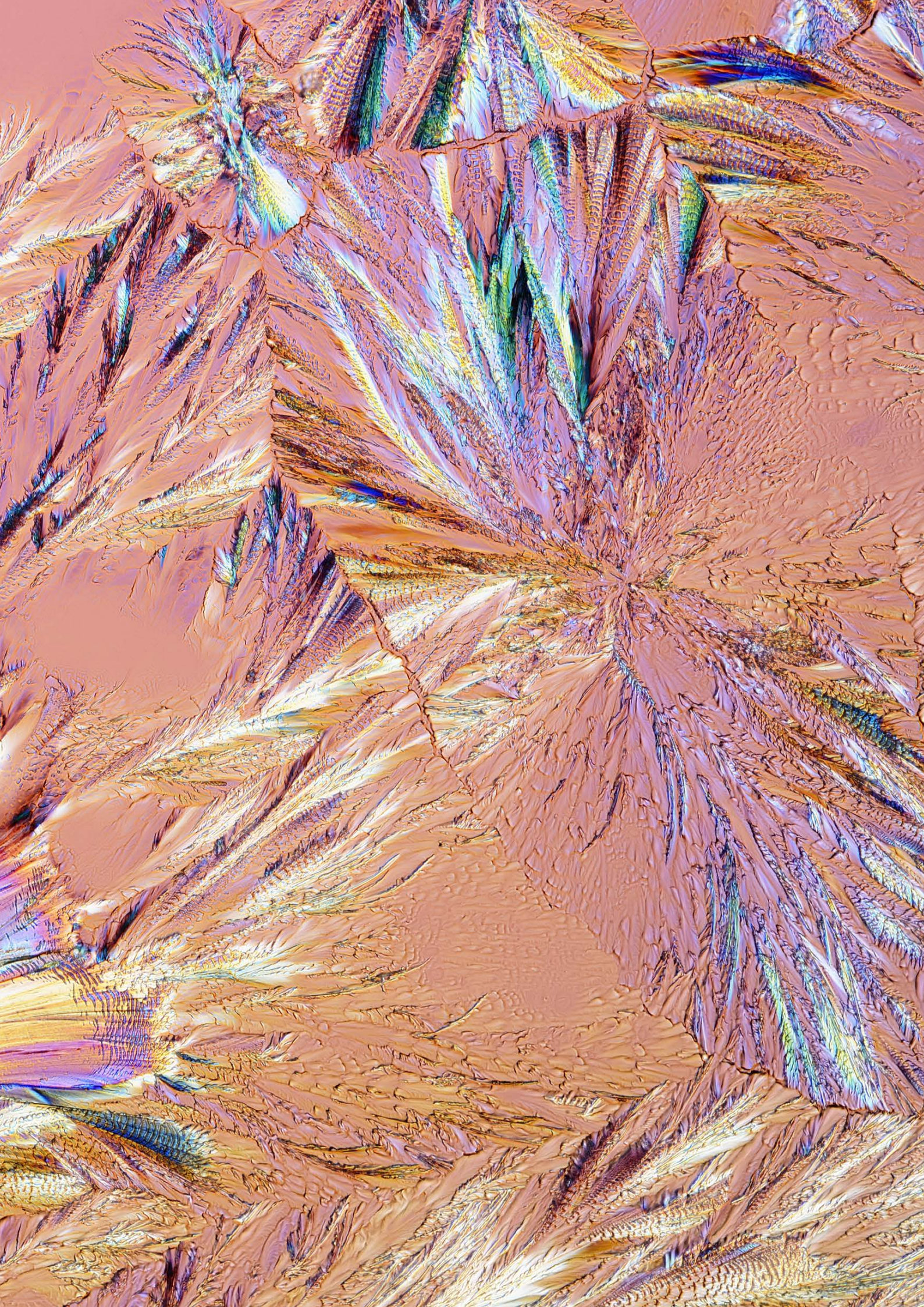

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