Law Society of Ontario | Barreau de l'Ontario

14th In-House Counsel Summit

CO-CHAIRS

Angela Giancaterini, Legal Director, Canada
Kellanova Canada Inc.

Sarah Mansour, General Counsel
Mazda Canada Inc.

February 27, 2024

CLE24-002030 1-D-WEB

Law Society of Ontario | Barreau de l'Ontario

CPD Materials Disclaimer & Copyright

These materials are part of the Law Society of Ontario's initiatives in Continuing Professional Development. Their content, including information and opinions, provided by the authors, is that of the authors. The content does not represent or embody any official position of, or statement by, the Law Society of Ontario, except where specifically indicated, nor should any content be understood as providing definitive practice standards or legal advice. The Law Society of Ontario does not warrant the current or future accuracy of the content and expressly disclaims responsibility for any errors and omissions in the content, including inaccuracies that may result due to developments in law.

Law Society of Ontario
130 Queen Street West, Toronto, ON M5H 2N6
Phone: 416-947-3315 or 1-800-668-7380 Ext. 3315
Fax: 416-947-3370
E-mail: cpd@lso.ca
www.lso.ca

Library and Archives Canada
Cataloguing in Publication

14th In-House Counsel Summit

ISBN 978-1-77345-808-3 (PDF)
ISBN 978-1-77345-9956-1 (Hardcopy)

cpd

14th In-House Counsel Summit

CO-CHAIRS: **Angela Giancaterini**
Legal Director, Canada, *Kellanova Canada Inc.*

Sarah Mansour
General Counsel*, Mazda Canada Inc.*

February 27, 2024
9:00 a.m. to 5:00 p.m.
Total CPD Hours = 6 h Substantive + 20 m Professionalism
+ 40 m EDI Professionalism

Law Society of Ontario
130 Queen St West

SKU CLE24-00203

Agenda

9:00 a.m. – 9:05 a.m. **Welcome**

Angela Giancaterini, Legal Director, Canada, *Kellanova Canada Inc.*

Sarah Mansour, General Counsel*, Mazda Canada Inc.*

9:05 a.m. – 9:40 a.m.	**Marketing and Advertising Law in the New Age of Social Media Influencers** Daniel Cole, *Gowling WLG (Canada) LLP*
9:40 a.m. – 10:10 a.m.	**Recent Developments in Generative AI** (20 m P) Diana Drappel, *RBC* Chetan Phull, Senior Legal Counsel, Corporate & Privacy, *Great Canadian Gaming Corporation*
10:10 a.m. – 10:40 a.m.	**Quebec's French Language Charter Rights: Bill 96 Impacts and Key Considerations** François Larose, *Bereskin & Parr LLP* Melissa Tehrani, *Gowling WLG (Canada) LLP*
10:40 a.m. – 10:45 a.m.	**Question and Answer Session**
10:45 a.m. – 11:05 a.m.	**Break**
11:05 a.m. – 11:40 a.m.	**A Year in Review: Key Legal Developments and their Impact for In-House Counsel** Matthew Estabrooks, *Gowling WLG (Canada) LLP* Joanna Leong, *Honda Canada Inc.*
11:40 a.m. – 12:05 a.m.	**Leadership Opportunities as an In-House Counsel** Rustam GC, Juma, *Volkswagen Group Canada Inc.* Mark Le Blanc, President, *Thrive Legal – Advisory Services*

12:05 p.m. – 12:15 p.m.	**Question and Answer Session**
12:15 p.m. – 1:15 p.m.	**Lunch**
1:15 p.m. – 1:50 p.m.	**Trends in Class Action Litigation** David Elman, *Borden Ladner Gervais LLP* Anne Merminod, *Borden Ladner Gervais LLP*
1:50 p.m. – 2:20 p.m.	**Competition Law Update: Wage Fixing and No Poaching Dos and Don'ts** Sarah Mavula, *Baker Mackenzie LLP* Chris Hersh, *Norton Rose Fulbright LLP*
2:20 p.m. – 2:55 p.m.	**Mastering the Complexities of Workplace Investigations** (10 m e) Stephanie Lewis, *Dentons Canada LLP* (Ottawa) Jacqueline J. Luksha, *Hicks Morley Hamilton Stewart Storie LLP*
2:55 p.m. – 3:05 p.m.	**Question and Answer Session**
3:05 p.m. – 3:25 p.m.	**Break**
3:25 p.m. – 3:55 p.m.	**Why your Company Should Undergo Unconscious Bias Training** (30 m e) Hina Latif, General Counsel, *Mercedes Benz Financial* Marian Van Hoek, General Counsel, *BASF Canada Inc.*

3:55 p.m. – 4:40 p.m.	**Contract Drafting Primer: Critical Insights for In-House Counsel** (10 m P) Mark Galati, *Hatch Ltd.* Geoff Hall, *McCarthy Tétrault LLP*
4:40p.m. – 5:00 p.m.	**Question and Answer Session**
5:00 p.m.	**Program Ends**

This program qualifies for the 2025 LAWPRO Risk Management Credit

What is the LAWPRO Risk Management credit program?

The LAWPRO Risk Management Credit program pays you to participate in certain CPD programs. For every LAWPRO-approved program you take between September 16, 2023 and September 15, 2024, you will be entitled to a $50 premium reduction on your **2025 insurance premium** (to a maximum of $100 per lawyer). Completing any Homewood Health Member Assistance Plan e-learning course available at homeweb.ca/map also qualifies you for a $50 credit.

Why has LAWPRO created the Risk Management Credit?

LAWPRO believes it is critical for lawyers to incorporate risk management strategies into their practices, and that the use of risk management tools and strategies will help reduce claims. Programs that include a risk management component and have been approved by LAWPRO are eligible for the credit.

How do I qualify for the LAWPRO Risk Management Credit?

Attendance at a qualifying CPD program will NOT automatically generate the LAWPRO Risk Management Credit. To receive the credit on your 2025 invoice, you must log in to My LAWPRO and completing the online Declaration Form in the Risk Management Credit section.

STEP 1:	STEP 2:
• Attend an approved program in person or online; and/or • View a past approved program • Completing a Homewood Health e-course*	Complete the online declaration form in the Risk Management Credit section of my.lawpro.ca by September 15, 2024. The credit will automatically appear on your 2025 invoice.

You are eligible for the Risk Management Credit if you chair or speak at a qualifying program provided you attend the entire program.

Where can I access a list of qualifying programs?

See a list of current approved programs at lawpro.ca/RMcreditlist. Past approved programs are usually indicated as such in the program materials or download page. Free CPD programs offered by LAWPRO can be found at www.practicepro.ca/cpd

Whom do I contact for more information?

Contact practicePRO by e-mail: practicepro@lawpro.ca or call 416-598-5899 or 1-800-410-1013.

*One Homewood Health e-learning course is eligible for the credit on a yearly basis.

LawPRO®
Lawyers' Professional Indemnity Company

14th In-House Counsel Summit

February 27, 2024

SKU CLE24-00203

Table of Contents

Law Society of Ontario | Barreau de l'Ontario

TAB 1

14th In-House Counsel Summit

AI Primer (PowerPoint)

Diana Drappel
RBC

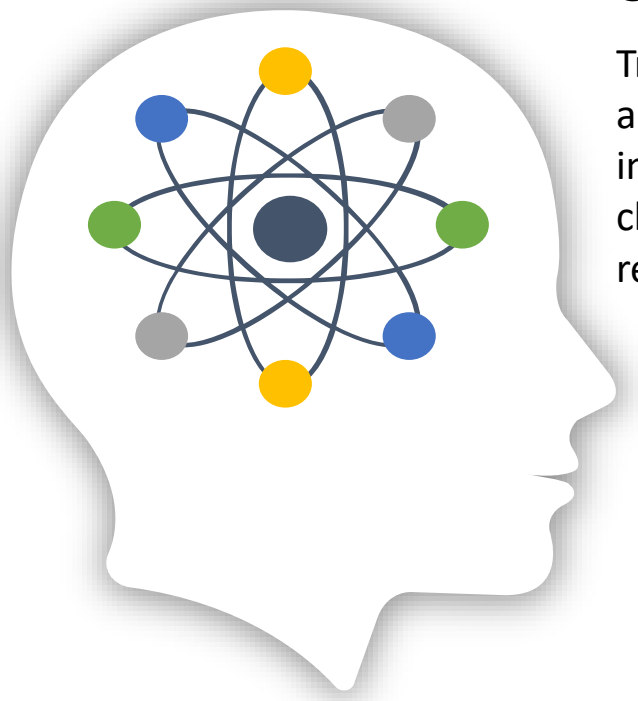
February 27, 2024

AI Primer

AI system: Technological system that autonomously or partly autonomously processes data related to human activities through the use of machine learning, neural network or other technique to make decisions, recommendations or predictions, or to generate content.

Machine Learning

Uses algorithms that analyze data and apply learnings (Different types: supervised, unsupervised, reinforcement)



Computer Vision

Trains computers to analyze information from images and video to classify objects and respond

Deep Learning

Neural networks learn complex patterns and analyze/predict without further human input

Natural Language Processing

Trains computers to process, analyze, interpret, and manipulate human written and spoken languages

Generative AI: Transformer Models

- A transformer (ML model) that **processes and understands sequential data**, such as natural language text.
- Chat-based generative AI systems are trained on huge amounts of data from the Internet, including using **Reinforcement Learning from Human Feedback (RLHF)**, in which human trainers provide the model with conversations in which they play both the AI chatbot and the user.
- A large language model, or LLM, is **a deep learning algorithm** that can **recognize, summarize, translate, predict and generate text and other content** based on knowledge gained from massive datasets.

✓ All of today's well-known language models—GPT from OpenAI, PaLM, LaMDA from Google, Galactica, Llama, OPT from Meta – are **autoregressive, self-supervised, pre-trained, densely activated, transformer-based models**.

Generative AI's Reliability Problem

- LLMs regularly produce **inaccurate, misleading or false information** (and present it confidently and convincingly).

- OpenAI CEO Sam Altman acknowledged this recently saying: "ChatGPT is incredibly limited, but good enough at some things to create a misleading impression of greatness. It's a mistake to be relying on it for anything important right now."

- Mitigating LLMs' factual unreliability is not always straightforward; retraining models is expensive and time consuming because the models use neural networks.

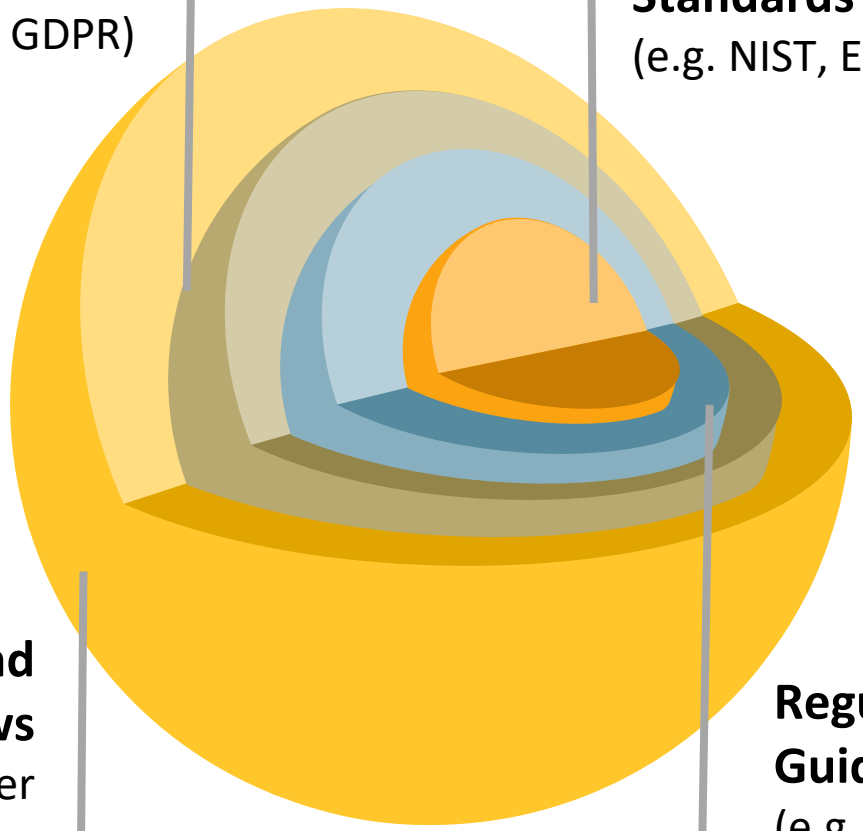
✓ As powerful as they are, currently LLM's have some significant limitations due to reliability
✓ Correcting this issue (and developing mechanisms to update training data) is a significant focus of AI research

Existing Legal Framework

Even without AI specific legislation, assess legal issues and risks raise by the use of AI modfels in the context of existing legal and regulatory frameworks.

Data and Privacy Legislation
(e.g. PIPEDA, GDPR)

Standards
(e.g. NIST, EU Commission)



General Application and Industry Specific Laws
(e.g. Bank Act, Consumer Protection legislation, Competition Act)

Regulatory Guidelines
(e.g. OSFI, CSA, Federal Reserve, SEC)

Useful Guidance: AI Standards

Governance standards

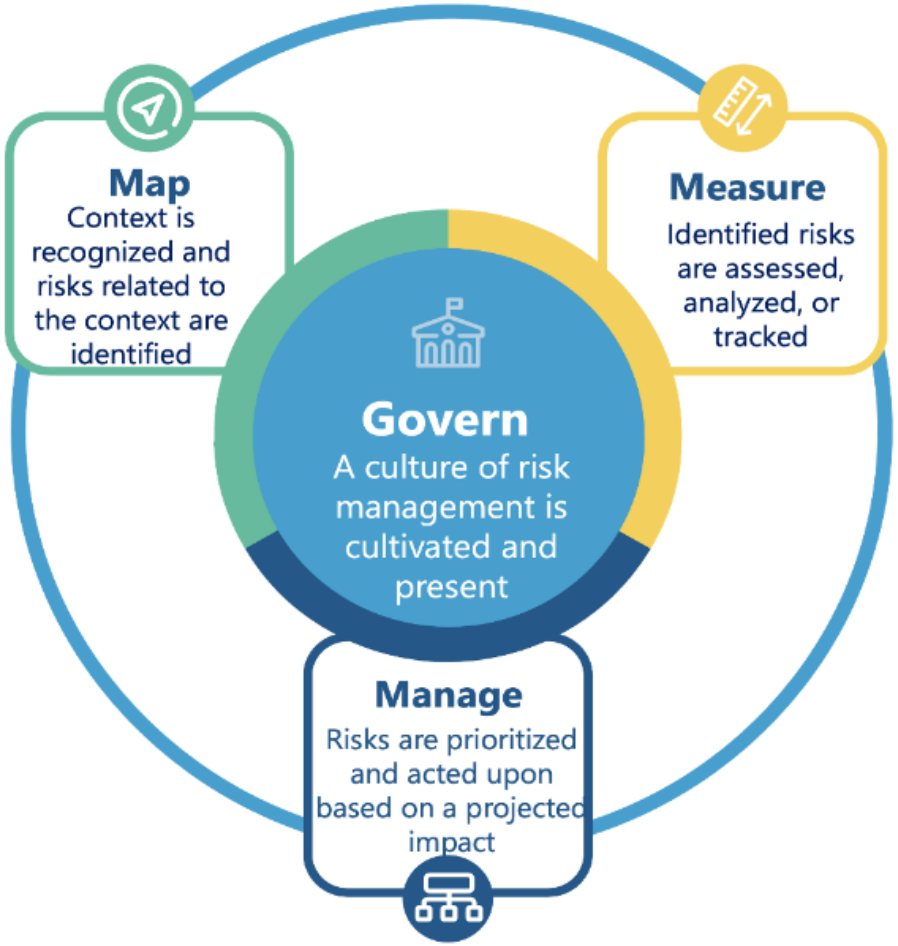
- Addressed to corporate leaders, high level, admin best practices, e.g., OECD

Foundational standards

- Frameworks that can be implemented across all AI use cases e.g., ISO/IEC 22989 (AI concepts and terminology), ISO/IEC 23894 (guidance on AI risk management), OECD's framework for AI risk classification), ISO/IEC 42001 (management system standard for artificial intelligence, considered for adoption by the EU and UK national standards bodies)

Technical standards

- e.g., U.S., NIST, U.K., Standards Hub, Japan, National Institute of Advanced Industrial Science and Technology, EU, Committee for Standardization (CEN), European Committee for Electrotechnical Standardization (CENELEC) (or CEN-CENELEC)



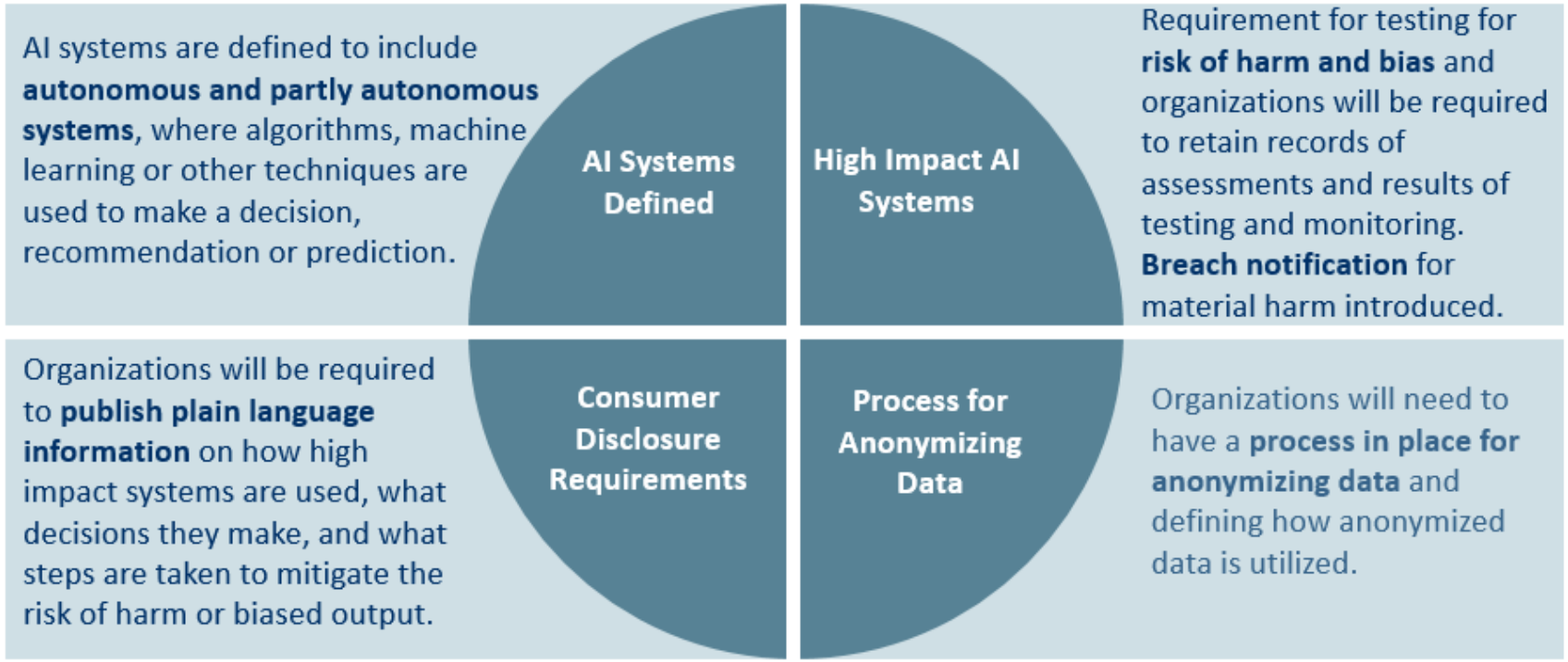
From NIST RAI Model Framework

Artificial Intelligence and Data Act (AIDA)

- Introduced as part of Bill C-27, along with the Consumer Privacy Protection Act (CPPA) and the Personal Information and Data Protection Tribunal Act
- **Net new legislation** creates regulatory framework for use of AI
- Key details to be set out in regulations that have **not yet been published**
- Creates a **risk-based approach** to regulating AI systems (consistent with draft EU legislation)
- **Minister has potentially significant, yet to be clarified, powers** to order an audit of an AI system, publish information to prevent harm and impose administrative monetary penalties of up to 3% of global gross revenue (and up to 5% for certain offences)

- C-27 has passed second reading and is currently in Committee
- Not all components of the legislation are expected to come in to force at the same time
- ISED has signaled that a significant amount of time will be provided for organizations to comply

Key AIDA Elements



ISED Guardrails for GenAI – Code of Practice

Safety

Obligation to identify and prevent malicious uses; provide clarity on model limitations throughout model life cycle.

Fairness

Ensure models are trained on representative data and produce unbiased outputs; data sets and models are tested and validated and appropriate safeguards are in place.

Transparency

Provide meaningful explanations of models; create mechanisms to detect AI generated content, identify to users that they are using an AI system.

Human Oversight

Human oversight to identify, report and address adverse impacts.

Validity & Robustness

Ensure through rigorous testing that models work as intended, cybersecurity measures are in place to prevent adversarial attack, misuse.

Accountability

Robust risk management framework and processes in place.

EU AI Act

- EU Member States unanimously passed the EU AI Act earlier this months
- Significant fines of up to 7% of annual global turnover for certain offence (similar to GDPR)
- Expected to be fully in force by 2026
- Risk based approach to AI governance, with significant focus on High Risk systems
- Set to become a global standard (in the same way GDPR has)

Highlights

- Banned Applications (unlike AIDA)
- Exceptions: Research, Open source models (subject to end-use) (unlike AIDA)
- Focus on transparency: e.g. watermarks, human oversight
- Obligations in respect of third party agreements

EU AI Act Risk Classifications

UNACCEPTABLE RISK (PROHIBITED)

Social scoring, facial recognition, dark-pattern AI, manipulation contravene EU values and are banned.

HIGH RISK (ASSESSMENT)

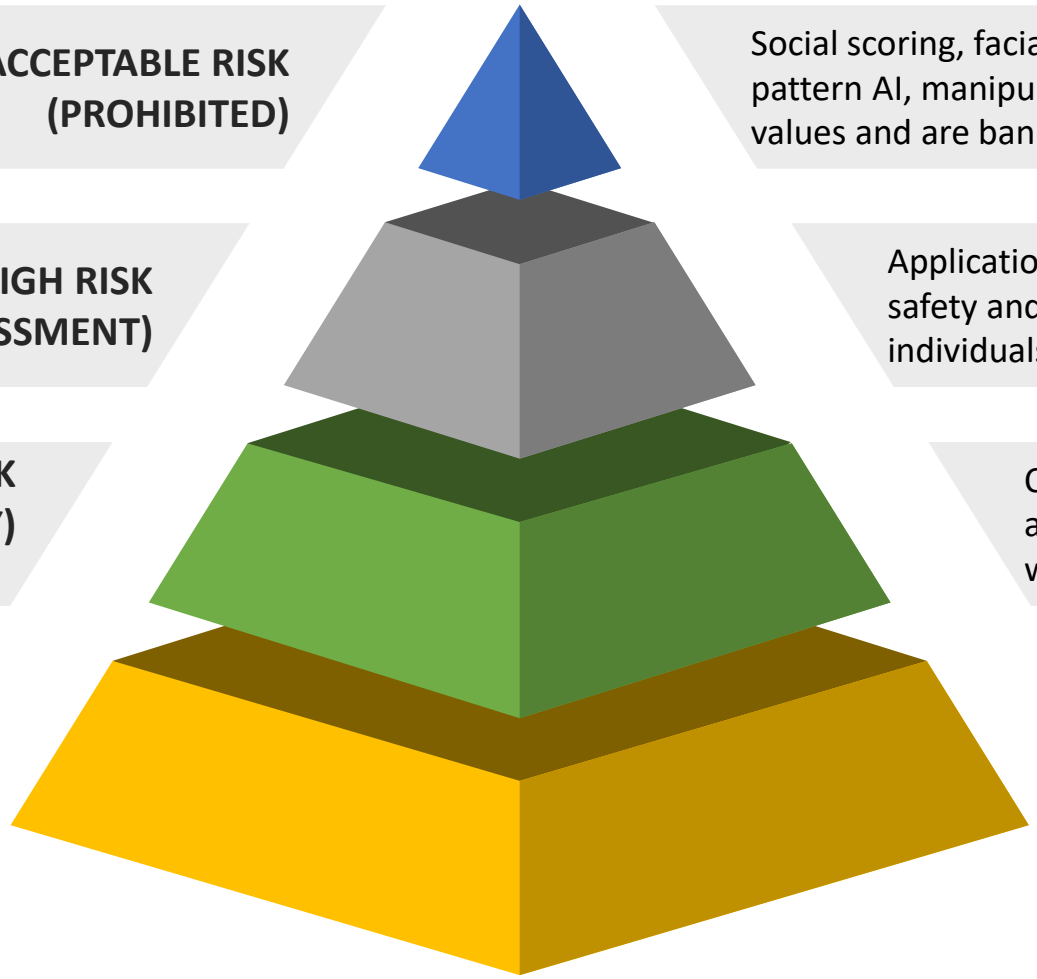
Applications that go to the health, safety and fundamental rights of individuals

LIMITED RISK (TRANSPARENCY)

Consumers must be advised they are dealing with AI (e.g. chatbots)

MINIMAL RISK

E.g. Spam filters, video games



AI Model Legal Risks

Tort

- Liability for harm or damage caused by AI model, privacy breach, potential for class action litigation

IP

- Potential for sharing proprietary and confidential data with third party AI model
- Uncertainty around IP rights for AI generated data and content

Cybersecurity

- Potential for introducing weaknesses in system which could result in data breaches, reputational impacts

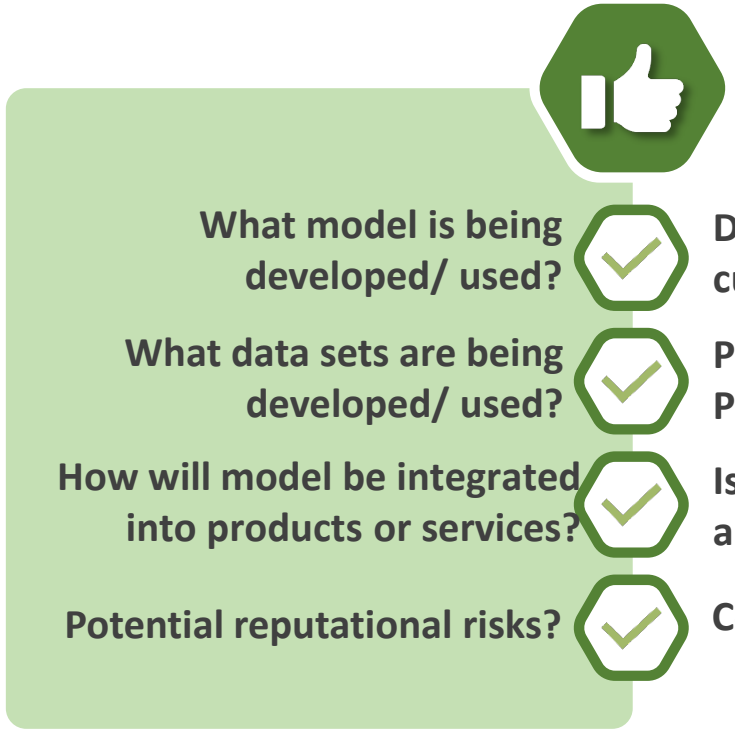
Privacy

- Risk management strategies for training models without contravening privacy legislation

Use of Third Party AI models

- Review of key contract terms including ongoing bias and fairness testing, indemnity language
- Ask DevOps team what assistive coding programs they may be (are!) using

Managing Legal Risks – Issues to Consider



What model is being developed/ used?	Developed internally? Off the shelf product? Vendor customized solution?
What data sets are being developed/ used?	Purchased data set? Internally sourced (ie. Customer data)? PII, de-identified or anonymized data? Derivative data?
How will model be integrated into products or services?	Is model internal facing? Is it used in customer facing applications?
Potential reputational risks?	Consider risks associated with current and future use cases

Mitigation of Legal Risks

Model Risk

- ✓ Model risk management governance is key!
- ✓ Testing and validation for:
  - **fairness** (to ensure no bias or discrimination),
  - **reliability** (accuracy and reproducibility of results) and
  - **explainability** (transparency around how the model works)

Generative AI Model Risk

- ✓ Education and awareness around legal and business risks of use of existing assisted coding products, particularly DevOps teams
- ✓ Vetting and validation of third party models and appropriate contractual provisions, including representations and warranties and indemnities
- ✓ Ensure we address vendor use of generative AI tools such as GPT and assisted coding programs and use of generative AI add-ons

Law Society of Ontario | Barreau de l'Ontario

TAB 2

14th In-House Counsel Summit

Quebec's Charter of the French Language: Bill 96 Impacts and Key Considerations (PowerPoint)

François Larose
Bereskin & Parr LLP

Melissa Tehrani
Gowling WLG (Canada) LLP

February 27, 2024

cpd

Quebec's Charter of the French Language: Bill 96 Impacts and Key Considerations

Law Society of Ontario
14th In-House Counsel Summit

François Larose, Bereskin & Parr LLP

Melissa Tehrani, Gowling WLG (Canada) LLP

Bereskin&Parr

GOWLING WLG

FEBRUARY 27, 2024

Disclaimer

This presentation is based on the text of Bill 96, the draft *Regulation under Bill 96 amending Québec's Charter of the French Language* published on January 10, 2024, and the limited material currently available.

The content of this presentation is subject to change in response to consultations on the draft Regulation, court judgments and/or any guidance issued by the government or the *Office québécois de la langue française* ("OQLF").

What is Bill 96?

An Act respecting French, the official and common language of Québec

Received royal assent on June 1, 2022

Amends Québec's Charter of the French language (the “Charter”)

- Mandates French as "the only official language" and affirms it as the language of commerce and business in the Province of Québec
- Stipulates several obligations imposed on businesses that are subject to its application
- Strengthens the role and powers of the OQLF.

Bill 96

1. Trademark Exception

   - For Product Packaging & Labelling & Public Signage/Commercial Advertising

2. Products, Packaging & Labelling

   - Generic/descriptive of the product

3. Public Signage/Commercial Advertising

   - On public signs and posters visible from outside premises

1. Trademark Exception

- Current: « recognized » = registered or unregistered
- Bill 96: « registered » only

2. Product Packaging & Labelling – The Rule

51. *Every inscription on a product, on its container or on its wrapping, or on a document or object supplied with it, including the directions for use and the warranty certificates, must be drafted in French. This rule applies also to menus and wine lists.*

The French inscription may be accompanied with a translation or translations, but no inscription in another language may be given greater prominence than that in French ***or be available on more favourable terms (Bill 96).***

(our emphasis)

- This provision, as modified, is currently in force.

51.1. *Despite section 51,* ***on a product****, a* ***registered*** *trademark within the meaning of the Trademarks Act [reference omitted] may be drawn up, even partially, only in a language other than French where no corresponding French version appears in the register kept according to that Act.*

However, if a generic term or a description of the product is included in the trademark, it must appear in French on the product or on a medium permanently attached to the product*.*

(our emphasis)

- This provision enters into force on **June 1st 2025.**

2-6

3. Public Signage/Commercial Advertising

- 58.1. […]

*However, **on public signs and posters visible from outside premises**, French must be **markedly predominant** where such a trademark appears in a language other than French*.

But:

- *"immovable" : means a building and any structure intended to receive at least 1 person for the carrying on of activities, regardless of the materials used, excluding a temporary or seasonal facility*;
- *"**premises**" : means a space, closed or not, devoted to an activity, in particular a stand or counter intended for the sale of products in a mall, excluding a temporary or seasonal facility*.

Draft Regulation under Bill 96 amending Québec's Charter of the French Language: Product

- "… *a registered trademark includes a trademark in respect of which an application for registration is* ***pending****, as of the filing date of the application*"

- Compliance extension period until June 1, 2027

Draft Regulation under Bill 96 amending Québec's Charter of the French Language: Product

- a ***product*** includes container, wrapping, document or object supplied with it;
- ***size***: *generic term or description of a product in a non-French trademark cannot be given greater prominence than that in French or be available on more favourable terms*
- **"Description"** refers to one or more words describing the *characteristics of a product*
- A "**generic term**" refers to one or more words describing the *nature of a product*

Marques de commerce sur les produits

Exemple de changements

Projet de règlement modifiant principalement le
Règlement sur la langue du commerce et des affaires

Votre gouvernement

Québec

But what about…?

- "medium permanently attached to the product"?
- QUID registered trademarks that consist of a label?
- 12(3) marks?

Draft Regulation under Bill 96 amending Québec's Charter of the French Language: Exterior Signage

- Outside *premises* includes immovable
- French text has a *much greater visual* impact where, within the same visual field, the following conditions are met:

  (1) the **French text is at least twice as large** as the text in another language;

  (2) The French text's **legibility and permanent visibility are equivalent** to those of the text in another language

Currently

The New Outdoor Signage Requirements

Trademarks displayed outside an immovable:

A **"sufficient presence of French"** must be ensured – i.e. *a generic term or description of the products or services, a slogan or any other term/words*:

- Permanently visible;
- Legible within the same visual field; and
- Illuminated (where applicable)

Nette prédominance du français

Exemple de marque de commerce accompagnée d'un générique

Projet de règlement modifiant principalement le
Règlement sur la langue du commerce et des affaires

Votre gouvernement

Québec

Nette prédominance du français

Exemple de marque de commerce accompagnée d'un slogan

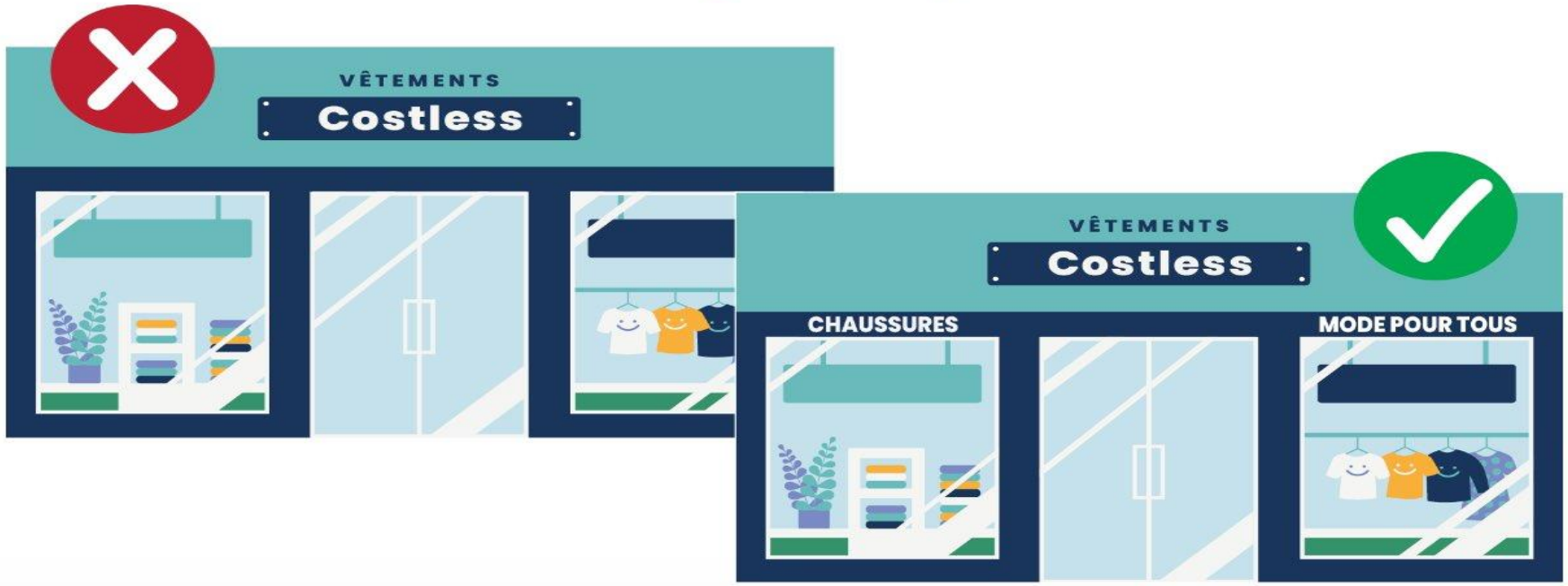
Projet de règlement modifiant principalement le
Règlement sur la langue du commerce et des affaires

Votre gouvernement

Québec

Nette prédominance du français

Exemple de nom d'entreprise accompagné d'un générique



Projet de règlement modifiant principalement le
Règlement sur la langue du commerce et des affaires

Votre gouvernement

Québec

Markedly Predominant

Markedly Predominant

2-18

But what about…?

- Trademark Exception for public signage?
- Phase-out period?

Another Important Change

3. *An inscription on a product may be exclusively in a language other than French in the following cases:*

(6) the product is from outside Québec and the inscription, except if it concerns safety or is necessary for the use of the product, is engraved, baked or inlaid in the product itself, riveted or welded to it or embossed on it, in a permanent manner. ~~However, inscriptions concerning safety must be written in French and appear on the product or accompany it in a permanent manner.~~

2-20

Another Important Change

92. ***Nothing prevents the use of a language in derogation of this Act*** *by international organizations designated by the Government or* ***where international usage requires it****, as well as to quote a statement made in a language other than French*.

Other

- Commercial Publications include the information published on *websites* or posted on *social media*.

- « Contracts of adhesion »

How Should Companies Doing Business in Québec Prepare for June 1, 2025?

- Consider filing applications for non-French trademarks.
- Any unregistered non-French trademarks (that are not otherwise exempt from translation as discussed above) will need to be translated to French.
- Any registered non-French trademarks on product packaging and labelling will need to be assessed to identify generic or descriptive words that will require French translation elsewhere on the packaging/labelling.
- Any registered non-French trademarks on outdoor signage will need to be amended to ensure there is appropriate accompaniment of French that is "markedly predominant".

What Now?

Public Consultation Period ended: February 24, 2024 (Feb. 26)

INTA Coalition

CIF: June 1, 2025

Thank you!

Merci!

François Larose, Bereskin & Parr LLP

Melissa Tehrani, Gowling WLG (Canada) LLP

Law Society of Ontario | Barreau de l'Ontario

TAB 3

14th In-House Counsel Summit

A Year in Review: Key Legal Developments and their Impact for In-House Counsel (PowerPoint)

Joanna Leong
Honda Canada Inc.

Matthew Estabrooks
Gowling WLG (Canada) LLP

February 27, 2024

cpd

A Year in Review: Key Legal Developments and their Impact for In-house Counsel

Law Society of Ontario
In-House Counsel Summit

Joanna Leong, Honda Canada Inc.

Matthew Estabrooks, Gowling WLG (Canada) LLP

Corporate Disclosures and Reporting

Securities Act - "Material Change"

- Two ONCA decisions:
  - *Markowich v. Lundin Mining Corporation*, 2023 ONCA 359
  - *Peters v. SNC-Lavalin Group Inc.*, 2023 ONCA 360

- Both motions under the Ontario *Securities Act*
- Both proposed shareholder class actions resulting from loss of share value

“Material Change” – Statutory Scheme

- Section 138.3(4) of the *Securities Act* creates a statutory right of action for an issuer’s failure to make timely disclosure.
- Before commencing such an action, the potential claimant must establish that:
  - (a) the action is being brought in good faith, and
  - (b) there is a reasonable possibility that the action will be resolved in favour of the plaintiff at trial.
- In both cases, the alleged failure to comply with section 75(1) of the *Securities Act,* which requires a reporting issuer to “**forthwith issue and file a news release**” in circumstances “**where a material change occurs in the affairs of [the] reporting issuer**”.

"Material Change" – Statutory Scheme

"material change" vs "material fact"

The *Act* defines "**material change**" as:

- a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer

The *Act* defines "**material fact**" as:

- "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities"

“Material Change” – *Lundin Mining*

- Alleged “material change” was that the mine had discovered instability in one wall of their open pit copper ore mine
- The distinction between material change and material fact does **not** focus on the magnitude of the change but, rather, on whether the change was external to the company as opposed to whether the change was in the business, operations or capital of the company.
- “a change is a change and it should be *defined broadly* especially in the context of a leave motion under s. 138.8 of the *Securities Act*”
- “material change” means a change that would reasonably be expected to have a significant effect on stock prices
- there was a reasonable possibility that Mr. Markowich and the proposed class could succeed at trial with the statutory cause of action

“Material Change” – *SNC-Lavalin*

- Court of Appeal affirmed the two-stage test from *Theratechnologies:*
  - First, the court must determine whether there has been a change in the business, operations or capital of the issuer.
  - Second, the court must determine whether the change was material, in the sense that it would be expected to have a significant impact on the value of the issuer’s shares

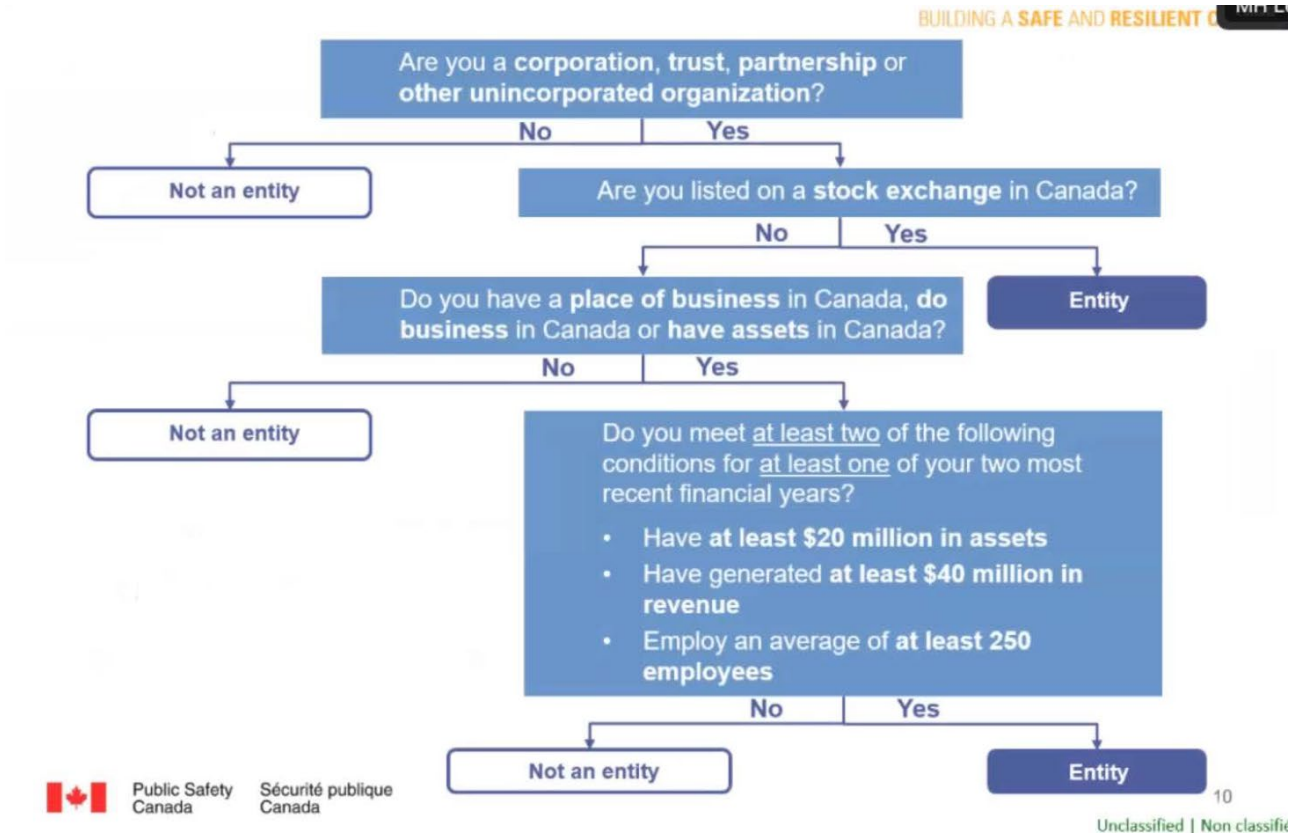
Key Considerations for In-House Counsel

- The term “change” is to be interpreted broadly, the only limit in the definition of “material change”, are the qualifying words in the definition itself to the effect that the change must be “in the business, operations or capital”. In other words, external circumstances that may affect share prices but that do not effect a change in an issuer’s business, operations or capital do not qualify as change within the meaning of material changes.
- The magnitude of the change is irrelevant to the first part of the analysis. Magnitude is to be considered in the second part of the analysis, when determining whether a change was “material” in the sense that it “would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer”

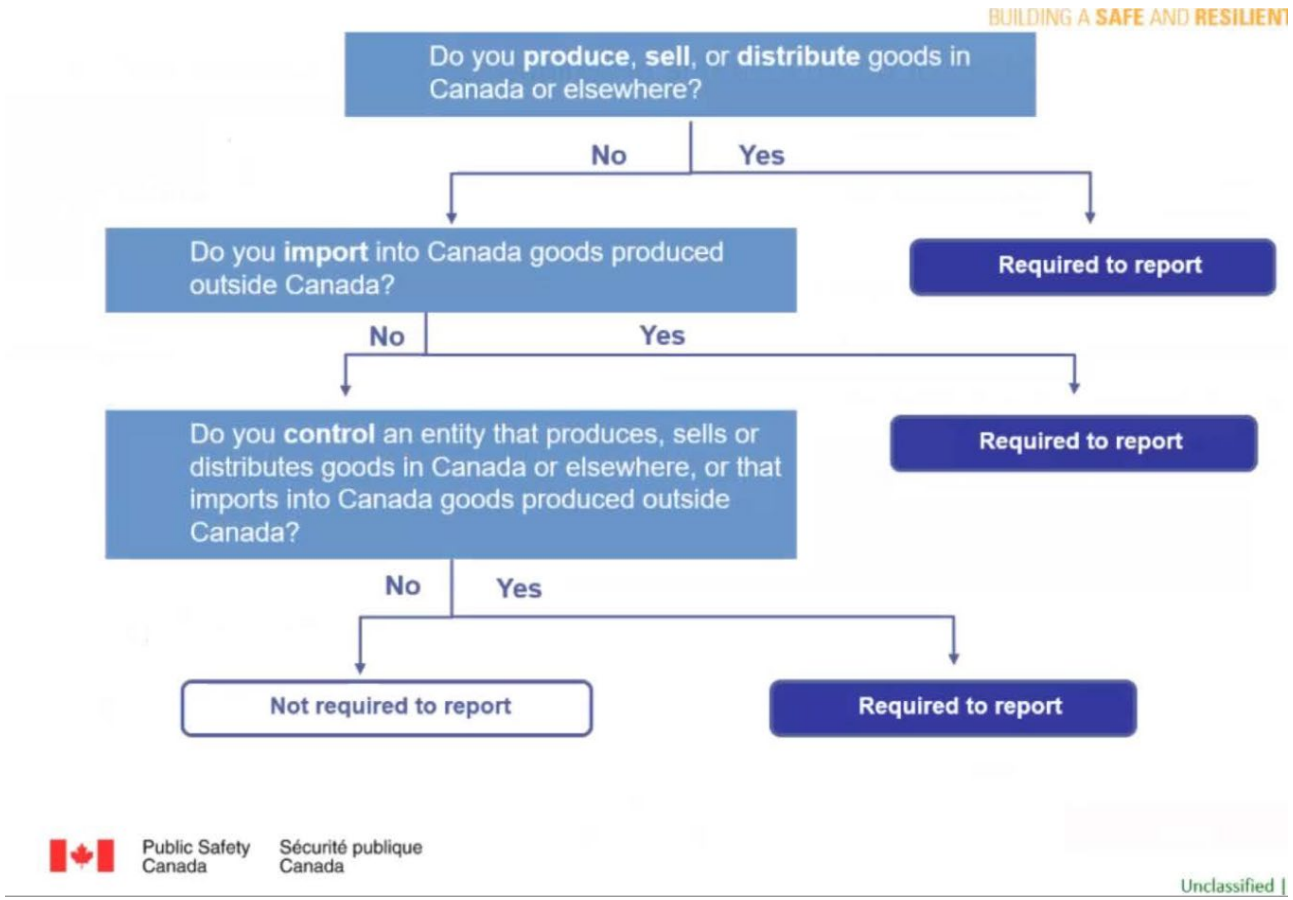
Federal Mandatory Supply Chain Reporting

- On May 11, 2023 the Fighting Against Forced Labour and Child Labour in Supply Chains Act received Royal Assent – came into Force January 2024
  - Canada's **first public reporting** regime aimed at supply chain transparency
  - Requires certain entities to **file an annual report by May 31** of each year
  - The Act specifies **7 mandatory areas** to be addressed - focus on a company's due diligence and mitigation efforts, as well as remediation efforts
  - There is **currently no due diligence standard – but this is expected in coming years**
  - Reports **can be filed jointly** with related entities, and entities may also rely on reports filed by related companies in **other jurisdictions with similar reporting requirements (UK, Australia)** provided mandatory criteria met
  - **Reports must be approved by the entity's governing body, filed on the government website and displayed prominently on a company's website**
  - Regulations released also required companies to **complete an online questionnaire**
  - **Penalty:** Failure to comply or supplying false or misleading information can result in fines of $250,000

Are you an “entity”?



Do you have to report?



Key Considerations for In-House Counsel

- ESG disclosures or statements are continuing to be made by companies – both voluntarily and as part of mandatory reporting. These are attracting significant scrutiny by shareholders, regulators, and members of the public in recent years
    - Ex. in 2023 Greenpeace Canada filed 2 complaints against oil companies over their environmental campaigns
- In-house counsel should ensure that they have reviewed any material being published either for the public or for shareholders for false or misleading claims
- The Supply Chain Reporting legislation should be reviewed carefully to determine whether your company is required to report
    - report similarly needs to be reviewed very closely by legal counsel – misrepresentations can result in fines or litigation
    - If you are a Canadian affiliate of an international company, consider whether you can piggy-back on reports filed in other jurisdictions
    - Ensure you have factored in enough time to validate contents, have the report approved, and uploaded on to your website

Consumer Protection

Ontario's new Consumer Protection Act

- In December 2023, Bill 142 received royal assent, which enacted the new *Consumer Protection Act*
- The **coming in to force date has not yet been proclaimed**, but once in force, it will replace the existing 2002 Consumer Protection Act in its entirety
- **Regulations are pending**
- The 2023 Act contains several changes that will impact businesses offering products or services, including:

Unfair Practices provisions -contains an expanded list of examples of false, misleading or deceptive representations -in addition to existing unconscionable representations provisions, unfair practices now includes unconscionable acts (no knowledge requirement) -extends the timeline for providing notice of recission or recovery from one year after entering into the contract to the later of one year after entering into the contract and one year after the unfair practice occurs	**Consumer Contracts** -list of expressly prohibited terms includes mandatory arbitration, limiting monetary liability for certain claims, preventing commencement of a class action, or prohibiting publication of reviews -a violation of these provisions of the new Act gives a consumer the right to cancel the contract within 1 year of entering into the contract; the business would then have to issue a refund within 15 days and failure to do so would allow the consumer to commence an action (see refund claims below) -the old CPA only made an offending term void and unenforceable
Increased fines and penalties Maximum fines now doubled from 2002 CPA and are now $100,000 for an individual and $500,000 for a corporation	**3x the damages for refund claims** a consumer who is successful in a civil action brought for a refund pursuant to the CPA is entitled to recover three times the refund amount, unless it would be inequitable

Updates to Quebec's Consumer Protection Act

- In October 2023, Bill 29, *An Act to protect consumers from planned obsolescence and to promote the durability, repairability, and maintenance of goods* received royal assent
- The act amends Quebec's Consumer Protection Act
- There is a phased in approach to coming into force
- **Regulations are pending**
- Imposes significant obligations on companies who manufacture, sell or provide long-term lease of consumer goods in Quebec including:

In Force as of October 2023:
Prohibition on trading in goods for which obsolescence is planned
Lemon Laws applicable to vehicles the first in Canada
Prohibition on certain fees that can be claimed in any long term lease agreement
10 day cooling off period for all extended warranty agreement

In Force as of October 2025:

-Replacement parts, repair services and all information necessary (including software) to repair good that requires maintenance must be made available at a reasonable price and for a reasonable period of time, in French

-a manufacturer or merchant may be released from this obligation if disclosed prior to entering in to the contract

-Regulations will exclude certain products from this release

-Strict timelines are imposed on merchants and manufacturers to provide the repair, failing which the merchant must replace the goods with new or equivalent goods, or reimburse the price

In Force as of October 2026:

-Through regulations, the Act will now determine the length of time that certain goods (mostly household products) must be in good working order, modifying existing legal warranty provisions for which both the manufacturer and merchant will be liable

-cost of shipping and repair will be borne by the merchant or manufacturer

Penalties:
-Administrative Monetary Penalties may be issued in the amount of $1,750 to $3,500 for each day that the failure continues
-Increased penal fines

Key Considerations for In-House Counsel

- Governments were focused on beefing up consumer protection legislation in Canada in 2023 which may require changes in risk assessments for in-house counsel
- Consumer contracts should be thoroughly reviewed in light of the upcoming coming in to force of the new 2023 CPA to ensure there are no prohibited clauses given the greater cost consequences
- Counsel representing companies that do business in, or whose products are sold in Quebec should review the substantial changes to the QC CPA and keep an eye out for the regulations
- New consumer protection legislation will like expand the type and volume of actions commenced by consumers, especially in the class action context…to be continued…

Advertising and Marketing

Comparative Advertising – *Energizer Brands, LLC v Gillette Company*

- Federal Court decision – s. 22 of the *Trademarks Act* – "depreciation of goodwill" (2023 FC 804)
- The Court decided that Duracell's use of Energizer's registered trademarks contravened section 22, and awarded Energizer a permanent injunction and damages in the amount of $179,000 CAD.

Comparative Advertising – *Energizer Brands, LLC v Gillette Company*

- Comparisons to “the next leading brand” or “the bunny brand” were OK
- In assessing depreciation of goodwill, the Court will “consider how the parties’ batteries would appear to an average consumer somewhat in a hurry, coming across the batteries in a retail or store setting”

Key Considerations for In-House Counsel

- Additional caution should be taken when creating advertising that refers to competitors' marks
- Direct reference to a competitor's mark in a context where it is likely to affect "an average consumer somewhat in a hurry" may give rise to a section 22 action
- Oblique references to competitors (i.e. "the bunny brand") are less problematic
- Assessment is context-dependent

Quebec repeal of rules governing promotional contests

- Oct. 27, 2023 - the province abolished the rules respecting promotional contests
- Before the amendments, the rules required sponsors of publicity contests to file their contests with the province’s Régie des alcools, des courses et des jeux (Liquor, Racing, and Gaming Authority), which enforced the Act.

Key Considerations for In-House Counsel

- As of October 27, 2023, companies running promotional contests:
  - No longer need to complete the notice of holding a publicity contest
  - No longer need to pay a duty
  - No longer need to post a security bond
  - No longer need to file contest rules
  - No longer need to file advertising materials
  - No longer need to file a winner’s report

Employment and Labour

Legislative Developments – Pay Transparency

- **BC's Pay Transparency Act (BC) Came into force May 11, 2023**
  - Requires an employer advertising a job opportunity to provide the expected salary or salary range for a job
  - Impacts Ontario employers advertising a job posting in British Columbia
  - On the horizon: Ontario introduced Bill 149, *Working For Workers Four Act, 2023* that, if enacted will have similar pay transparency requirements, as well as prohibit an employer requiring that an application have Canadian work experience, and disclosing use of AI in hiring process

Two ONCA cases: *Milwid v. IBM Canada Ltd.* & *Lynch v. Avaya Canada Corp.*

- Leading wrongful dismissal case of Dawe v. The Equitable Life (2019) a president dismissed after 40 years of service just before retirement was awarded 30-months' notice, however, the Court of Appeal overturned this award, and affirmed that exceptional circumstance must exist to support a notice period in excess of 24 months
- In ***Milwid***, Court awarded 27-months' award for a 62 year-old manager with 38 years of service – upheld by CA
  - The Court did not consider the COVID-19 pandemic specifically to constitute an exceptional circumstance, however the bleak economic outlook created by it was
  - Factors indicated this was akin to a "forced retirement" and "exceptional circumstances" pronounced, however, the lower court decision did not cite any "exceptional" factors noting only Bardal factors
  - Court of Appeal reasoned that the constellation of Bardal factors, as well as the fact that Milwid's skills were not easily transferrable constituted exceptional circumstances
- In ***Lynch***, Court awarded a 30-months' award for a 60 year-old employee with 38.5 years of service – upheld by CA
  - The Court determined that exceptional circumstances in this case included the specialised skills that were not transferrable to another employer, Lynch had developed patents each year for his employer, and he was a "key performer"

Key Considerations for In-House Counsel

- The recent ONCA decisions signal uncertainty with regards to what constitutes exceptional circumstances and most organizations' belief that 24 months' pay in lieu of notice would be worst-case scenario
- To mitigate these risks and avoid uncertainty, Counsel should review their employment contracts to ensure that termination provisions are enforceable and entitlement on termination is clearly set out

R v. Greater Sudbury (City) – Meaning of "owner"

- Decision significantly expands the health and safety obligations of an "Owner" under Ontario's *Occupational Health and Safety Act*
- Engaging a General Contractor as a "constructor" at a construction project, and allowing the GC to assume full operational "control" over the project, may no longer insulate an owner from liability under the OHSA.

R v. Greater Sudbury (City) – Facts

- Contractual relationship at issue is typical. Sudbury put to tender a construction project for road and water main repairs and the contract stipulated that the GC would assume full responsibility for ensuring that it – and all sub-trades under its control – was in full compliance with the *OHSA* for the entire project.
- In September 2015, a pedestrian was tragically struck and killed by a road grading machine operated by an employee of the GC.
- The City was charged for breaching its obligations as a "constructor" and as an "employer" under the *OHSA*.

R v. Greater Sudbury (City) – Statutory Scheme

- The *OHSA* governs all workplaces in Ontario, and imposes health and safety responsibilities and obligations on employers.
- "employer" is broadly defined to mean:
  - a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services;
- Under the *OHSA*, on a construction project, an employer is permitted to delegate some of its health and safety responsibilities to a "constructor," subject to certain rules governing how this delegation can be permitted.

R v. Greater Sudbury (City) – SCC Decision

- **Court was split 4-4** (as a result of the departure of Brown J.)
  - A majority is required to overturn a lower court ruling, so the ONCA decision stands
- The plurality ruled that the City was the *employer* of its own inspectors and the *employer* of the GC, therefore City was required by the *OHSA* to ensure that the prescribed measures were carried out at the Project, and they weren't. Accordingly, the City, as an "employer," committed an offence under the *OHSA*.
- The City's control over the project and the parties at the workplace is relevant to its due diligence defence.

R v. Greater Sudbury (City) – SCC Decision

- Criticism from Rowe and O'Bonsawin JJ.:
  - "The Ministry argues that as soon as a worker is present in the workplace, their employer is liable for complying with all regulatory measures… What this interpretation effectively means is that everyone who employs *anyone* is responsible for everything that *anyone* does. It would be absurd to interpret s. 25(1)(c) and the Regulation as obligating every employer at a construction project to ensure compliance with all measures contained within the Regulation."

Key Considerations for In-House Counsel

- Owners are at greater risk for health and safety on their projects, and need to carefully reconsider their contractual arrangements with GCs and construction managers.
- As a result of *Sudbury,* it may no longer be prudent for an owner to send its own employees to conduct quality control, maintenance, etc., at a project, even though those functions may have nothing whatsoever to do with construction work being performed.
- Even if an owner retains a GC to serve as the constructor for a project and essentially adopts a "hands off" approach to the project, it may be required to meet much more strenuous compliance obligations under the *OHSA*, including maintaining supervisory responsibility over the day-to-day affairs of the project, and heightened due diligence requirements.

Privilege

Ontario (Auditor General) v. Laurentian University, 2023 ONCA 299

- Laurentian University entered creditor protection in February 2021. The Standing Committee on Public Accounts passed a motion requesting the Auditor General to conduct a value-for-money audit on Laurentian's operations.
- In the course of the audit, the Auditor General sought access to materials that Laurentian claimed were covered by solicitor-client privilege.

Auditor General Act

Duty to furnish information

10 (1) Every ministry of the public service, every agency of the Crown, every Crown controlled corporation and every grant recipient shall give the Auditor General the information regarding its powers, duties, activities, organization, financial transactions and methods of business that the Auditor General believes to be necessary to perform his or her duties under this Act.

Access to records

(2) The Auditor General is entitled to have free access to all books, accounts, financial records, electronic data processing records, reports, files and all other papers, things or property belonging to or used by a ministry, agency of the Crown, Crown controlled corporation or grant recipient, as the case may be, that the Auditor General believes to be necessary to perform his or her duties under this Act.

No waiver of privilege

(3) A disclosure to the Auditor General under subsection (1) or (2) does not constitute a waiver of solicitor-client privilege, litigation privilege or settlement privilege.

Ontario (Auditor General) v. Laurentian University, 2023 ONCA 299

- The Court of Appeal confirmed that privilege is sacrosanct. Solicitor-client privilege and litigation privilege are fundamental to a proper functioning of our legal system.
- Privilege cannot be abrogated by inference. Open-texture language governing production of documents will be read *not* to include solicitor-client documents.

Key Considerations for In-House Counsel

- Solicitor-client and litigation privilege can be abrogated by statute, but only through unambiguous language. Abrogation of privilege cannot be accomplished through inference or “open-textured” language
- Note that after the Superior Court decision in this case (2022), Bill 19 was tabled in the legislative assembly to re-enact s. 10 of the *Auditor General Act* to:
  - provide that the duty to furnish information applies to documents and information that are otherwise confidential or subject to certain privilege rights
  - provide that the Auditor General’s right to access information applies despite other rights of privacy, confidentiality and privilege
- Bill 19 passed First Reading on September 7, 2022

Contracts

Contractual Interpretation: *Baffinlands Iron Mines v. Tower* & *Niagara Falls Shopping Centre v. LAF*

- Both cases are reminders of the importance of choosing contractual language carefully, and ensuring that intent is clearly expressed
- In ***Baffinlands*** the parties entered into a contract where standard form template contracts were modified for the specific project, but contained the standard form templated arbitration caluses
  - The clause stated:
    - Unless settled amicably, any dispute in respect of which the [dispute adjudication board's] decision (if any) has not become **final and binding shall be finally settled** by international arbitration. Unless otherwise agreed by both Parties:
    - (a) the dispute shall be **finally settled** under the Rules of Arbitration of the International Chamber of Commerce,
- Following termination of the contract, Baffinlands terminated the contracts, and the parties proceeded to arbitration
- The arbitrators found in favour of Tower, and Baffinlands sought to appeal the award to the Superior Court claiming that the words "finally settled" and "final" differed, and that the arbitration clause did not preclude appeal
- This case was eventually heard by the ONCA, who took a common sense approach to contractual interpretation, and found that "final is final" whether used with the words binding or settled, favouring a consistent meaning

Contractual Interpretation: *Baffinlands Iron Mines v. Tower & Niagara Falls Shopping Centre v. LAF*

- In ***Niagara Falls****,* LAF had entered into a lease agreement for space to run their fitness centre. The lease contained a standard force majeure clause that stated:
  - FORCE MAJEURE. If either party is delayed or hindered in or prevented from the performance of any act required hereunder because of […] ***restrictive laws*** […] beyond the reasonable control of the party delayed, *financial inability excepted* (each, a "Force Majeure Event") […] performance of such act shall be excused for the period of delay caused by the Force Majeure Event ***and the period for the performance of such act shall be extended for an equivalent period*** […]. Delays or failures to perform resulting from lack of funds or which can be cured by the payment of money shall not be Force Majeure Events. […]
- As a result of COVID, the plaza including the fitness centre was forced to shut down due to government mandates
- The Court of Appeal agreed with the lower court that the government mandates constituted "restrictive laws" in a broad sense, and as such, the landlord was excused from the requirement to provide the tenant with the premises, however, the tenant's failure to pay did not result from the laws themselves, but rather from financial difficulties as a result of not receiving members' dues and thus the force majeure clause did not excuse them from paying rent

South West Terminal Ltd. v. Achter Land (SK)

Facts:

- The plaintiff and the defendant has a longstanding relationship of purchase and sale of flax seed
- They had, in the past agreed to contracts via “yup” or the like text messages
- With regards to the contract at issue, South West had sent a text photo of the contract signed on their part to Achter who then replied with a : 
- Acter failed to deliver the flax, but claimed he had not agreed to the contract

Court’s Analysis:

- The Court determined that the thumbs up emoji was consistent with past method of accepting contracts
- Further, the Court found that the thumbs-up emoji was “an action in electronic form” signaling acceptance pursuant to SK’s *Electronic Information and Documents Act*

Key Considerations for In-House Counsel

- In contracts, there are no “throwaway” clauses
- The cases highlight a reminder to Counsel to regularly review templates and precedents in light of these recent decisions
- Precise words are important, as is capturing the intent of the parties
- The impact of a clause on each party should be clearly set out to avoid situations like that in *Niagara Falls*
- Internal business partners should be made aware of the ease at which a contract may be considered “accepted” and ensure that corporate authorization guidelines are clear and communicated to counterparties to an agreement

THANK YOU

Joanna Leong
Honda Canada Inc.
Joanna_Leong@ch.honda.com

Matthew Estabrooks
Gowling WLG
Matthew.Estabrooks@gowlingwlg.com

Law Society of Ontario | Barreau de l'Ontario

TAB 4

14th In-House Counsel Summit

Leadership Opportunities as an In-House Counsel (PowerPoint)

Rustam Juma, GC
Volkswagen Group Canada Inc.

Mark Le Blanc, President
Thrive Legal – Advisory Services

February 27, 2024

cpd

14th In-House Counsel Summit

Leadership Opportunities as an In-House Counsel

Rustam Juma, GC, Volkswagen Group Canada Inc

Mark Le Blanc, President, Thrive Legal – Advisory Services

WHAT IS LEADERSHIP

- In its simplest form, leadership is influencing other people to follow towards a common objective.
- It is the ability to learn from past experiences, take on new challenges, and make decisions under uncertainty.

THE SKILLS OF LEADERSHIP

1. Relationship building
2. Agility and adaptability
3. Innovation and creativity
4. Employee motivation
5. Decision-making
6. Conflict management
7. Negotiation
8. Critical Thinking

THE PRACTICES OF EXECUTIVE LEADERSHIP – The Eight Practices

An effective Executive Leader follows the same eight practices:

Curiosity

1. They asked, “What needs to be done?”
2. They asked, “What is right for the enterprise?”

Planning

3. They developed action plans.
4. They took responsibility for decisions.
5. They took responsibility for communicating.
6. They were focused on opportunities rather than problems.

Engagement

7. They ran productive meetings.
8. They thought and said “we” rather than “I.”

THE PRACTICES OF EXECUTIVE LEADERSHIP – The Eight Practices (continued)

Curiosity

- Gives the Leaders the knowledge they needed.

Planning

- Helps Leaders to convert this knowledge into effective action.

Engagement

- Ensures the whole organization feels responsible and accountable.

Note: Based on *What Makes an Effective Executive*, by Peter F. Drucker (HBR)

EXECUTIVE PRESENCE

What it was	***What it now is***
Gravitas	Inclusion
Strong Communication Skills	Listening & Learning
The “Right” Appearance	Authenticity

WHAT IS LEADERSHIP FOR YOU AS INHOUSE COUNSEL

- There are **many different styles**. Diversity of leadership is critical.
- Yours will be **defined by your strengths & weaknesses** and the nature of your organization.
- It is NOT being the 'Top Dog'. Leadership is a **collaborative skill**.
- You can **lead from any level**.
- Be your **authentic self**, or you will not effectively lead.
- It will be a **critical asset in your career journey**.

PRACTICAL TIPS

1. Shift your mindset from Subject Matter Expert to Strategic Business Leader. ***Think***: How to factor in business objectives to all of my legal work.
2. Learn about the business as much as about the law. ***Think***: What does my organization actually do and how.
3. How can I add more value. ***Think***: How does my output affect the key business objectives
4. Exhibit curiosity. ***Think***: Ask questions. What needs doing that I can do or bring others along to do.
5. Follow through. ***Think***: Deliver on what I promise, and where I can't, quickly communicate the issue.

PRACTICAL TIPS

6. Help others. ***Think***: What needs to get done that I can help make happen.
7. Be prepared to act on partial information. ***Think***: Don't think about perfect. Think about the best solution at the time with what you know.
8. Be prepared to fail … and learn from it. ***Think***: Win the war, not all the battles. Learn.
9. Be inclusive and open. ***Think***: Who can I work with to help solve problems and leverage opportunities. Include all perspectives.
10. Look for opportunities, not problems. ***Think***: How can I help make this happen. Worry less about the problems (but, don't ignore them). They can be overcome.

Law Society of Ontario | Barreau de l'Ontario

TAB 5

14th In-House Counsel Summit

Class Actions Trends and Developments (PowerPoint)

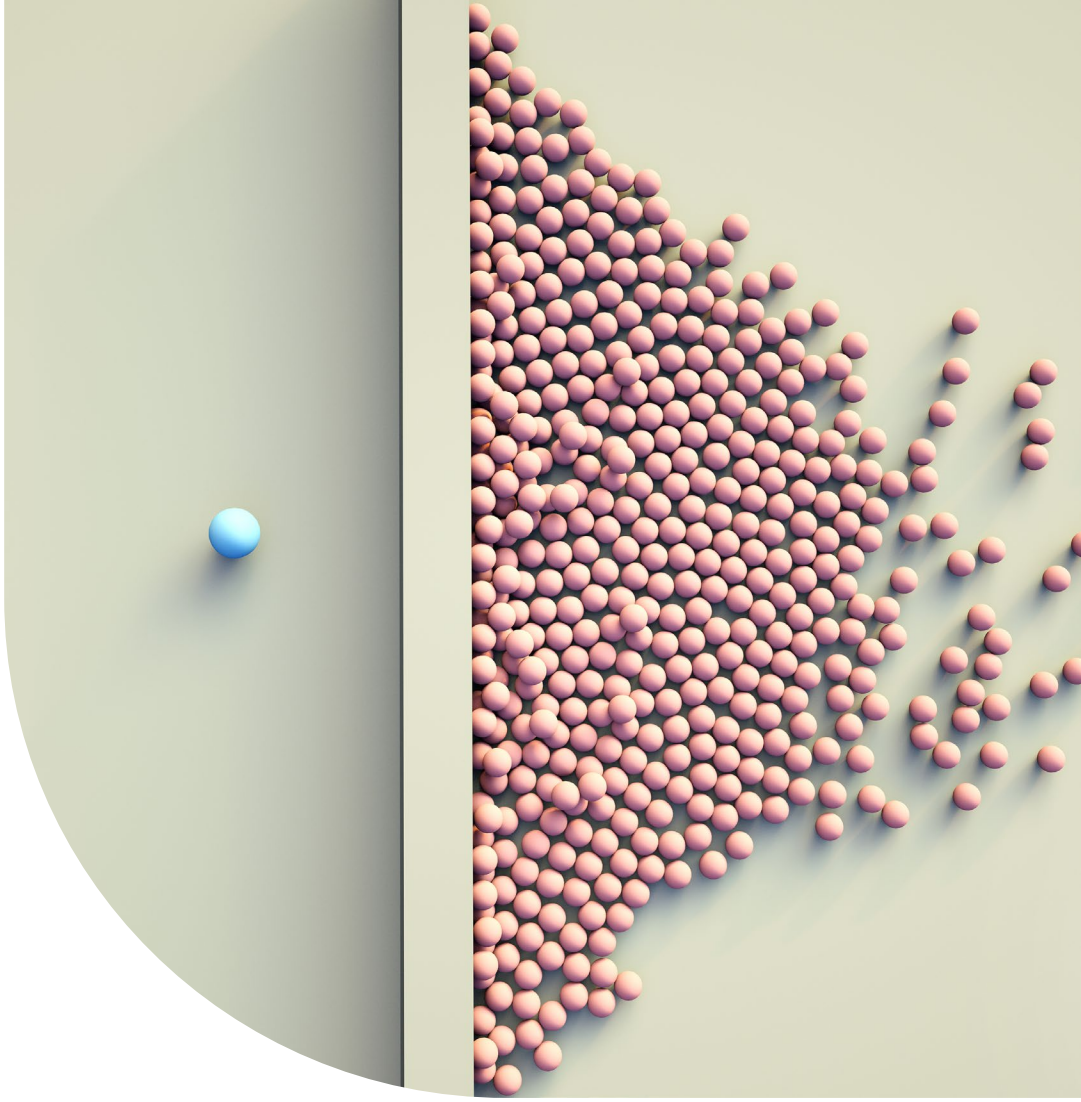
David Elman
Borden Ladner Gervais LLP

Anne Merminod
Norton Rose Fulbright Canada LLP

February 27, 2024

cpd

Class Actions Trends and Developments



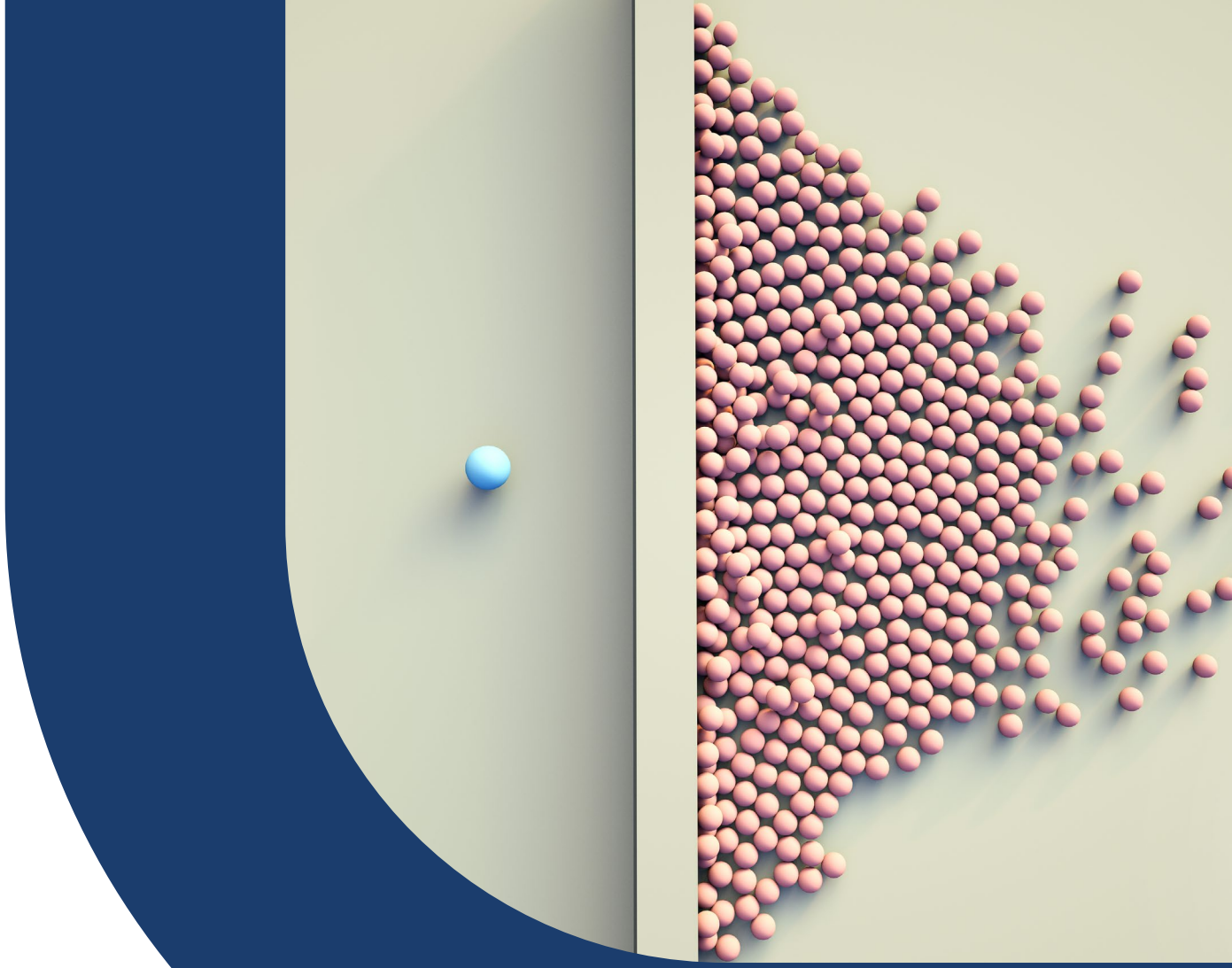
David Elman, *Partner, BLG*

Anne Merminod, *Partner, BLG*

February 27, 2024

Borden Ladner Gervais

Filing Trends



Borden Ladner Gervais

Quebec

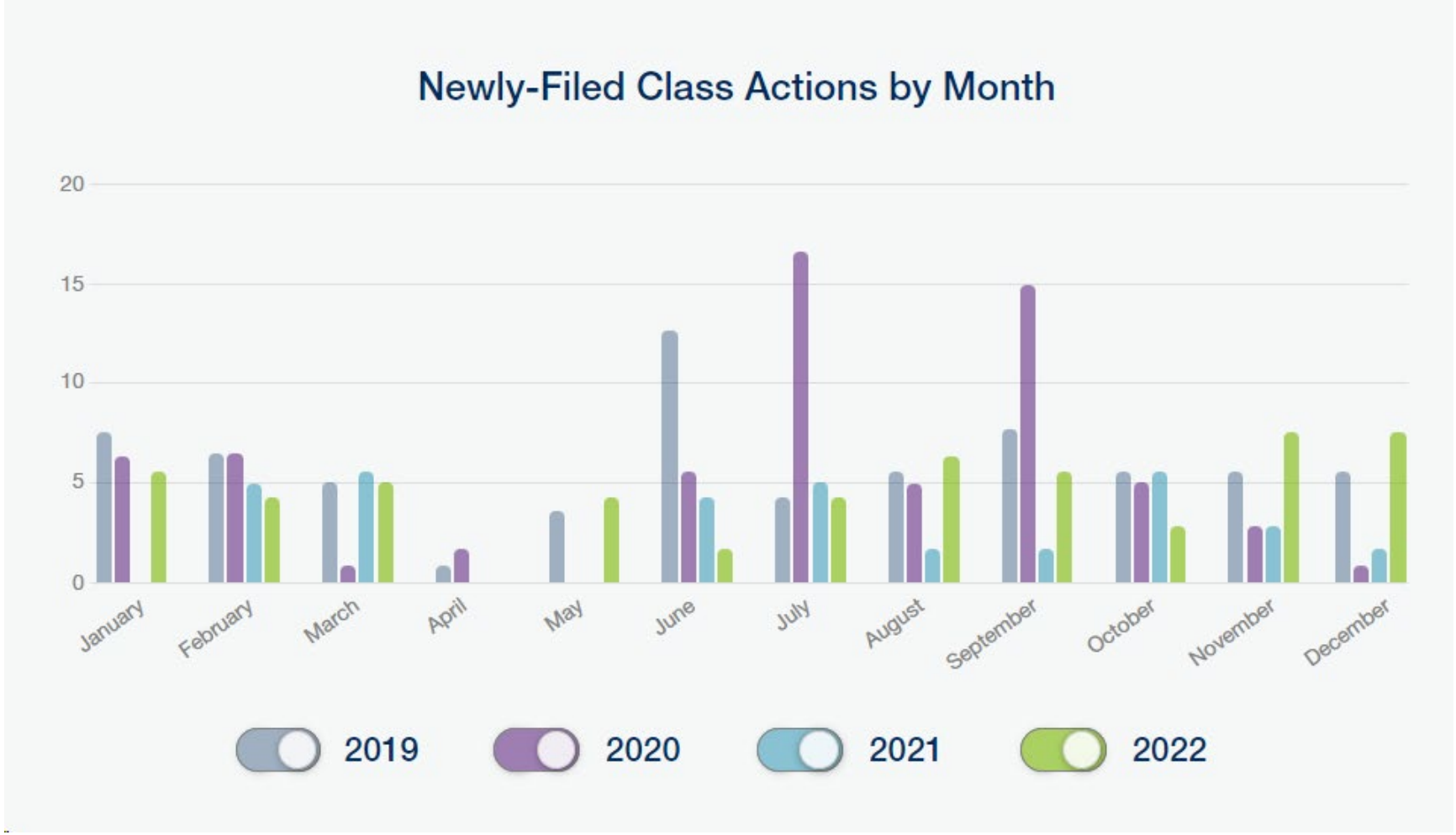

New class action filings
2022-2023
14
12
10
8
6
4
2
0
January
February
March
April
May
June
July
August
September
October
November
December
2022
2023

Quebec

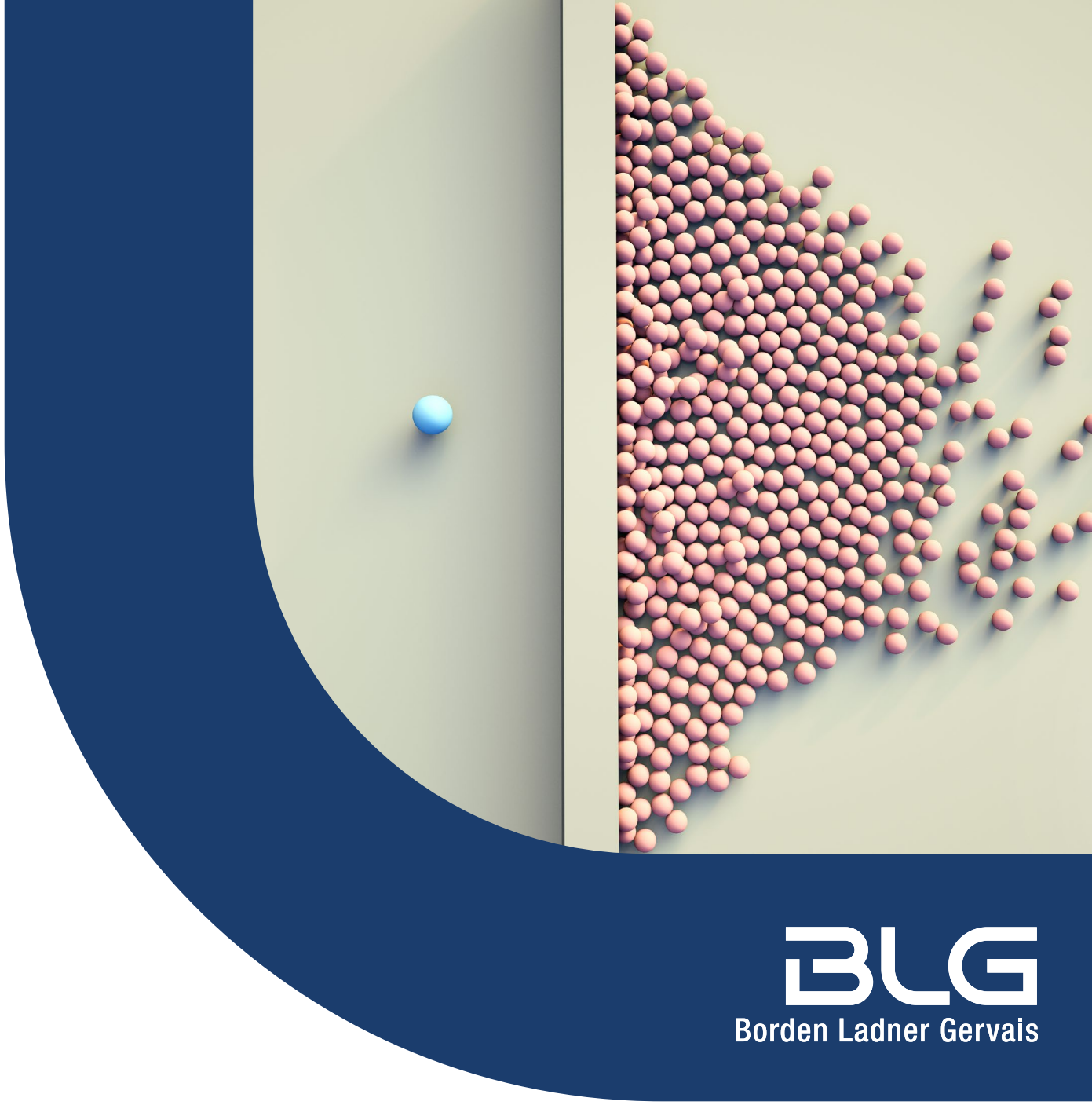
New applications - per month		
	2022	2023
January	3	5
February	1	8
March	3	7
April	4	3
May	5	8
June	6	2
July	5	7
August	2	3
September	5	7
October	3	13
November	7	7
December	4	12
Total	48	82

5-4

Ontario


Newly-Filed Class Actions by Month
20
15
10
5
0
January
February
March
April
May
June
July
August
September
October
November
December
2019
2020
2021
2022

Certification / Authorization Developments



Borden Ladner Gervais

Cause of Action Criterion

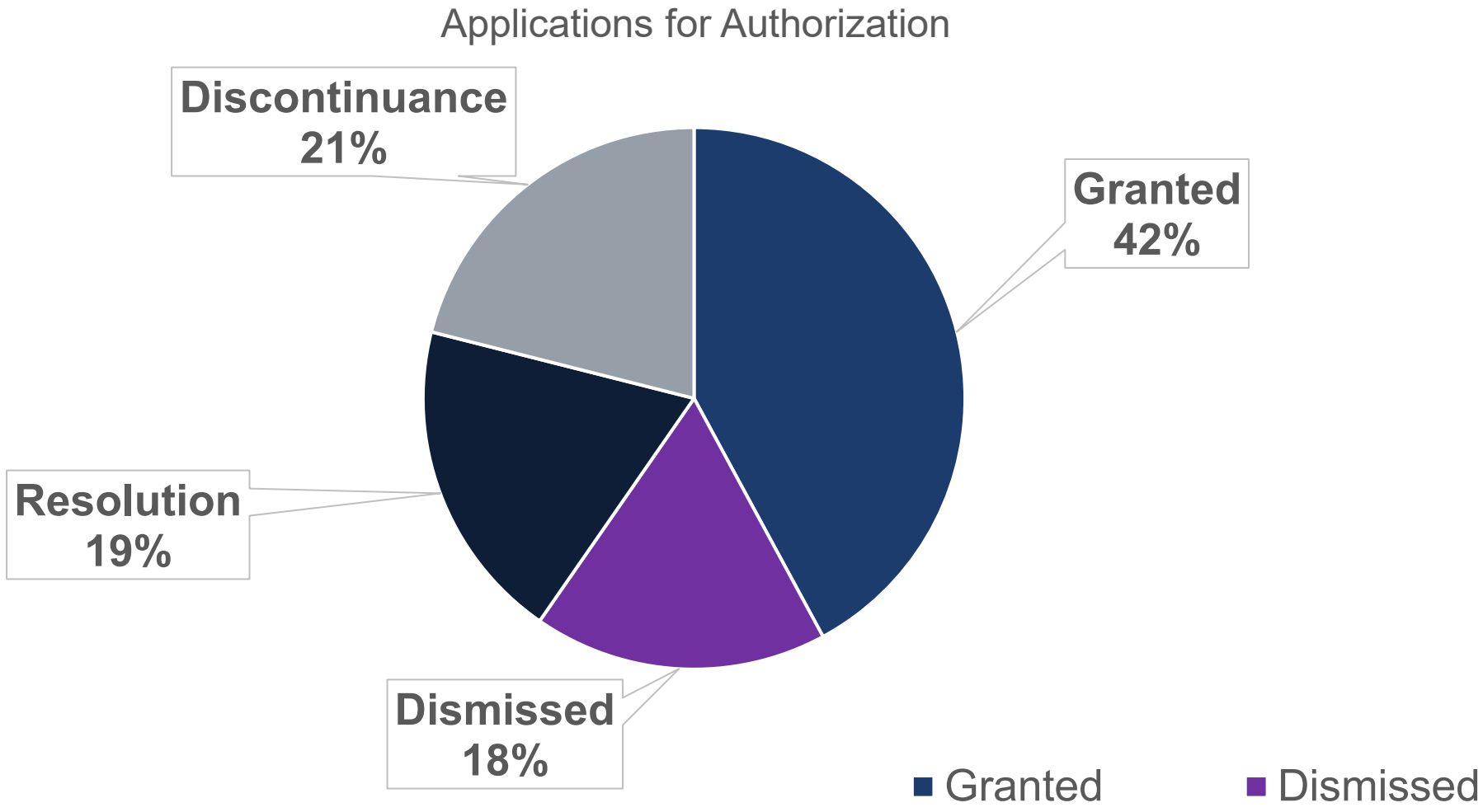
- Meaningful scrutiny of cause of action at certification:
  - *Lewis v Uber Canada Inc*
  - *Difederico v Amazon.com*
  - *Jensen v Samsung Electronics Co Ltd*
  - *Frayce v BMO Investor Line Inc et al.*
  - *Larsen v. ZF TRW Automotive Holdings*
  - *Robertson v. Ontario (ONCA)*

Preferable Procedure Analysis

- *Banman v Ontario, 2023 ONSC 6187*
  - First interpretation and application of the new s.5(1.1) of the *CPA*
  - Changes in s.5 (1.1) of the amended Ontario *Class Proceedings Act* were designed to "*raise the threshold, heighten the barrier, or make more rigorous the challenge of satisfying the preferable procedure criterion*" (at para 317)

5-8

Quebec


Applications for Authorization
Discontinuance
21%
Granted
42%
Resolution
19%
Dismissed
18%
Granted
Dismissed

Successful Arguments at Authorization in Quebec

- Frequent Dispositive Battle Grounds at Authorization (art. 575(2) CCP)
  - **Application for Authorization with vague, imprecise and hypothetical allegations**
    - *Hazan c. Micron Technology Inc.*, 2023 QCCA 132
    - *Groupe Alter Justice c. Procureur général du Canada*, 2023 QCCA 622
  - **Lack of personal claim for the class representative/Clear lack of prejudice**
    - *Tessier c. Economical, compagnie mutuelle d'assurance*, 2023 QCCA 688

5-10

Successful arguments at Authorization in Quebec (cont'd)

- **The "pure question of law"**
  - *Banque de Montréal c. Chevrette*, 2023 QCCA 516
  - *Centre de santé dentaire Gendron Delisle inc. c. La Personnelle, assurances générales inc.*, 2021 QCCA 1758

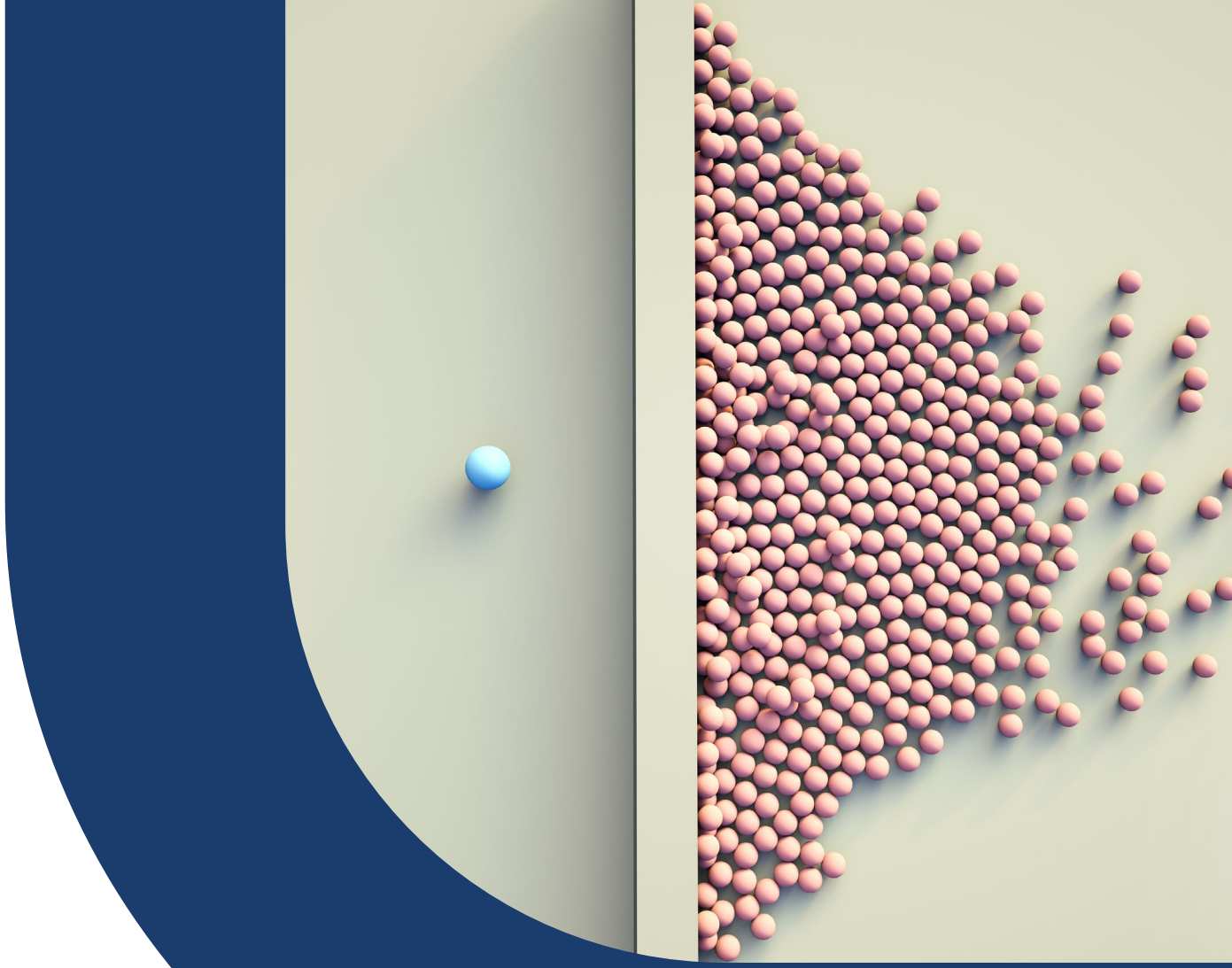
- Non-Dispositive Battle Grounds
  - Causes of actions : *Poitras c. Concession A25,* 2021 QCCA 1182
  - The scope of the class (Qc only) : *Lemieux c. Marinacci,* 2023 QCCS 1519, *Décary-Gilardeau* c. *General Motors of Canada*, 2023 QCCS 92.
  - Punitive damages : *Mireault c. Loblaws inc*, 2022 QCCA 1752

Trial on the Merits in Quebec is Often the Option

- Class actions **dismissed entirely** at the merits stage :
  1. *Fortin c. Mazda Canada inc.*, 2022 QCCA 635
  2. *Lamoureux c. OCRCVM*, 2022 QCCA 685
  3. *Martel c. Kia Canada inc.*, 2022 QCCA 1140
  4. *Duguay c. General Motors du Canada ltée*, 2023 QCCS 3223
  5. *Coalition contre le bruit c. Bel-Air Aviation inc.*, 2022 QCCA 5
  6. *Union des consommateurs c. Air Canada*, 2022 QCCS 4254

5-12

Substantive Trends



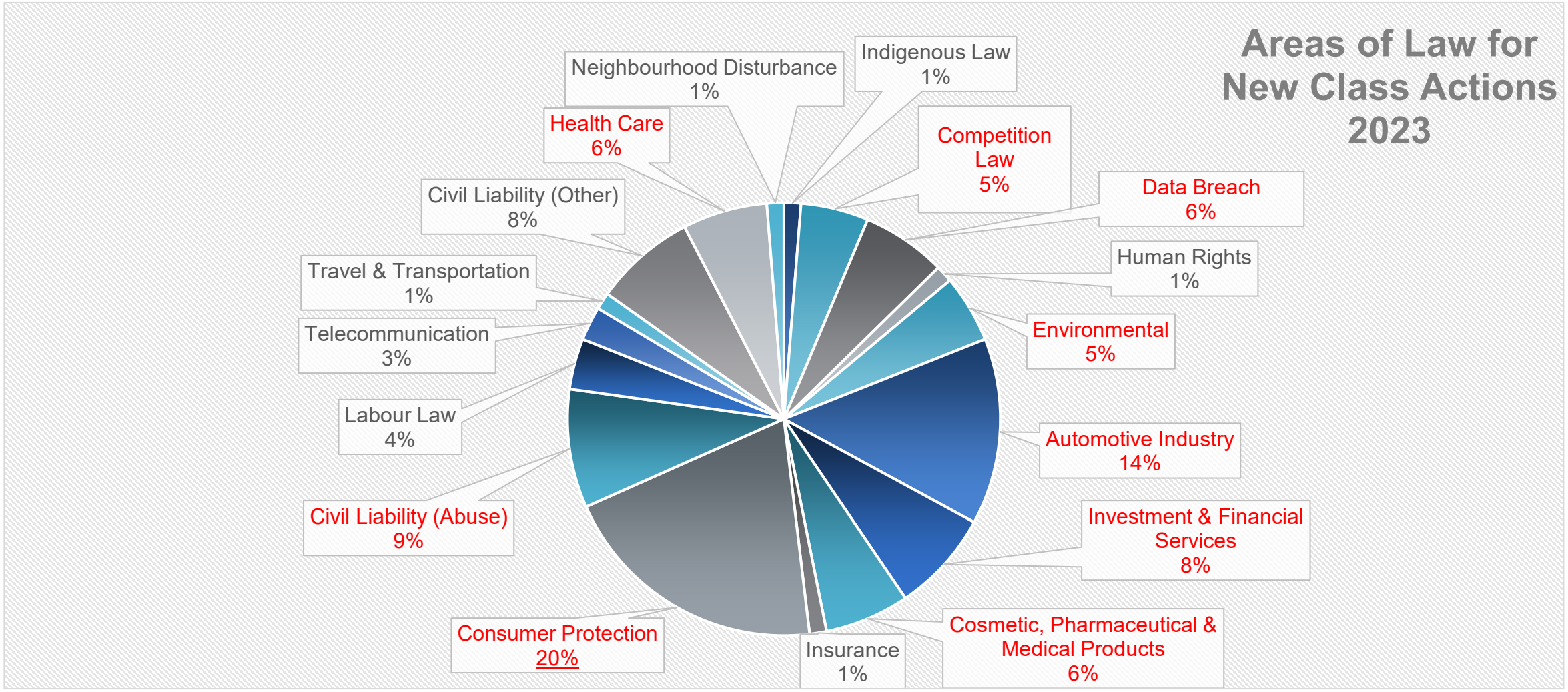
Borden Ladner Gervais

Ontario Filings

- Class action activity following the broader litigation landscape?
- Migration of class actions out of Ontario?
- Mass torts trend?

5-14

Quebec Filings



Certification Trends for Competition Class Actions

- *Pioneer Corp v Godfrey*: The SCC's last competition class action decision (2019)
- Since *Godfrey*, the expectation of near-automatic certification has not materialized
- 2023 decisions suggest that Canadian courts are prepared to scrutinize proposed class actions alleging anti-competitive behaviour
  - *Lilleyman v Bumblebee Foods LLC*
  - *Sunderland v Toronto Regional Real Estate Board et al.*
  - *Jensen v Samsung Electronics Co Ltd*

5-16

Competition Class Actions in Quebec

- Competition class actions in Québec can be instituted pursuant to the *Competition Act* and section 1457 of the *Civil Code of Québec*
- In 2013, in *Infineon*, the Court noted that "mere assertions are insufficient without some form of factual underpinning"
- Most proposed competition class actions were authorized in Québec after the Infineon decision was rendered
- In *Hazan v. Micron Technology*, 2023 QCCA 132 the Court of Appeal however recently upheld a judgment by Justice Donald Bisson of the Superior Court of Québec denying authorization to institute a class action regarding a second alleged international conspiracy in the production of DRAM

Bulletin we published on the judgment

Implications for Authorization Strategy in Quebec

- Certification should not be viewed as automatic
- Early investment in taking a careful look at plaintiffs' claims, evidentiary support, sufficiency of expert methodology and challenging areas where even the certification low test is not met has proven to be worthwhile
- Partial wins are possible: even if certification is not defeated, classes can be limited

5-18

Changes to the *Competition Act*

- December 2023: proposed “generational” changes *Competition Act*
- Impacts of the changes include:
  - Expanded scope for private litigation in Canada
  - Loosened requirements for finding of anti-competitive behaviour
- Changes likely to impact virtually every business and may increase likelihood of class action lawsuits

Bulletin we published on the major changes coming to Canadian Competition Act

Bulletin we published on the enforcement guidance on wage-fixing and no-poaching agreements

Intrusion Upon Seclusion for Data Breach

- Certification in breach of privacy claims remains an area in flux
- Canadian courts have refused certification in cases of data breaches under the tort of intrusion upon seclusion
- Liability can only attach to a party who is an active participant in the wrongful access of private information
  - Trilogy of Cases: *Owsianik v Equifax Canada Co*; *Obodo v Trans Union of Canada Inc*; *Winder v Marriott International Inc*

5-20

Quebec: Embracing the No Harm, No Foul Principle

- *Lamoureux c. Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*, 2023 CanLII 24495 (CSC)

Normal inconveniences of life in society are not compensable

Preponderant evidence that the personal information contained in the lost computer had been used unlawfully

Diligent corporate response bars punitive damages

In the absence of demonstrated compensable harm, a corporation may successfully defend itself against claims following a data incident by reacting diligently to the incident.

Bulletin we published on the judgment

In the News : "Landmark ruling upholds dismissal of first privacy class action on the merits" , " Class action over loss of personal information dismissed on the merits", "Privacy breach class action fails on merits, a first in Canada"

Where Have the Cases Remaining Gone?

1

- Disclosure of private information to third parties

2

Breach of consent

3

False representations within the meaning of the CPA

- In ***Homsy v. Google, 2023 QCCA 1220***: It is alleged that Google Photos app on Android smartphones organizes photos according to individuals' facial features then transfers photos to Google servers, transforming facial characteristics into distinct digital biometric data akin to fingerprints or DNA profiles
- In ***Elgadi c. WhatsApp, 2023 QCCS 3181***: It is alleged that the defendant made false statements within the meaning of the CPA with respect to WhatsApp's "security and privacy features"

5-22

Disruptions and Trends to Watch: Federal Legislation (Bill C-27)

- Legislative Changes are Coming…
  - Bill C-27 provides for a private right of action
    - *If the Commissioner has made a finding that an organization has contravened the Act and the finding has become final,*
    - *Or an organization has been convicted of an offence under the Act*
    - *An individual affected can claim damages for loss or injury suffered as a result of the contravention or offence.*
  - Bill C-27 does not expressly preclude the application of remedies provided by the common law in respect of the same contravention or offence

Disruptions and Trends to Watch: Privacy Sector Act (Law 25)

1. **Quebec Pioneer:** First jurisdiction in Canada to update private sector privacy laws, inspired by the EU's GDPR

2. **Universal Compliance:** All businesses processing personal information in Quebec must understand and comply with the revamped regulations

3. **Timeline:** the amendments to the *Private Sector Act* are into force, with the exception to the right to data portability (s. 27 para. 3) that will come into force on September 22, 2024

Compliance Guide we published for our clients on the *Act respecting the protection of personal information in the private sector ("Privacy Sector Act")*

Bulletin we published on the Key differences between Bill 64 (Québec) and C-27 (federal)

New Enforcement Mechanisms (Law 25)

1. **Administrative Monetary Penalties.** New regime administered by CAI. Up to $10,000,000 or 2% of worldwide turnover

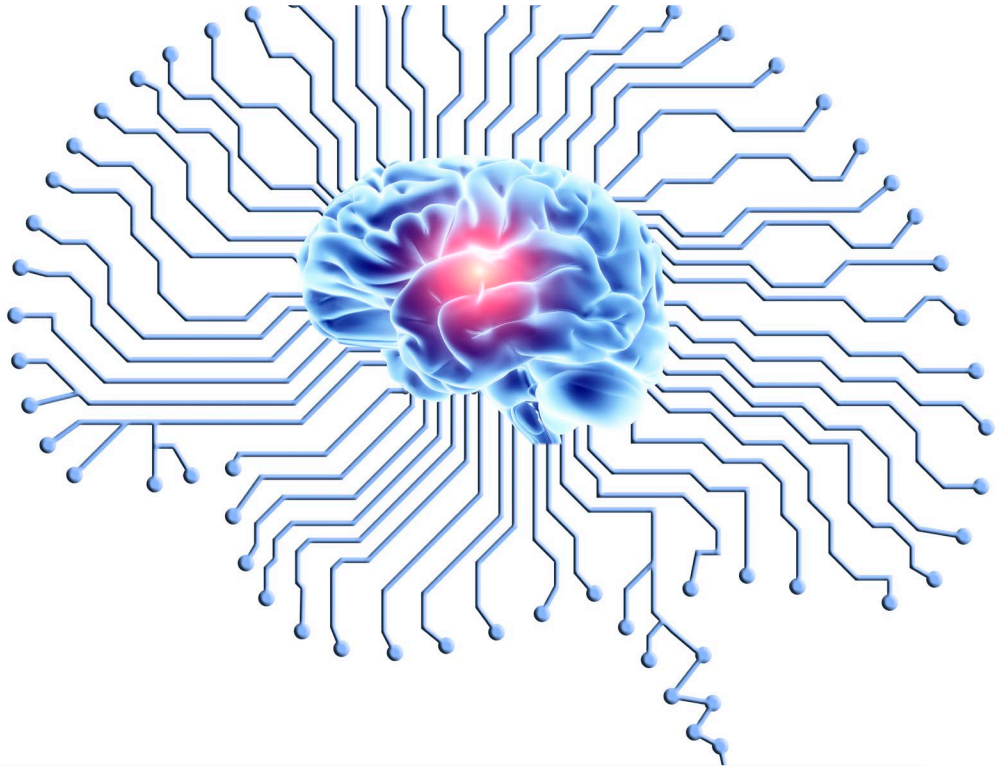
2. **Penal Offences (ss. 91 to 93).** Introduction of new offences. Fines of up to $25,000,000 or 4% of worldwide turnover imposed by the Court of Québec

3. **Punitive Damages (s. 93.1).** Where the unlawful infringement of a right conferred by this Act or by articles 35 to 40 of the Civil Code causes an injury and the infringement is intentional or results from a gross fault, the court shall award punitive damages of not less than $1,000

Disruptions and Trends to Watch: AI Issues

Recent Trends in Generative AI Litigation in the United States

- Intellectual property class action proceedings in the United States are addressing potential infringements related to works of art and AI training code
- Privacy and copyright law violations for alleged use datasets of information gathered to train generative AI tools
- Challenges may involve licenses or copyright for artistic works and AI code, impacting how AI systems are trained and raising questions about evidence, data management, and confidentiality



5-26

Three Key Areas of ESG Class Actions

- Greenwashing / Misrepresentation Claims
  - Misleading marketing or corporate disclosure re an organization's environmental impact and/or impact of specific products
- Climate change
  - Claims against governments for insufficient action to combat climate change
  - Claims against private companies for contributions to climate change
- Global Supply Chains
  - Claims alleging negligence/misconduct by subsidiaries/suppliers abroad
  - Potential for securities class actions alleging misrepresentations in required disclosures in new modern slavery legislation

Greenwashing and Misrepresentation Claims

- Increasing ESG and Greenwashing litigation in Canada. Likely to continue increasing given the rise of ESG across sectors
- Prominent Greenwashing class actions in Canada include:
  - *Rebuck v Ford Motor Company*
  - Keurig recyclability claims
- Best Practice: ensure precise and verifiable disclosures and advertising for ESG-related claims

5-28

Climate Change Litigation

- Growing number of climate lawsuits internationally, with more limited developments in Canada:
  - Canada: *La Rose v Canada*
  - Netherlands: *Milieudefensie et al v Royal Dutch Shell*
  - US: *Ramirez v Exxon Mobil Corp*
  - Quebec: We already have a few class actions:
    - Keurig
    - Reusable bags
    - Migrant workers
    - Environnement Jeunesse
    - Diesel Gate

Questions?

Thank You

For more information, contact:

David Elman
Partner
416.367.6031
delman@blg.com

Anne Merminod
Partner
514.954.2529
amerminod@blg.com

Borden Ladner Gervais

Law Society of Ontario | Barreau de l'Ontario

TAB 6

14th In-House Counsel Summit

Unpacking No-Poach and Wage-Fixing Developments (PowerPoint)

Sarah Mavula
Baker Mackenzie LLP

Chris Hersh
Norton Rose Fulbright Canada LLP

February 27, 2024

cpd

Unpacking no-poach and wage-fixing developments

LSO In-House Counsel Summit
February 27, 2024

Sarah Mavula
Baker McKenzie LLP

Chris Hersh
Norton Rose Fulbright Canada LLP

Agenda

1. Overview of No-Poach and Wage-Fixing
2. Defences and Exemptions
3. Main Source of Problems
4. Information Exchange
5. Recommended Actions

No-Poach & Wage-Fixing: Criminalized

It is a *per se* criminal offence for unaffiliated employers to :

- Fix, maintain, decrease or control salaries, wages or **terms and conditions of employment** (wage-fixing agreements)

- Agree to not solicit or hire each other's employees (no-poach agreements)*

  * Only “two-way” no-poach agreements are prohibited

  - **Applies to agreements made on or after June 23, 2023, but can also apply to conduct that reaffirms or implements agreements that were made before then**
  - **No evidence of anticompetitive effects is required**
  - **“Employer” is a broad term that includes individuals who are human resources professionals, agents or employees, and directors and officers**
  - **Employers can face a fine at the court's discretion, and a prison sentence of up to 14 years, or both**
  - **Private parties can also pursue civil actions (including class actions) against employers**

Defences and Exemptions

- **Ancillary Restraints Defence**
- **Regulated Conduct Defence**
- **Collective Bargaining**
- **Affiliates**

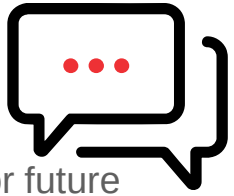
The agreement is ancillary to, or flows from, a broader or separate legal agreement that includes the same parties, and is necessary to achieve the purpose of this other agreement

Where the employer's conduct is required or authorized by or under another provincial or federal law

Agreements between employers with respect to collective bargaining with their employees over salaries, wages, or terms or conditions of employment are exempt

Wage-fixing and no-poach agreements between affiliated employers are not prohibited within the meaning of the Competition Act

What is the Main Source of Problems?

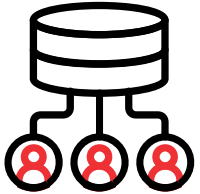


Information Exchange of your organization's current policy or future intentions with respect to any benefit offered to employees with another employer

"Information exchange" includes the sharing of data:

- between competitors
- through non-competitors:
  - customers
  - manufacturers and distributors
  - by means of publishing
  - in commercial negotiations
- through a common agency (e.g., trade association)

Information Exchange



"Information exchange" includes the sharing of data:

- On the talent market, information can be highly competitively sensitive information.
- Benchmarking exercises (e.g., market studies) → less problematic if information is sufficiently aggregated, historical data, etc.
- Industry association meetings.
- Information exchange in a private setting.

- Salaries
- Bonuses
- Holiday entitlements
- Allowances
- Healthcare
- Travel / relocation allowances
- Maternity leave policies
- Work from home policies
- Other benefits/Terms & conditions of employment

Recommendation Actions

Compliance Tips

- Update existing compliance policies and training
- Establish guidelines for sharing information related to employment terms
- Review template commercial agreements and business arrangements
- Engage employees responsible for hiring and compensation to identify and scope potential risk
- Continually assess relationships with independent contractors

Questions

Law Society of Ontario | Barreau de l'Ontario

TAB 7

14th In-House Counsel Summit

Workplace Investigation Tips

Stephanie Lewis
Dentons Canada LLP (Ottawa)

Federal Workplace Harassment and Violence Regulations Steps in the Resolution Process

Stephanie Lewis
Dentons Canada LLP (Ottawa)

Larysa Workewych
Dentons Canada LLP (Toronto)

February 27, 2024

cpd

大成 DENTONS

Workplace Investigation Tips

Before the Investigation

- Make sure policies and procedures are up to date
- Make sure all employees are trained on the policies and know how to bring a complaint forward
- Know that a complaint can come forward in different ways (formally, anonymously, by social media, from members of the public)

When the Investigation Begins

- Establish the facts of the complaint
    - If possible, have an unwritten complaint committed to writing by the Complainant
    - Provide written complaint to the Respondent and give time to respond
- Determine whether an investigation is necessary (only necessary if the allegations would constitute harassment if true)
- Decide whether investigation should be internal of external
    - Consider expertise, experience, actual or perceived neutrality, speed, efficiency and resource allocation
    - Investigator should be at arm's length from the individuals involved
    - If complaint involves a senior employee, external investigator is advisable
- Be mindful of privacy concerns

Contacting the Parties (Complainant and Respondent)

- Notify parties that an investigation is happening
- Provide information on the process
- If there are live issues in the workplace regarding behaviour, develop a plan around stopping or monitoring the behaviour
- Take measures to separate the parties if necessary

Conducting Interviews

- Interviews should be conducted in a neutral environment if possible. Environment should allow for privacy and the maintenance of confidentiality.
- Interview Complainant first, then Respondent, then witnesses
- During all interviews:
    - Tape (with the witnesses' knowledge or consent) or take contemporaneous notes
    - Ensure adequate time with each interviewee
    - Have the interviewee read and sign a summary of the interview/your notes
    - Ensure that all parties and witnesses understand that confidentiality cannot be guaranteed
    - Request copies of relevant documents and keep them secure

    - At the conclusion of the interview, remind interviewees that the process is confidential (can only discuss with HR/legal counsel/union) and that they are protected from reprisal
    - Advise that you may reach out with more questions or schedule another interview if necessary
- Conduct follow up interviews if necessary

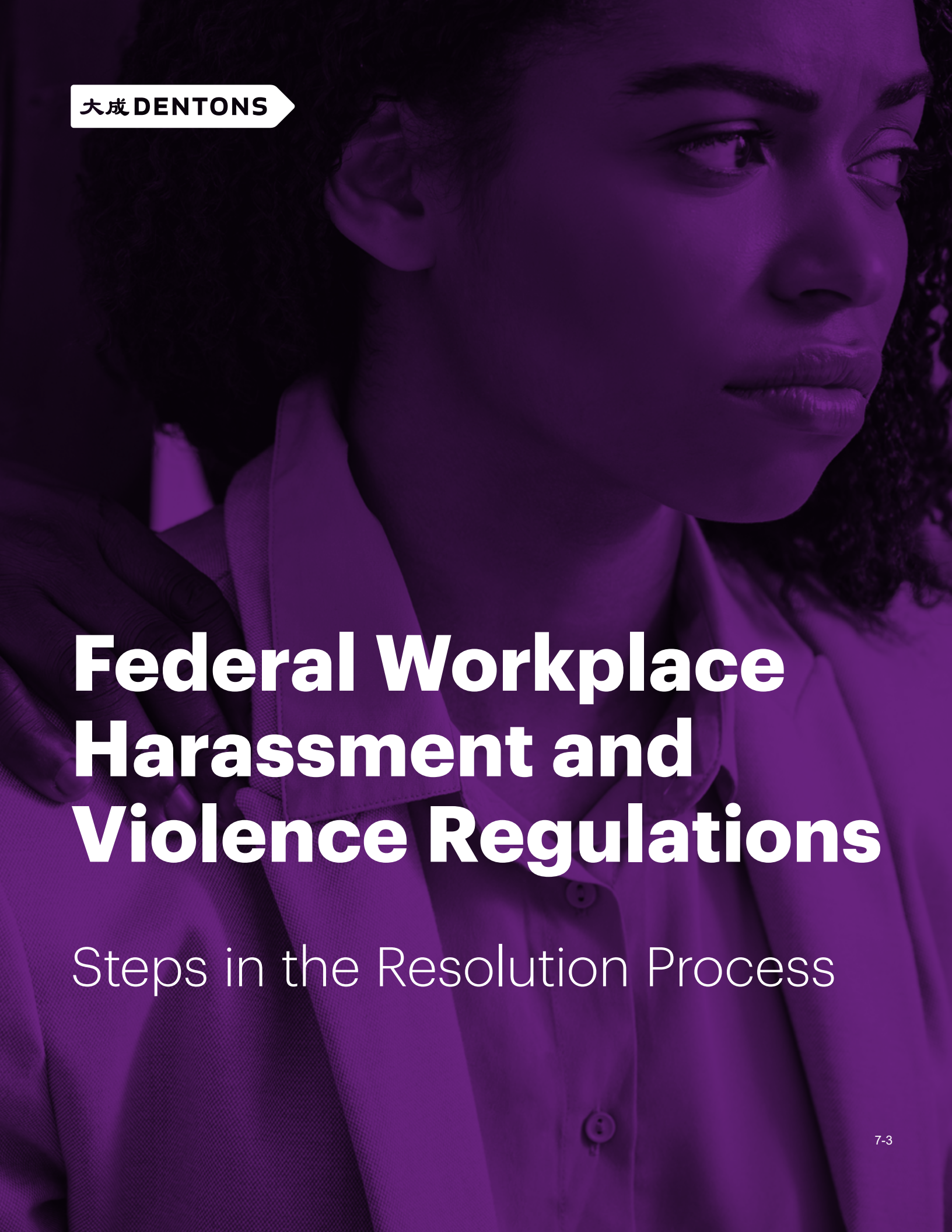
Concluding the Investigation

- Review all evidence (interviews and documents)
- Make findings and draw conclusions based on the policies and procedures
- If complaint is well-founded, determine appropriate next steps
    - Relationship management?
    - Coaching?
    - Discipline?
    - Termination?
- Advise Complainant and Respondent of the outcome (do not need to provide copy of any report, which is employer property)

KEY CONTACTS

Stephanie Lewis
Ottawa
D +1 613 783 9651
stephanie.lewis@dentons.com

CSBrand-37240-Branded flyer 02 — 18/09/2020



大成 DENTONS

Federal Workplace Harassment and Violence Regulations

Steps in the Resolution Process

Completion of the Resolution Process: An employer must ensure that the resolution process outlined below is completed within **one (1) year** of the receipt of the notice of occurrence. If the principal party or responding party is absent from work for more than 90 days after receipt of the notice of occurrence, then the employer must ensure that the resolution process is completed within the later of one (1) year after receipt of the notice of occurrence and six (6) months after the day on which the principal party returns to work. If an employer cannot complete the resolution process within the timelines set out in the Regulation, the employer is required to document the reason for the delay and must keep a copy of this record for 10 years.

Contacts

Stephanie Lewis
Counsel, Ottawa
D +1 613 783 9651
stephanie.lewis@dentons.com

Larysa Workewych
Associate, Toronto
D +1 416 863 4613
larysa.workewych@dentons.com

Step	Description	Time Period
Notice of occurrence	A complainant will provide notice of an occurrence to the employee's supervisor or to the designated recipient. The complaint can be provided either by a witness or by the principal party (i.e. the individual who was the object of the incident). The complaint must include the following prescribed information: • Name of the principal party (i.e. the subject of the occurrence) • Name of the responding party (if known) • Date of the occurrence • Detailed description of the occurrence If the principal party or the responding party is the employer, then notice must be provided to the designated recipient.	There is no time limit for an individual to submit a notice of occurrence for current employees of the employer. However, employees are encouraged to submit their notice of occurrence as soon as they are able to. Former employees can make complaints as long as they are made within **three (3) months** of the termination of their employment. Former employees can apply to the Labour Program for an extension to this time period (there is no time limit for applying for an exemption).
Initial review of notice of occurrence	The party that receives the notice of occurrence conducts an initial review of the notice of occurrence. The purpose of the review is to determine whether the notice of occurrence contains the required information. If it does not, the party that receives the notice of occurrence should give the complainant (i.e. the principal party or witness) the opportunity to provide the missing information. Following an initial review, an occurrence is deemed to be resolved if the notice does not contain the name of the principal party or otherwise allow the identity to be determined. In such circumstances, an employer is not required to take further action to resolve the occurrence (and can deem it resolved).	There is no explicit period of time for performing this initial review, but this should be done in close proximity to receipt of the notice of occurrence due to the timeline for contacting the principal party and witness (if applicable) below.
Contact with principal party	The party that receives the notice of occurrence contacts the principal party and provides them with the following information: • That their notice has been received or that they have been named or identified as a principal party by a witness (whichever is applicable) • The manner in which the workplace harassment and violence prevention policy is accessed • Each step in the resolution process • That they may be represented during the resolution process	Within **seven (7) days** of receipt of the notice of occurrence.
Contact with witness (if applicable)	If the witness is not anonymous, party that receives the notice of occurrence contacts the witness to confirm that the notice was received.	Within **seven (7) days** of receipt of the notice of occurrence.

Step	Description	Time Period
Contact with responding party	On the first occasion that the party that receives the notice of occurrence contacts the responding party, they must provide them with the following information: • That they have been named or identified as a responding party • The manner in which the workplace harassment and violence prevention policy is accessed • Each step in the resolution process • That they may be represented during the resolution process	No explicit time period for contacting the responding party is provided. During a negotiated resolution, the party that receives the notice of occurrence should only contact the responding party if the principal party agrees that it is appropriate. However, the responding party must be contacted if the principal party chooses to proceed with conciliation and/or investigation prior to the commencement of this step.
Review of notice of occurrence with principal party	The party that receives the notice of occurrence, the principal party and the responding party (if contacted) must make every reasonable effort to resolve an occurrence. Reasonable effort includes, at a minimum, a review by the principal party and the party that receives the notice of occurrence to determine whether the action, conduct or comment of the responding party constitutes harassment and violence. During the review, and if necessary, clarification on the details of the occurrence and what the principal party is seeking in terms of resolution should be obtained. If, after the review, the party that receives he notice of occurrence and the principal party cannot jointly agree on whether an occurrence is an action, conduct or comment that is harassment and violence, if the principal party wishes to proceed with the resolution process they may choose from the following options: • A negotiated resolution • Conciliation (if the responding party agrees); and/or • An investigation The party that receives the notice of occurrence, the principal party and the responding party (if contacted) must make every reasonable effort to resolve an occurrence before the matter is referred to an investigator.	Reasonable efforts must commence no later than **forty-five (45) days** after the day on which the notice of occurrence is provided.

Step	Description	Time Period
Commencement of negotiated resolution	A negotiated resolution is any form of communication between the participating parties to discuss the occurrence and attempt to reach an agreement on possible actions to resolve the occurrence. A negotiation resolution and an investigation may run as parallel processes. However, once the investigator's report is provided to the employer, the occurrence can no longer be resolved through negotiated resolution. An employer can ask an investigator to suspend the investigation if the principal party wishes to engage in negotiated resolution, but this does not extend the **one (1) year** time period in which to complete the resolution process.	Reasonable efforts to resolve an occurrence must commence no later than **forty-five (45) days** after the day on which the notice of occurrence is provided. The party that receives the notice of occurrence must provide **monthly updates** regarding the status of the resolution process to: • The principal party, beginning on the first month after the month in which the notice is provided and ending on the month in which the resolution process is completed; and • The responding party, beginning on the first month after the month in which the responding party is first contacted and ending on the month in which the resolution process is completed.
Commencement of conciliation [optional]	Conciliation is a discussion or series of discussions that is mediated by a neutral third party who is there to facilitate the discussion(s) and assist the parties involved in reaching a resolution. A conciliator can be a professional mediator, a supervisor, an Elder, a religious figure, a colleague, etc. If the principal party and responding party agree, they may engage in a conciliation. The principal party and responding party must agree on the person to facilitate it. A conciliation and an investigation may run as parallel processes. However, once the investigator's report is provided to the employer, the occurrence can no longer be resolved through conciliation. An employer can ask an investigator to suspend the investigation if the principal party wishes to engage in conciliation, but this does not extend the **one (1) year** time period in which to complete the resolution process.	No explicit time period for commencement of a conciliation is provided. Reasonable efforts to resolve an occurrence must commence no later than **forty-five (45) days** after the day on which the notice of occurrence is provided. The party that receives the notice of occurrence must provide **monthly updates** regarding the status of the resolution process to: • The principal party, beginning on the first month after the month in which the notice is provided and ending on the month in which the resolution process is completed; and • The responding party, beginning on the first month after the month in which the responding party is first contacted and ending on the month in which the resolution process is completed.

Step	Description	Time Period
Commencement of investigation	If an occurrence is not resolved through negotiated resolution or conciliation, an investigation of the occurrence must be carried out (if the principal party requests it). This requirement applies whether or not the employer believes all parties have made reasonable efforts to resolve the occurrence. The party that receives notice of occurrence must provide the principal party and responding party with notice an investigation is to be carried out. The investigator must be one of the following: a. If the employer an applicable partner have jointly developer or identified a list of persons who may act as investigator, an inspector from that list (who must have the prescribed knowledge, training and experience. b. In any other case, a person that is agreed to by the principal party, responding party and party that receives the notice of occurrence who has the prescribed knowledge, training and experience OR if there is no agreement within **sixty (60) days** after notice of the investigation is provided, a person among those whom the Canadian Centre for Occupational Health and Safety identifies as having the prescribed knowledge, training and experience. The person or party who proposes a person to act as investigator must provide the other persons and parties with the following information: • The investigator's name; • If the investigator is an employee of the employer, their job title and the name of their immediate supervisor; • A description of their knowledge, training and experience demonstrating they meet the prescribed requirements; and • A description of any relevant experience.	No explicit time period for commencement of an investigation is provided. Reasonable efforts to resolve an occurrence must commence no later than **forty-five (45) days** after the day on which the notice of occurrence is provided. The party that receives the notice of occurrence must provide **monthly updates** regarding the status of the resolution process to: • The principal party, beginning on the first month after the month in which the notice is provided and ending on the month in which the resolution process is completed; and • The responding party, beginning on the first month after the month in which the responding party is first contacted and ending on the month in which the resolution process is completed.

Step	Description	Time Period
Completion of the investigator's report	Party that receives the notice of occurrence must provide the investigator with all information that is relevant to the investigation. Upon completion of the investigation, the investigator must prepare a report setting out the following information: • A general description of the occurrence; • Their conclusions, including those related to the circumstances in the workplace that contributed to the occurrence; and • Their recommendations to eliminate or minimize the risk of a similar occurrence. The investigator's report must not reveal, directly or indirectly, the identity of persons who are involved in an occurrence or the resolution process for an occurrence. The employer must provide a copy of the investigator's report to the principal party, responding party, the workplace committee or health and safety representative and, if the party that receives the notice of occurrence was the designated recipient, to the designated recipient. If the occurrence is resolved through negotiated resolution or conciliation before the investigator provides their report, the investigation must be discontinued and no investigator's report is completed.	No explicit time period for completion of the investigator's report is provided. The party that receives the notice of occurrence must provide **monthly updates** regarding the status of the resolution process to: • The principal party, beginning on the first month after the month in which the notice is provided and ending on the month in which the resolution process is completed; and • The responding party, beginning on the first month after the month in which the responding party is first contacted and ending on the month in which the resolution process is completed.
Joint implementation of the investigator's recommendations	The employer and workplace committee or health and safety representative must jointly determine which of the recommendations set out in the investigator's report are to be implemented. The employer must reasonably attempt to come to an agreement with the workplace committee or health and safety representative regarding which recommendations to implement. If the parties cannot agree on which recommendations should be implemented, the employer's decision on the matter prevails. However, the employer must document its decision and the reason for that decision, and keep a record of this decision and its reasons for 10 years. If an employee believes their employer's decision not to implement a recommendation is a failure to protect their health and safety they may engage the internal complaint resolution process under the Code and/or may be able to file a grievance under their collective agreement or file a complaint under the *Canadian Human Rights Act* (as applicable).	No explicit time period for implementation of the investigator's recommendations is provided. The party that receives the notice of occurrence must provide **monthly updates** regarding the status of the resolution process to: • The principal party, beginning on the first month after the month in which the notice is provided and ending on the month in which the resolution process is completed; and • The responding party, beginning on the first month after the month in which the responding party is first contacted and ending on the month in which the resolution process is completed.

Step	Description	Time Period

Completion of the resolution process	The resolution process is completed when:
	• If a workplace assessment is required, the review and, if necessary, update of the assessment is carried out;
	• The occurrence is resolved after
	  • the initial review of the notice of occurrence if the identity of the principal party from the notice of occurrence could not be determined
	  • a negotiated resolution, if the principal party and party that received the notice of occurrence jointly determine that the occurrence does not meet the definition of harassment and violence, or
	  • a conciliation; or
	• Upon receipt of the investigator's report, the employer implements the recommendations of the investigator.
		Resolution process must be completed within **one (1) year** after the day on which the notice of occurrence is provided.
		If the principal party or responding party is temporarily absent from work for more than ninety (90) consecutive days after the day on which notice of occurrence is provided, the employer must ensure the resolution process is completed within the later of:
		• **One (1) year** after the day on which notice of occurrence is provided; and
		• **Six (6) months** after the day on which the party returns to work

The following information should be included in monthly status updates provided to the principal party and responding party by the party that receives the notice of occurrence (i.e. the employer or designated recipient, as applicable):

- The process that is being followed
- The status on the review and update of the workplace assessment
- The status on timelines for the selection and/or hiring, if applicable, of a conciliator
- The status on timelines for the selection and/or hiring, if applicable, of an investigator
- The status of the investigation report
- The status on implementing the recommendations from the investigator's report

The investigator cannot provide monthly status updates instead of the party that receives the notice of occurrence.

ABOUT DENTONS

Dentons is the world's largest law firm, connecting top-tier talent to the world's challenges and opportunities with 20,000 professionals including 12,000 lawyers, in more than 200 locations, in more than 80 countries. Dentons' polycentric and purpose driven approach, commitment to inclusion and diversity, and award winning client service challenge the status quo to advance client interests.

dentons.com

CSBrand-60700 Workplace Harassment and Violence Regulations-2 — 07/06/2021

Law Society of Ontario | Barreau de l'Ontario

TAB 8

14th In-House Counsel Summit

Contract Drafting Primer: Critical Insights for In-House Counsel (PowerPoint)

Mark Galati
Hatch Ltd.

Geoff Hall
McCarthy Tétrault LLP

February 27, 2024

cpd

Contract Drafting Primer: Critical Insights for In-House Counsel

14th In-House Counsel Summit, Law Society of Ontario
February 27, 2024

Mark Galati, Hatch Ltd.
mark.Galati@hatch.com

Geoff R. Hall, McCarthy Tétrault LLP
ghall@mccarthy.ca

Roadmap

- The litigator's view
  - How things work if a contract is litigated
  - Eight fundamental precepts of contractual interpretation
- The transactional lawyer's view
  - How things actually work when negotiating in the real world

Eight fundamental precepts of contractual interpretation

1. Words and their context.
2. A contract is interpreted as a whole with meaning given to all provisions.
3. The factual matrix.
4. The organizing principle of good faith.
5. Interpretation is an objective exercise.
6. Commercial efficacy.
7. Every effort should be made to find a meaning.
8. A contract is interpreted as of the date it was made.

1. Words and their context

The principle

The primary (if not sole) goal of interpreting contracts is to achieve interpretive accuracy. Interpretive accuracy requires placing language in its proper context.

The drafting lesson

Do not just focus on literal meaning. Consider how the contractual language will be understood in context.

2. Interpreted as a whole with meaning given to all provisions (part 1)

The principle

"[T]he various clauses of a contract cannot be considered in isolation but must be given an interpretation that takes the entire agreement into account.": *Canadian Newspapers Co. v. Kanda General Insurance Co.* (1996), 30 O.R. (3d) 257 (C.A.).

Includes consideration of interrelated contracts entered into as part of a composite transaction: *Downey v. Ecore*, 2012 ONCA 480.

2. Interpreted as a whole with meaning given to all provisions (part 2)

The drafting lesson

When there is contentious negotiation, do not just focus on the disputed words. Make sure the resolution of the disputed words accords with the agreement as a whole and interrelated contracts.

Consider the contract and interrelated contracts together. Inconsistencies can lead to interpretive disputes or a court adopting an interpretation you do not want.

3. The factual matrix (part 1)

The principle

Consists of the background facts known to both parties at the time of contracting; includes “absolutely anything” that could affect the way the language would reasonably be understood; but it cannot overwhelm the words of the agreement: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 57-58.

3. The factual matrix (part 2)

The drafting lesson

Use recitals to specify the factual matrix.

A question: does the parol evidence rule still exist in light of the role of the factual matrix?

Sattva said yes, but the better answer is probably "not so much". In general, the parol evidence rule now applies only: (i) to preclude evidence of subjective intent ("in entering into the agreement, Seller intended…"); and (ii) if there is a direct contradiction between a written agreement and oral evidence.

4. The organizing principle of good faith (part 1)

The principle

There is a general organizing principle of good faith that underlies many facets of contract law; it requires that parties must perform contractual obligations honestly, reasonably, and not capriciously or arbitrarily: *Bhasin v. Hrynew*, 2014 SCC 71 at paras. 63 and 93.

4. The organizing principle of good faith (part 2)

The actual extent of the principle

A contracting party may not knowingly mislead a counterparty: *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45.

There is a duty to exercise contractual discretion in good faith; it requires the parties to exercise their discretion in a manner consistent with the purposes for which it was granted in the contract: *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 at para. 63.

4. The organizing principle of good faith (part 3)

The drafting lesson

Be mindful of when the law may imply a duty of good faith to change the literal meaning of the language used, in particular clauses purporting to give absolute discretion.

5. Interpretation is an objective exercise

The principle

"The goal in interpreting an agreement is to discover, objectively, the parties' intention at the time the contract was made.": *Gilchrist v. Western Star Trucks Inc.* (2000), 73 B.C.L.R. (3d) 102 (C.A.) at para. 17.

The drafting lesson

Be aware that if there is a discrepancy between what you intend and what is reasonably conveyed to the counterparty, the latter will prevail. Evidence of subjective intention is never admitted in an interpretive dispute.

6. Commercial efficacy

The principle

Commercial contracts must be interpreted in accordance with sound commercial principles and good business sense: *Scanlon v. Castlepoint Development Corp.* (1992), 11 O.R. (3d) 744 (C.A.) at 770-1.

The drafting lesson

Help the court to understand the commercial purpose of the contract (recitals again).

7. Every effort should be made to find a meaning

The principle

Difficulties in interpretation do not invalidate a provision as long as some definite meaning can be extracted: *Marquest Industries Ltd. v. Willows Poultry Farms Ltd.* (1968), 1 D.L.R. (3d) 513 (B.C.C.A.).

The drafting lesson

Make sure no court ever has to invoke this precept for a contract you have drafted. It can help save bad drafting, but if a court has to rely on it for your contract something has gone seriously wrong.

8. A contract is to be interpreted as of the date it was made

The principle

"It is a fundamental rule of contractual interpretation that the intention of the parties is to be determined as of the time when the contract is made": *Davidson v. Allelix Inc.* (1991), 7 O.R. (3d) 581 (C.A.) at 587.

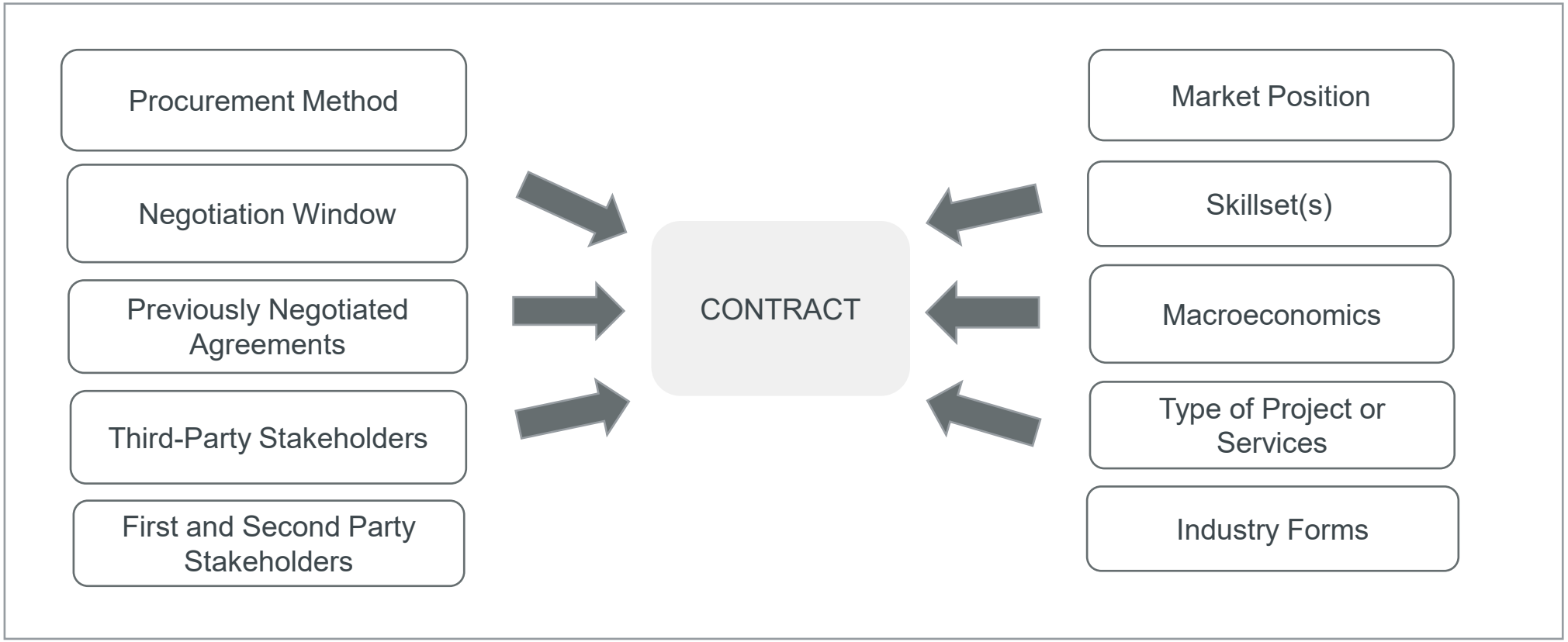
The drafting lesson

If you want the contractual relationship to evolve over time, that must be made clear as the original intention of the parties.

Drafting Challenges: The In-House Perspective

- “A well drafted contract is simple, clear and accurate. It avoids ambiguity by excluding references to topics that are either irrelevant or unnecessary to the transaction that it is meant to facilitate.”
- Q: If most drafters agree with this statement, why do so many contracts fail to achieve these goals?
- A: Contracts are neither drafted nor negotiated in a vacuum
- context under which negotiations or drafting takes place materially impacts the quality of the contract

How Context Influences a Contract



Manifestations

- inconsistent clauses

  (ex. separate definitions of the standard of performance that are incompatible with one another)

- schedules and appendices
  - *poorly drafted (usually due to time constraints)*
  - *do not align with main text (ex. scope of services is a frequent offender)*
- frequent use of carve outs

  (ex. notwithstanding, notwithstanding and superseding, for clarity…)

- provisions with no obvious connection to underlying transaction

  (ex. reference to safety obligations when work product is a study or report)

- incorporation by reference

  (ex: hyperlinks, references to other agreements or corporate policies)

- use of words that beg for interpretation

  (i.e. acting reasonably, promptly, sufficient, necessary or implied, mutually agreeable)

Dealing with Context

1. Plan so that you can achieve internal stakeholder alignment
2. Review commercial offers and responding proposals
3. Review precedent agreements (be prepared to defend distinctions or advocate for similarities)
4. Understand the market and your client's position in it!
   - big fish in a small pond or a small fish in a big pond?
5. Accept that you can't ~~win~~ fight 'em all
6. When low (or no) leverage, muddy waters can be better than clear springs (caveat)
7. Use of industry standard forms as a solution to deadlock
8. Lean-In (avoid victim or cynic mentality in tough situations)

mccarthy tétrault

VANCOUVER

Suite 2400, 745 Thurlow Street
Vancouver BC V6E 0C5
Tel: 604-643-7100
Fax: 604-643-7900
Toll-Free: 1-877-244-7711

CALGARY

Suite 4000, 421 7th Avenue SW
Calgary AB T2P 4K9
Tel: 403-260-3500
Fax: 403-260-3501
Toll-Free: 1-877-244-7711

TORONTO

Suite 5300, TD Bank Tower
Box 48, 66 Wellington Street West
Toronto ON M5K 1E6
Tel: 416-362-1812
Fax: 416-868-0673
Toll-Free: 1-877-244-7711

MONTRÉAL

Suite MZ400
1000 De La Gauchetière Street West
Montréal QC H3B 0A2
Tel: 514-397-4100
Fax: 514-875-6246
Toll-Free: 1-877-244-7711

QUÉBEC CITY

500, Grande Allée Est, 9e étage
Québec QC G1R 2J7
Tel: 418-521-3000
Fax: 418-521-3099
Toll-Free: 1-877-244-7711

NEW YORK

55 West 46th Street, Suite 2804
New York NY 10036
UNITED STATES
Tel: 646-940-8970
Fax: 646-940-8972

LONDON

1 Angel Court, 18th Floor
London EC2R 7HJ
UNITED KINGDOM
Tel: +44 (0)20 7786 5700
Fax: +44 (0)20 7786 5702