Law Society of Ontario | Barreau de l'Ontario

13th In-House Counsel Summit

CO-CHAIRS

Angela Giancaterini, Senior Corporate Counsel
Kellogg Canada Inc.

Vinay Mehta, General Counsel
Alectra Utilities Corporation

February 16, 2023

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Law Society of Ontario | Barreau de l'Ontario

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Vinay Mehta, General Counsel, *Alectra Utilities Corporation*

February 16, 2023
9:00 a.m. to 4:00 p.m.
Total CPD Hours = 5 h Substantive + 30 m Professionalism
+ 30 m EDI Professionalism

Law Society of Ontario
Donald Lamont Learning Centre
130 Queen St. W.
Toronto, ON

SKU CLE23-00202

Agenda

9:00 a.m. – 9:05 a.m. **Welcome**

Angela Giancaterini, Senior Corporate Counsel, *Kellogg Canada Inc.*

Vinay Mehta, General Counsel, *Alectra Utilities Corporation*

9:05 a.m. – 9:35 a.m.	**Privacy Legislative Developments- Quebec and Federal** Daniel Fabiano, *Fasken Martineau DuMoulin LLP* Melissa Tehrani, *Gowling WLG (Canada) LLP* (Montreal)
9:35 a.m. – 10:05 a.m.	**Latest Employment Law Updates and Insights** (10m P) James Butlin, AVP & Managing Counsel, Employment Law*, Sun Life* Daniel Fogel, *Hicks Morley Hamilton Stewart Storie LLP*
10:05 a.m. – 10:35 a.m.	**The Role of In-House Counsel During a Recession** Sanjay Kutty, Co-Founder*, Spark Law Professional Corporation* Kyle Plunkett, *Aird & Berlis LLP*
10:35 a.m. – 10:45 a.m.	**Question and Answer Session**
10:45 a.m. – 11:00 a.m.	**Break**
11:00 a.m. – 11:30 a.m.	**EDI in Corporate Canada** (30 m e) Dal Bhathal, *The Counsel Network – A Caldwell Company* Jennifer Kulyk, Legal Counsel, *Kellogg Canada Inc.*
11:30 a.m. – 11:50 a.m.	**Shining the Light on Dark Patterns. What are they and are they Useful, Unethical or Just Clever Marketing?** Alice Tseng, *Smart & Biggar LLP*
11:50 a.m. – 12:00 p.m.	**Question and Answer Session**

12:00 p.m. – 1:00 p.m.	**Lunch**
1:00 p.m. – 1:20 p.m.	**Mental Health and Wellness in the Legal Profession** (30 mP) Carole Dagher, VP Legal, *Loblaw Companies Limited* Beth Beattie, Senior Counsel, *Ministry of the Attorney General*
1:20 p.m. – 1:30 p.m.	**Question and Answer Session**
1:30 p.m. – 2:00 p.m.	**Litigation Risks and Greenwashing Claims** Conor Chell, *MLT Aikins LLP* (Calgary) Anton Tabuns, Senior Counsel, Sustainability, *BMO Financial Group LLP*
2:00 p.m. – 2:30 p.m.	**Cybersecurity Breaches: Are You Ready?** (15mP) Imran Ahmad, *Norton Rose Fulbright LLP* Terrie-Lynne Devonish, *Altus Group Limited*
2:30 p.m. – 2:40 p.m.	**Question and Answer Session**
2:40 p.m. – 2:55 p.m.	**Break**
2:55 p.m. – 3:25 p.m.	**Best Practices for Managing Disputes and Litigation In-House** (10 mP) Andrew Bernstein, *Torys LLP* Catherine Koch, National Quality Counsel, Aviva Trial Lawyers, *Aviva Canada Inc.*

3:25 p.m. – 3:55 p.m.	**Top Ten Things to Consider When Negotiating Hardware/Software Agreements** Wesley Ng, *Stikeman Elliott LLP* Amy Hu, Regional Vice President Legal, North America, *Newmont Corporation*
3:55 p.m. – 4:00 p.m.	**Question and Answer Session**
4:00 p.m.	**Program Ends**

This program qualifies for the 2024 LAWPRO Risk Management Credit

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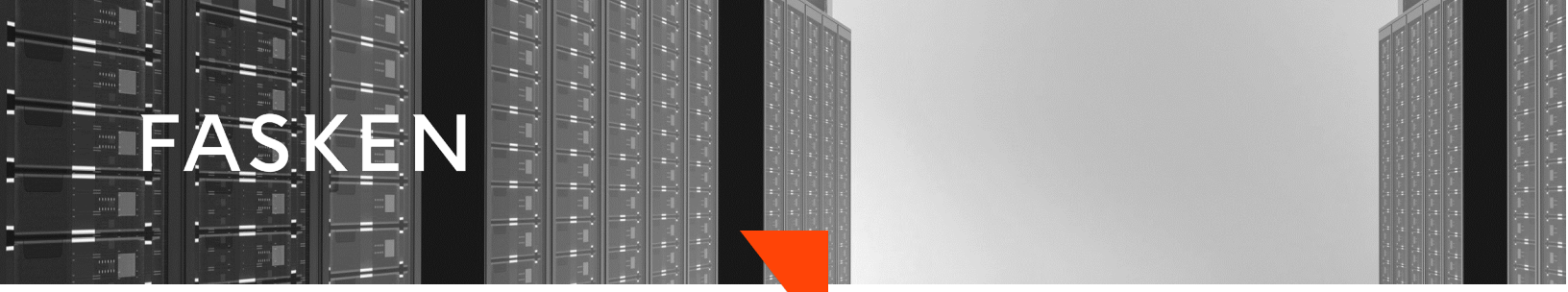
TAB 1A

13th In-House Counsel Summit

Bill C-27: Federal Privacy Law Modernization

Daniel Fabiano
Fasken Martineau DuMoulin LLP

February 16, 2023



January 30, 2023

Daniel Fabiano
Partner
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Bill C-27: Federal Privacy Law Modernization

The following is a high-level summary of the changes proposed by Bill C-27, the *Digital Charter Implementation Act, 2022*. That bill was introduced and completed first reading on June 16, 2022, and is (as of the date of this summary) currently at second reading.

At this time, we do not know when Parliament will enact Bill C-27, or whether there will be a transition-in period that will delay the coming into force of any of its requirements (although we expect a transition-in period of approximately a year or more, consistent with the original enactment of the current federal statute, and the recent privacy reform in Quebec).

In addition to summarizing the proposed requirements and features of the new legislation, this summary includes practical suggestions for organizations who will need to review and update their privacy compliance program and related activities ahead of the new requirement coming into force. Those suggestions are flagged with a magnifying glass icon.

1. Introduction

Bill C-27 would enact three new statutes and repeal the privacy aspects of the federal *Personal Information Protection and Electronic Documents Act* (leaving the electronic documents aspects in force). Those statutes are:

- the ***Artificial Intelligence and Data Act*** ("*AIDA*") to regulate "artificial intelligence systems" and the processing of data in connection with AI systems;
- the ***Consumer Privacy Protection Act*** ("*CPPA*") to replace Part 1 of the *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*"), which is the part of *PIPEDA* that addresses privacy in the private sector; and
- the ***Personal Information and Data Protection Tribunal Act*** ("*PIDPT*") establishing the Personal Information and Data Protection Tribunal ("Tribunal"), which would hear recommendations of, and appeals from, decisions of the Privacy Commissioner of Canada.

2. *Artificial Intelligence and Data Act*

Note: In recent months, some Members of Parliament have proposed separating *AIDA* from Bill C-27. Such a move would seek to enact *CIPPA* and *PIDPT*, but defer enactment of the *AIDA*. As of the date of this summary, such a change has not occurred.

Under the *AIDA*, "artificial intelligence system" means (parsed for ease of comprehension):

- a technological system that autonomously or partly autonomously processes data related to human activities;
- through the use of a genetic algorithm, a neural network, machine learning or another technique; and
- in order to generate content or make decisions, recommendations, or predictions.

The *AIDA* regulates the following activities:

- designing, developing, or making available for use an artificial intelligence system (referred to in this summary as an "AI system") or managing the operations of an AI system; and
- processing or making available for use any data relating to human activities for the purpose of designing, developing, or using an AI system.

The *AIDA* imposes requirements on any person who, as part of engaging in any of the above regulated activities, processes or makes available for use anonymized data. Specifically, that person will be required to establish measures as to (a) how the data is anonymized, and (b) the use or management of anonymized data. The AIDA does not define anonymized data.

Otherwise, most of *AIDA*'s proposed regime applies to "high-impact AI systems" – and which systems are considered "high-impact AI systems" will be defined in future regulations. This makes the applicable of *AIDA* difficult to discuss.

The *AIDA* will require impose a variety of requirements regarding the use of high-impact AI systems, including: various risk mitigation measures; issuing a public AI statement; and record-keeping and reporting obligations. It also empowers a new "AI & Data Commissioner" to oversee and enforce *AIDA.*

Like the European Union's proposed *Artificial Intelligence Act*, *AIDA* is risk-based and focuses on mitigating the risks of harm and bias in the use of "high-impact" AI systems. However, *AIDA* is not as prescriptive as the EU's proposed law, which sets out a more detailed methodology for classifying "high-risk" AI systems and expressly prohibits a broader range of harmful AI practices, such as certain uses of biometric identification systems by law enforcement.

Still, both proposed laws aim to regulate AI in a balanced manner which protects against individual harm but is not overly restrictive of technological development. Whether *AIDA* will be relevant for a given organization will generally hinge on how a future regulation defines a "high-impact AI system" and whether the organization develops or uses "high-impact AI systems".

3. *Consumer Privacy Protection Act*

Purpose and Scope

Like *PIPEDA*, the *CPPA* would impose rules governing the protection of personal information in a manner that recognizes both: the right of privacy of individuals; and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

Also, the *CPPA* will apply to organizations that handle personal information in the course of **commercial activities**, if that information crosses interprovincial or international borders and within provinces that do not have their own "substantially similar" provincial privacy law.

The discussion below highlights some of the key changes that are introduced in the *CPPA*, which differ from current requirements under *PIPEDA* – and a few "action items" to consider.

Appropriate Purposes Analysis

Under *PIPEDA*, an organization may collect, use or disclose personal information only for purposes that a reasonable person would consider appropriate in the circumstances. The *CPPA* takes this a step further by codifying Commissioner guidance on the factors to consider in determining whether particular purposes are appropriate. Specifically, before collecting, using or disclosing personal information, the *CPPA* requires that organizations consider whether the purpose and manner of doing so is appropriate to do so in light of:

- **sensitivity** of personal information;

- whether the purposes underlying the collection, use or disclosure represent **legitimate business needs;**
- **effectiveness** of the collection, use or disclosure in meeting those legitimate business needs;
- are there **less intrusive means** of achieving those purposes (at a comparable cost and with comparable benefits); and
- whether any loss of privacy is **proportionate** to benefits.

By making these specific considerations mandatory, the *CPPA* requires organizations to take greater care in deciding what personal information to collect, use and disclose. This means that organizations will need to implement (and should document) more "reflection" before taking action with personal information – which may require the organization's privacy officer or delegates to be involved in more decision-making within the organization.

- Review your organization's existing collections, uses and disclosures against these factors.

  Note: An "appropriate purposes" analysis is required even if an individual has consented to a particular collection, use or disclosure. The analysis required even if consent is not required.

Requirements for Consent

Like *PIPEDA*, the *CPPA* is consent-based, but expands (1) the requirements for obtaining consent; and (2) exceptions to consent.

To obtain valid consent, organizations must notify individuals, in plain language, before or at the time of collection, of:

- the type of personal information they collect, use, and disclose;
- the purposes, manner, and consequences of collection, use, and disclosure; and
- identify any third parties to whom personal information will be disclosed.

The expanded exceptions to consent (meaning that consent is not required) include where:

- the collection or use of personal information is for certain **business activities**, including:
  - an activity required to provide products or services to an individual,
  - an activity that is necessary for the organization's information system or network security, or
  - for the safety of a product or service that the organization provides; and
- the collection and use of personal information is for a **legitimate interest** "that outweighs any potential adverse effect on the individual" – provided that the organization identifies any potential adverse effect on the individual and takes reasonable measures to reduce or mitigate those effects prior to relying on the exception; and keeps records of that assessment.

In both cases, these exceptions may *only* be relied upon if:

- the individual would expect the collection or use; and
- it is not for the purposes of influencing the behaviours or decisions of the individual (e.g., marketing).

The *CPPA* also clarifies two aspects of *PIPEDA* that are not expressly stated in *PIPEDA* but assumed to be inherent in that law – namely that organizations may also use personal information to **de-identify** it, or transfer it to a **service provider**, without consent.

- Take inventory of your collections, uses and disclosures of personal information
- Validate consent forms and data collection points against the requirements
- Validate application of new exceptions to consent – including new exceptions for "business activities" and for "legitimate purposes". In particular, if relying on the "legitimate interests" exception, ensure the adverse effects analysis and mitigation measures are documented.

Privacy Management Program

PIPEDA currently imposes a general requirement that an organization implement internal privacy policies and procedures regarding privacy compliance. The *CPPA* expands on that requirement.

The *CPPA* requires organizations to implement a "privacy management program" which includes internal policies, practices and procedures to fulfil *CPPA* requirements, with specific references to procedures about: the protection of personal information; how requests for information and complaints are received and dealt with; the training and information provided to the organization's staff respecting its policies, practices and procedures; and the development of materials to explain the organization's privacy policies and procedures.

The program must account for the volume and sensitivity of the personal information under the organization's control.

- Review existing policies and procedures to identify compliance gaps
- Consider often over-looked topics that have been the subject of Commissioner guidance, such as:
  - record retention (including email and electronic records) policies and a schedule of retention periods (including whether personnel are complying); and
  - video surveillance policies and procedures (even routine safety / security measures).

Openness and Transparency

As with *PIPEDA*, the *CPPA* requires organizations to make information readily available, in **plain language**, that explains their privacy policies and practices under the *CPPA*. This is the sort of summary that often appears as a "privacy policy" posted on an organization's website.

Under the *CPPA*, public-facing descriptions of privacy practices must address:

- the **type** of personal information under the organization's control;
- how personal information is **used** (including how any consent exceptions are applied);
- how **automated decision system** are used to make predictions, recommendations or decisions about individuals that could have a significant impact on individuals;
- if the organization carries out any **international or interprovincial transfer or disclosure** of personal information;
- **retention periods** for sensitive personal information;
- how individuals may **request** disposal of or access to their personal information; and
- **contact information** of individual to whom complaints / requests may be made.

How organizations are to operationalize these proposed requirements is not always clear. Notably, it is unclear what level of detail is needed (with extensive detail weighed against the plain language requirement, and the need for ready comprehension by individuals). Also, for the discussion of how consent exceptions are applied, would this

simply be a recitation of the fairly comment exceptions that often appear in public-facing privacy notices (e.g., we may use or disclose your personal information as part of investigations into breaches of law or contract, including disclosures to law enforcement authorities if appropriate)? Or is it something more specific? This seems inconsistent with the notion that consent exceptions permit certain activities to occur *without* the knowledge or consent of the individual – if no knowledge or consent is required, why must an organization then describe how it applies exceptions to consent (particularly if it must do so with greater specificity)? Normally, an organization applies consent exceptions as the need arises.

- Review existing privacy statements / notices against *CPPA* requirements to identify compliance gaps, and ensure they use plain language.

De-Identification

De-identifying personal information is a common method of retaining useful data without infringing on the privacy of individuals. If information is not identifiable to a particular individual, then it is not subject to *PIPEDA*.

Like Québec's new privacy law, the *CPPA* distinguishes between anonymized and de-identified personal information.

- It defines "**anonymize**" as irreversibly and permanently modifying personal information, in accordance with generally accepted best practices, to ensure that no individual can be identified from the information, whether directly or indirectly, by any means. **The *CPPA* does not apply to anonymized information.**
- It defines "**de-identify**" as modifying personal information so that an individual cannot be directly identified from it, though a risk of the individual being identified indirectly remains. **The *CPPA* will apply to de-identified information, except in certain contexts.**

In particular, the *CPPA* still applies to de-identified information, *except*, most notably, in connection with research, business transactions, and certain access rights of individuals. This means that, unlike *PIPEDA*, the *CPPA* seeks to regulate information that is not personal information, per se. This aspect of the *CPPA* will require significant attention once the *CPPA*'s provisions are finalized – as organizations benefit from considerable latitude in their handling of de-identified personal information at present.

The *CPPA* confirms that personal information can be de-identified without consent, provided that the de-identification measures are proportionate to the purpose of use and the sensitivity of the information.

- Review how de-identified information is created, used and/or disclosed, considering:
  - proportionality of de-identification measures; and
  - whether an exception to treating the information as personal information applies.
- Review how anonymous information is created and assess against best practices.

Automated Decision Systems

Independently of the *AIDA*, the *CPPA* also addresses the impacts on privacy rights and personal information protection in relation to automated decision systems that replace the judgement of a human decision maker.

It defines "automated decision system" ("ADS") as: any technology that assists or replaces the judgment of human decision-makers through the use of a rules-based system, regression analysis, predictive analytics, machine learning, deep learning a neural network or other technique.

ADS rules will only apply to systems that may have a "significant impact" on individuals. However, the *CPPA* does not define factors that help determine what is "significant". One guidepost might be the "significant harm" definition used for privacy breaches – for example, could the automated decision system generate decisions that humiliate

individuals, damage their reputation – such as making decisions that could send marketing communications to the individual for controversial products/services.

Organizations that use automated decision systems to make a decision that could have a significant impact on an individual must, on request by the individual, explain:

- the type of personal information that was used to make the prediction, recommendation or decision;
- the source of the information; and
- the reasons or principal factors that led to the prediction, recommendation or decision.

- Inventory when ADS are used (it's a broad concept!)
- Review ADS to assess whether they have a "significant impact"
- Prepare the description of ADS with significant impact to reply to requests

Minors

PIPEDA does not expressly treat minors as being different from adults, although there is Commissioner guidance on the subject.

The *CPPA* would treat the personal information of minors as sensitive information and imposes heightened protection for the handling of such personal information, and expressly enables parents to act on behalf of their children to protect their rights. Of note, the *CPPA* does not define a "minor" or provide a specific age threshold. Presumably, the *CPPA* would defer to provincial law as to when a person reaches the age of majority and would be considered an for legal purposes in Canada. Even so, this creates some ambiguity as provinces define those age thresholds differently.

- Revisit practices relating to handling personal information of anyone under 18
- Revisit consents of minors (if applicable to your organization)

New Rights for Individuals: Disposal and Data Mobility

The *CPPA* creates a new right for individuals to request, in writing, the disposal of their personal information. Organizations receiving such requests must dispose of the personal information if under its control (including in hands of service providers) as soon as feasible after receiving the request.

Exceptions permitting an organization to deny such a request include (among others) where:

- disposal would result in disposal of personal information about another individual;
- disposal is prevented by law or the reasonable terms of a contract;
- the request is vexatious or made in bad faith; and
- if the information is scheduled to be disposed of according to record retention policy (if remaining period until disposal is explained to individual) – but not if the information is about a minor.

Any refusal of a disposal refusal must be in writing, and must explain the reason for refusal, and how to engage an organization's internal privacy complaint process or complain to the Commissioner.

This represents the Canadian version of the right to erasure or right to be forgotten under the GDPR.

The *CPPA* also provides the statutory foundation for future regulations on data mobility. Data mobility means that an individual may direct an organization to disclose their personal information that it has collected to another organization designated by the individual. The right will only apply if both organizations are subject to a data mobility framework to be provided under the regulations.

This represents the Canadian version of data portability under the GDPR.

However, without the regulations, it is unclear how the *CPPA*'s data mobility provisions will work – or what impact it may have on various sectors (e.g., retail, health, financial).

- Can you accommodate requests to delete personal information (including back-up copies)?
- Do service provider arrangements permit you to flow through requests for disposal?

4. Enforcement and Penalties

The *CPPA*'s biggest changes, relative to *PIPEDA*, are its proposed enforcement model, consisting of new Commissioner powers, the creation of a new Tribunal, and the potential for the Tribunal to impose financial penalties if recommended by the Commissioner.

Separate from those financial penalties, there are also new offences and fines that can be imposed upon successful prosecution, as well as a private right of action for individuals.

New Commissioner Powers

The Commissioner can order than an organization to:

- take measures to comply with the *CPPA*;
- stop doing something that is in contravention of the *CPPA*;
- comply with the terms of a compliance agreement with the Commissioner; and
- make public any measures to correct the organization's policies, practices, or procedures under the *CPPA*.

The Commissioner may recommend a penalty to the Tribunal, but only if an organization fails to comply with specific *CPPA* provisions, e.g. (among a lengthy list), maintaining a privacy management program, limiting collection, ensuring service providers are suitably bound to comply with privacy obligations, complying with requirements around safeguards, retention periods, disposal). It is then up to the Tribunal to decide whether to impose a penalty (not the Commissioner).

This is a significant change, as under *PIPEDA* the Commissioner has no powers to compel an organization to remedy a breach of *PIPEDA*. For organizations that commit serious breaches or that refuse to correct them, the Commissioner could name (and shame) those companies in publicly released decisions. Aside from that, the Commissioner's only other recourse is to apply to Federal Court – an exceedingly rare event.

New Tribunal

The Tribunal is created by the *PIDPT* for the purpose of:

- hearing appeals of Commissioner findings and orders; and

- imposing penalties where recommended by the Commissioner (although not entirely clear, it seems that the Tribunal cannot impose a penalty without such a recommendation, although the Tribunal can vary the penalty recommended by the Commissioner).

The Tribunal has powers of a superior court of record. Before imposing a penalty, the Tribunal must give the impugned organization an opportunity to make representations.

The Tribunal's decisions, and the reasons for them, must be made publicly available (subject to appropriate measures to protect the identity of a complainant individual).

There are a number of open questions relating to the Tribunal – notably, who will be appointed to the Tribunal, which will consist of three to six members.

New Penalties

The maximum penalty the Tribunal can impose is the greater of $10,000,000 and 3% of the organization's gross global revenue. When determining whether imposing a penalty is appropriate, or the amount of the penalty to recommend or to impose, the *CPPA* sets out certain factors that both the Commissioner and the Tribunal must consider, notably:

- nature/scope of contravention;
- evidence of due diligence to avoid the contravention;
- whether reasonable efforts were made to mitigate/reverse contravention;
- (Tribunal specific) the organization's ability to pay, and likely impact of payment on organization's ability to carry on business; and
- (Tribunal specific) whether the organization derived any financial benefit.

The *CPPA* recognizes a due diligence defence – that is, the Tribunal must not impose a penalty if the organization establishes that it exercised due diligence to prevent the contravention. Also, a penalty cannot be imposed against an organization that is being prosecuted under the *CPPA*'s offences provisions.

Offences and Fines

Separate from penalties imposed by the Tribunal, the *CPPA* provides for fines for knowingly contravening certain provisions, notably: failing to report breaches of security safeguards; maintain records of breaches of safeguards; retain information subject to an access request; or using de-identified information to identify an individual; contravening whistleblower protections; or obstructing a Commissioner investigation, inquiry, or audit.

In these cases, a fine not exceeding the greater of $25,000,000 and 5% of an organization's annual gross global revenue may be imposed on indictment, or the greater of $20,000,000 or 4% of annual gross global revenues on summary conviction.

This represents a considerable change relative to the offence provisions in *PIPEDA* (under which an organization could face a fine of $100,000).

Also, it is important to remember that the offences provisions are separate from the penalties that the Tribunal can impose. The Commissioner and the Tribunal can impose financial penalties under the administrative regime discussed earlier, but do not prosecute offences discussed above; however, they can refer information regarding the possible commission of an offence to the Attorney General of Canada, who would be responsible for any ultimate prosecution.

We are not aware of any prosecutions having occurred under *PIPEDA*, and expect that prosecutions will be reserved for more egregious violations of the *CPPA*, with the Tribunal imposing the bulk of the penalties issued under the *CPPA*.

Private Right of Action

The *CPPA* provides individuals with a private right of action: an individual who is affected by an organization's contravention of the *CPPA* has a cause of action against the organization for damages for loss or injury that the individual has suffered as a result of the contravention. However, before an individual can make a claim:

- there must be a final determination by the Commissioner or the Tribunal that the organization contravened the *CPPA*; or
- the organization must have been prosecuted and convicted of an offence under the *CPPA*.

There is a 2 year limitation period for any such action (from the date that the individual becomes aware of either of the above events). Any action may be brought in the Federal Court or a superior court of a province.

This is another significant change in the federal privacy regime, and will no doubt lead to increased litigation and the potential for class action proceedings. It also means that organizations can face significant penalties imposed by the Tribunal, and then face claims under the private right of action.

Concluding Comments

The *CPPA*'s enforcement regime, coupled with the increased fines for offences and the private right of action, will make privacy compliance a high stakes endeavour. The potential consequences for non-compliance are severe.

This will undoubtedly cause many organizations to be more conservative in how they choose to handle personal information in the future.

We recommend that organizations begin to assess their privacy practices and compliance program against the new requirements, starting by understanding and documenting the flow of personal information within their organization, in particular:

- how and why personal information is collected, used and disclosed;
- to whom is it disclosed;
- which service providers are processing personal information and for what purposes;
- in what jurisdictions is personal information processed;
- in what systems / departments / offices are different types of personal information stored; and
- how long are different types of personal information retained.

With a complete picture of personal information flows, organizations will be well-positioned to assess how their policies and practices would measure up to the final version of the *CPPA* (when the time comes).

It is important to note that Bill C-27 is only at second reading. There is no indication as to when Bill C-27 may be enacted, or if enacted, when certain *CPPA* provisions may come into force, or how long a transition period would be. Assuming things proceed normally, the Bill will be referred to committee (likely the Standing Committee on Access to Information, Privacy and Ethics) for further review and recommendation, before ultimately receiving royal assent and passing into law.

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Law Society of Ontario | Barreau de l'Ontario

TAB 1B

13th In-House Counsel Summit

Quebec's Bill 64/Law 25

Canadian Privacy Breach Notification Requirements

Melissa Tehrani
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February 16, 2023

GOWLING WLG

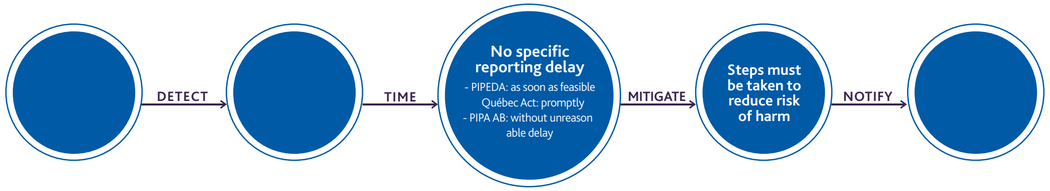
CANADIAN PRIVACY BREACH NOTIFICATION REQUIREMENTS[1]

- Federal privacy legislation is the Personal Information Protection and Electronic Documents Act ("PIPEDA")
- Québec's privacy legislation is the Act to modernize legislative provisions respecting the protection of personal information ("Québec Act")
- Alberta's privacy legislation is the Personal Information Protection Act ("PIPA AB")[2]

WHAT IS A PRIVACY BREACH?	WHO NEEDS TO NOTIFY WHOM?	WHEN IS NOTIFICATION MANDATORY?
	The principal organization having control of the personal information must notify the affected individuals and the relevant privacy regulators	
A **breach of security safeguards** is the loss of, unauthorized access to or unauthorized disclosure of personal information resulting from a breach of an organization's security safeguards that are referred to in clause 4.7 of Schedule 1 of PIPEDA, or from a failure to establish those safeguards.		When it is reasonable, in the circumstances, to believe that the breach of security safeguards creates a **real risk of significant harm** to an individual. Factors that are relevant to determining whether a breach of security safeguards creates a real risk of significant harm include the sensitivity of the personal information involved in the breach of security safeguards and the probability the personal information has been/is/will be misused.
A **confidentiality incident** is an unauthorized access, use or communication of personal information, loss of personal information, or other breach in the protection of such information.		When a confidentiality incident presents a **risk of serious injury**. Whether a particular incident presents a "risk of serious injury" depends on the sensitivity of the information, the anticipated consequences of its use, and the likelihood that the information will be used for injurious purposes.
Any **incident** involving the loss of or unauthorized access to or disclosure of personal information.	Office of the Information and Privacy Commissioner (the "OIPC")	When a reasonable person would consider, after any incident involving the loss of or unauthorized access to or disclosure of the personal information, that there exists a **real risk of significant harm**[3] to an individual as a result of the loss or unauthorized access or disclosure.

[1] Please note that this document does NOT touch on notification/reporting requirements under privacy public sector and health information laws. [2] Although not addressed in this document, please note that other Canadian jurisdictions may "effectively" mandate notification, even if not statutorily required, because failure to notify the individual may be considered a contravention of other privacy requirements or against other rules or laws. [3] It is worth noting that, in practice, Alberta's "real risk of significant harm" threshold has been set very low.

NOTIFICATION PROCESS



NOTIFICATION REQUIREMENTS TO PRIVACY REGULATORS: REQUIREMENTS BY JURISDICTION

Information about the organization			
Name of the organization	●	●	●
Contact information of a person within the organization who can answer questions about the breach	●	●	●
Description of the circumstances of the breach	●	●	●
Description of the cause of the breach, if known	●	●	●
Date or period during which the breach occurred (or approximate if unknown)	●	●	●
Date on which the organization became aware of the incident	●	●	●
Description of the personal information that is the subject of the breach if known.	●	●	●
If unknown, the reasons why it is impossible to provide such description.		●	
Number of individuals affected by the breach (or approximate if unknown)	●	●	●
Number of individuals affected by the breach in Québec (or approximate if unknown)		●	
Number of individuals affected by the breach in Alberta (or approximate if unknown)			●
Assessment of the risk of harm to individuals			●
Description of the elements that led the organization to conclude that there is a risk of serious injury to affected individuals		●	
Steps the organization has taken to reduce/mitigate the risk of harm to affected individuals	●	●	●
Steps the organization has taken or intends to take to notify affected individuals of the breach	●	●	●
Steps taken or planned, including those to prevent new incidents of the same nature (with timeline)		●	●
Updates to be provided to the CAI as soon as possible when known by the organization		●	
Other organizations (e.g. regulators) informed about the incident (if applicable)	●	●	●

NOTIFYING AFFECTED INDIVIDUALS: REQUIREMENTS BY JURISDICTION

Notice must be given directly to the affected individuals, unless prescribed circumstances for indirect notices are otherwise legislatively provided	●	●	●
Breach description			
Description of the circumstances of the breach	●	●	●
Date or period during which the breach occurred (or approximate if unknown)	●	●	●
Description of the personal information that is the subject of the breach if known.	●	●	●
If unknown, the reasons why it is impossible to provide such description.		●	
Description of risk mitigation steps			
Steps the organization has taken to reduce/mitigate the risk of harm to affected individuals	●	●	●
Steps affected individuals could take to reduce/mitigate the risk of harm	●	●	
Contact information of a person who can answer for the organization questions about the breach	●	●	●

RECORD-KEEPING OBLIGATIONS

Breach description		
Description of the circumstances of the breach	●	●
Date or period during which the breach occurred (or approximate if unknown)	●	●
Number of individuals impacted by the breach and the number of individuals residing in Québec (or approximate, if unknown)		●
Description of the personal information that is the subject of the breach if known.	●	●
If unknown, the reasons why it is impossible to provide such description.		●
Description of risk mitigation steps		
Description of the elements that led to conclude that there is a risk of serious injury to affected individuals		●
Assessment of the risk of harm to individuals	●	
If the incident presents a risk of serious injury/real risk of significant harm, the dates of transmission of the notices to the privacy regulator and to the persons concerned. If indirect notification, the rationale justifying it	●	●
Steps the organization has taken to reduce the risk of harm to affected individuals		●
Other		
Date on which the organization became aware of the incident		●
Minimum duration for which the breach record is kept	2 years	5 years

Law Society of Ontario | Barreau de l'Ontario

TAB 2A

13th In-House Counsel Summit

Employment Law Updates and Insights (PPT)

James Butlin, AVP & Managing Counsel, Employment Law
Sun Life

February 16, 2023

Employment Law Updates and Insights

13th In House Counsel Summit | Law Society of Ontario

February 16, 2023

James Butlin

AVP & Managing Counsel, Employment Law | Sun Life*

**opinions presented are my own and not necessarily those of Sun Life*

Termination provisions (continued challenges)

- *Waksdale v. Swegon North America*, 2020 ONCA 391, leave to appeal to SCC refused, 2021 CanLII 1109.
  Invalid termination for cause provision renders termination without cause provision invalid

- *Henderson v. Slavkin et. al.,* 2022 ONSC 2964
  Provisions setting out certain conduct constitutes "cause" may invalidate termination without cause provisions

- *Rahman v Cannon Design Architecture Inc.* 2022 ONCA 451
  Contextual factors (e.g. sophistication of parties, presence of independent legal advice) do not override plain language of an otherwise invalid termination provision. Application for leave to appeal to SCC pending.

Limits on duty to mitigate post-termination

- *Lake v La Presse* 2022 ONCA 742
  Employee obligation to mitigate does not include searching for non-comparable roles; job titles also not determinative re suitability

Vacation pay and holiday pay class actions

- Certified in late 2022/early 2023:

  Curtis v Medcan Health Management Inc. 2022 ONSC 5176 (CanLII)
  Employees claim failure to pay vacation pay and holiday pay on commissions and bonuses. Employer made remedial payments for 2 years, relying on *Limitations Act.* Is there further liability?

  Cunningham v RBC Dominion Securities 2022 ONSC 5862 (CanLII)
  Investment advisors claim failure to pay vacation pay and holiday pay on commissions. Were the commissions inclusive of these amounts?

  Lee v Allstate Insurance 2023 ONSC 8 (CanLII)
  Insurance agents claim failure to pay vacation pay and holiday pay on bonuses. Were the bonuses "wages" under the ESA?

- Employers with employees with variable sale compensation should review potential exposure
- If conceding they are wages, consider taking steps to document how vacation pay and holiday pay are paid
- May be a jumping-off point to review vacation and holiday pay compliance in general

Competition Act changes

- Effective June 2, 2023, no-poach agreements and wage-fixing agreements between unaffiliated employers will be covered under the criminal conspiracy provisions of the Act

- Competition Bureau Canada published draft guidelines for public consultation on the enforcement of the new prohibitions in January[1]
  - Feedback may be submitted online via link below by March 3
  - Guidelines suggest no-poach prohibition will apply to reciprocal agreements only
  - Guidelines suggest Ancillary Restraints Defence (ARD) under the Act may be used in certain contexts (sale of business, seconded consultants, use of staffing agencies) but caution extent of restraints must be limited

    [1] https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/consultations/enforcement-guidance-wage-fixing-and-no-poaching-agreements

- Considerations
  - Constitutional vulnerabilities. Is the federal government making employment-related law for provincially regulated employers in the guise of competition law?
  - Are the government's stated labour mobility objectives achieved if one-way agreements permitted?

Working for Workers Act, 2021 and *Working for Workers Act, 2022*

Employment Standards Act changes

- New exemptions for Business and IT Consultants
- Recruiter licensing regime – public consultation ended Dec 6 2022; awaiting further information
- Non-competes prohibited, except for Executives (defined as C-level), on sale of a business, and those in place prior to Oct 25 2021 [*Parekh et al. v. Schecter et. al.* 2022 ONSC 302 (CanLII)]
- Electronic Monitoring Policy
- Disconnecting from Work Policy (note: not a “right” to disconnect)

Occupational Health and Safety Act changes

- Limitation period for prosecution under OHSA increased to 2 years (from 1 year)
- Fines and penalties increased for directors, offices and other individuals
- Effective June 1, 2023 certain employers will be required to have naxolone kits and train workers

Beyond Ontario

B.C. *Workers Compensation Act* changes

- Right to request Independent Healthcare Practitioners be involved in appeals to WCAT (effective April 3)
- Obligation to return employees to work (short of undue hardship) will be codified on a date TBD

***Act respecting French, the official and common language of Quebec* (Bill 96)**

- Changes to the *Charter of the French Language* now require employers to demonstrate necessity for bilingualism and their efforts to avoid this as a requirement
- Employment documents and contracts of adhesion must be provided in French, even if language preference is other
- Postings must be in French to same market as postings in other languages

U.S. Supreme Court rulings on affirmative action

- Affirmative action in college admissions expected to be declared unconstitutional in June 2023
- U.S. commentators suggest employer programs will be considered next
- Potential impact to Canadian multi-national or cross-border employers

What's Next? The Future of Work

Law Society of Ontario | Barreau de l'Ontario

TAB 2B

13th In-House Counsel Summit

Wrongful Dismissal in the Time of COVID-19

Wrongful Dismissal in the Time of COVID-19 (PPT)

Daniel Fogel
Hicks Morley Hamilton Stewart Storie LLP

February 16, 2023

cpd

Wrongful Dismissal in the Time of COVID-19

(1) Infectious Disease Emergency Leave / Constructive Dismissal

Taylor v Hanley Hospitality Inc., 2022 ONCA 376 (CanLII): (12 May 2022): A motion judge found that s. 50.1 of the Employment Standards Act, 2000 (ESA) and O. Reg. 228/20 "Infectious Disease Emergency Leave" (IDEL) displaced an employee's common law claim for constructive dismissal. It held the employee was on IDEL, was deemed not to be laid off for all purposes and was not constructively dismissed. On appeal, the Ontario Court of Appeal found that analytical errors "tainted" the decision of the motion judge and remitted the action for determination before another judge of the Superior Court. The Court did not provide a decision on the substantive issues raised.

Fogelman v IFG, 2021 ONSC 4042: (2 June 2021): The plaintiff was placed on temporary lay-off because of the pandemic. The Ontario Superior Court concluded that in the absence of an express provision in his employment contract permitting a lay-off, the plaintiff had been constructively dismissed upon being laid off. The Court then considered the potential application of the IDEL and concluded that this provision did not operate to preclude the constructive dismissal claim as the plaintiff was pursuing his common law rights, not his rights under the ESA.

Coutinho v Ocular Health Centre Ltd., 2021 ONSC 3076 (CanLII): (4 April 2021) The plaintiff was temporarily laid off due to the closure of the her employer's clinic. She alleged that the elimination of her hours of work was a business decision unrelated to COVID-19 and claimed constructive dismissal. The employer argued that under the IDEL, the plaintiff "was deemed to be on emergency leave and the temporary elimination of her employment duties and work hours did not constitute a constructive dismissal." The Ontario Superior Court held that the IDEL only affected constructive dismissal under the ESA and did not remove the plaintiff's right to claim constructive dismissal at common law.

Parmar v Tribe Management Inc., 2022 BCSC 1675 (CanLII): the British Columbia Supreme Court found that the plaintiff employee was not constructively dismissed when she was placed on an unpaid leave of absence for refusing to comply with a mandatory vaccination policy due to her personal beliefs. The Court found that the mandatory vaccination policy was a reasonable and lawful response to the uncertainty created by the pandemic. While the policy allowed for both medical and religious exemptions, the plaintiff had not asserted either. The Court found that while the plaintiff was entitled to hold her personal beliefs about vaccination, this entitlement did not entitle her to risk the health and safety of the others at her workplace. Further, the strength of her beliefs did not entitle her to take the position that an exception to the policy should be made for her to allow her to work from home.

(2) Notice Period

Unsurprisingly, the prevailing opinion in the jurisprudence is that notice periods may be extended where the pandemic has a negative impact on a terminated employee's ability to secure alternative employment. However, whether an extension will be granted in a particular case is very fact-specific. *Nassar* suggests that generally citing the pandemic will not be sufficient to extend a notice period – the employee must provide some evidence that they were personally impacted by the pandemic.

Accordingly, where an employee's dismissal occurred before the pandemic materialized, length of notice would not be impacted (see *Flack* and *Ewach*). Further, where the job market to which the employee belongs remains robust during the pandemic (as was found in *Gracias* for dental hygienists and in *Campbell* for labour relations specialists), notice will not be extended.

(A) Case Law Review Chart:

Case	Decision on Notice	Position and Years of Service	Alternate Employment Secured?	Reasoning
Williams v Air Canada, 2022 ONSC 6616 (CanLII)	Higher end of notice range granted	International Operations Training Manager, ~24 years	Yes – within 2 years	The plaintiff's employment was terminated as a result of the pandemic and thus the economic uncertainty and effect of the pandemic on the airline industry during this time was factored into the 24 month notice period awarded.
Nassar v Oracle Global Services, 2022 ONSC 5401 (CanLII)	Notice not extended	Salesperson, ~3 years	Yes – within 5 months	It is not enough to suggest in a general way that the pandemic hampered employment efforts without evidence from plaintiff in order to lengthen the notice period beyond what it would otherwise be.
Pavlov v The New Zealand and Australian Lamb Company Limited, 2022 ONCA 655	Upholds lower court decision which takes pandemic into account in awarding notice	Director of Marketing Communications and PR, ~3 years	Despite strong efforts, remained unemployed	Notice must be determined with reference to the prevailing economic uncertainties which had a negative impact on the respondent's ability to secure similar alternative employment.

Gracias v Dr. David Walt Dentistry, 2022 ONSC 2967	Notice not extended	Dental Hygienist, ~5 months	Yes – 7 months later	The pandemic can be factor in longer notice periods, but not in this case there was a robust market or robust enough market for dental hygienists such that the downturn in the economy did not justify a longer notice period for the employee.
Ewach v Whiteoak Ford Lincoln Sales Limited, 2021 ONSC 7206 (CanLII)	Notice not extended	Salesperson, ~19.5 months	Unspecified	The period of reasonable notice will not be extended by the pandemic if notice period precedes the pandemic, especially where the pandemic did not "begin to assert itself in earnest" until after notice period awarded in this case.
Flack v Whiteoak Ford Lincoln Sales Limited, 2021 ONSC 7176 (CanLII)	Notice not extended	Finance Manager, 9 months	Yes - ~2-3 months later	The pandemic was a subsequent event to termination and ought not to impact the period of reasonable notice.
Campbell-Givons v Humber River Hospital, 2021 ONSC 6317	Notice not extended	Senior Labour Relations Specialist, 19 months	Yes - ~5 months later	Length of notice was not extended due to pandemic because there was an abundance of labour relations job opportunities available for plaintiff during pandemic.
Herreros v Glencore Canada, 2021 ONSC 5010 (CanLII)	Notice not extended	Administrative Support in the IT Department, ~15 years	Yes - ~15.5 months later	Because the pandemic had not materialized at time of dismissal, it was not a relevant factor in consideration of the Bardal factors.
Kraft v Firepower Financial Corp., 2021 ONSC 4962 (CanLII)	Notice extended by 1 month	Specialized Commissioned Salesperson, 5.5 years	Yes – 13 months later	The plaintiff was entitled to one month additional notice due to the pandemic, as there was evidence that the pandemic impacted on the plaintiff's ability to secure new employment.
Lamontagne v J.L. Richards & Associates Limited, 2021 ONSC 2133 (CanLII)	Notice seemingly extended	Chartered Accountant, 6.25 years	Yes - ~7 months later	The degree of uncertainty arising from the pandemic is one factor in determining reasonable notice. NOTE: decision upheld on appeal 8 December 2021

Iriotakis v Peninsula Employment Services Limited, 2021 ONSC 998 (CanLII)	Unspecified	Salesperson, ~28 months	Yes - ~7 months later	The Court considers the impact of the pandemic on notice, but states that its impact is highly speculative. However, the Court does note that there was "little doubt that the COVID-19 pandemic had some influence on the plaintiff's job search."
Marazzato v Dell Canada Inc., 2021 ONSC 248 (CanLII)	Notice not extended	Senior Manager Director Sales, 14 years	Unspecified	The pandemic did not favour longer notice period because there was no evidence that there would be extra difficulty in obtaining new employment and the employee's skill set and experience may have made him more likely to obtain employment given the greater use of computers for access to the internet and remote practices.

(3) Mitigation

Okano v Cathay Pacific Airways Limited, 2022 BCSC 881: The 61-year old plaintiff was terminated from her middle management position after almost 35 years of service as a result of the unprecedented downturn in business in airline travel due to the pandemic that had a devastating effect on the defendant's business. While the Court found that this was an appropriate case for the upper limit of 24 months' notice, the Court reduced this period by 3 months because of the plaintiff's failure to mitigate. Specifically, the plaintiff did not take reasonable steps to find alternate employment after her dismissal. Notably, despite the plaintiff's decision to passively seek employment outside of the airline industry, the Court found that it was incumbent upon the plaintiff to explore available positions in the very industry in which she had spent her entire working career.

Henderson v Slavkin et al., 2022 ONSC 2964 (CanLII): The 63-year old plaintiff's employment was terminated due to the closure of the employer's business when the pandemic had just been announced and dental practices were ordered closed. The plaintiff did not seek other employment until the end of 2020, did not apply to any dental surgeon offices and only secured employment 18 months later as frontline worker in long-term care home. The plaintiff alleged wrongful dismissal. The Court held that while taking 18 months to secure alternate employment would not meet the test for mitigation, given the pandemic, the resulting long economic recovery, the difficulty in finding work as businesses slowly began to open, the plaintiff's age and her move to a smaller local where rent was cheaper, there should be only a small deduction for the length of time it took her to mitigate. As the plaintiff acted reasonably and did her best to find work, the notice period was only reduced by 3 months.

Moore v Instow Enterprises Ltd., 2021 BCSC 930 (CanLII): The plaintiff was terminated due to significant downturn in business as result of COVID-19 and was paid eight weeks' pay in lieu of notice. The plaintiff had not found other employment since his termination and claimed damages for wrongful

dismissal. The Court noted that while the same economic downturn that impacted the employer had impacted other businesses within the industry and the economy in general, the plaintiff possessed a highly specialized and specific area of knowledge. The Court held that the plaintiff was entitled to 20 months' notice less three months for failing to mitigate his losses, as his job search efforts were not active, were unduly restrictive to niche-role in one industry, and were not reasonable in circumstances.

Goetz v Instow Enterprises Ltd., 2021 BCSC 709 (CanLII): The 53 year-old plaintiff employed as a commercial sales representative was terminated due to downturn in business as result of COVID-19. The plaintiff had not found other employment since his termination and claimed wrongful dismissal. The plaintiff had only considered commercial sales representative roles with tire companies and did not consider applying for jobs outside that sector. Viewed objectively, this was not deemed to be a constant, active and assiduous effort to find alternative employment, and was not a sufficient exploration of what was available through all means. Despite the pandemic, there continued to be job postings for positions in the tire industry and in senior sales positions in other industries, and the evidence did not support a limited availability of similar employment. As the plaintiff could have found comparable alternative employment had he expended reasonable effort, notice was reduced by two months for failure to mitigate.

(4) How Have the Courts Treated CERB Payments?

Generally the Ontario case law has treated CERB payments as non-deductible from wrongful dismissal damages awards. In *Iriotakis*, the Ontario Superior Court found that CERB should not be treated in the same way as Employment Insurance because it was an *ad hoc* programme and neither the employer nor the employee paid into it or earned an entitlement over time beyond their general status as taxpayers. Justice Dunphy reasoned that it would be inequitable to reduce the employee's entitlements to damages for wrongful dismissal by the amount of CERB he received, given the limited entitlements the employee received post-termination relative to his actual pre-termination earnings.

While most Ontario jurisprudence has followed the *Iriotakis* decision, the *Livshin* decision stands out from the Ontario jurisprudence as allowing CERB payments to be deducted from overall wrongful dismissal damages for reasons that are not clear. Justice Black of the Ontario Superior Court of Justice did not engage with prior case law in making the deduction.

The lack of clarity resulting from the two conflicting approaches to whether CERB ought to be deducted from wrongful dismissal damages awards was effectively cleared up by the *Yates* decision and the subsequent *Oostlander* decision, which each found that CERB should not be deducted from damages awards given the policy reasons outlined below.

Case	Decision on CERB	Reasoning
Oostlander v Cervus Equipment Corporation, 2023 ABCA 13	Damages award not reduced by CERB	While the trial judge initially deducted CERB from the damages awarded to the plaintiff under the assumption that the employee would retain the CERB benefits, the ABCA adopted the reasoning in *Yates*, finding that CERB should not be deducted from wrongful dismissal award. The Court noted that it was questionable whether CERB was a compensating advantage given the employee's dismissal was not connected to the pandemic in this case and the broader policy considerations mitigated against the deductibility of CERB from damages. The Court held that an employer who breached an employment contract should not enjoy a windfall from that breach, especially given CERB was a matter between an employee and the authority administering CERB which did not concern employer. The primary policy considerations that motivated the Court's ruling were (1) the desirability of equal treatment of those in similar situations, (2) the possibility of providing incentives for socially desirable conduct, and (3) the need for clear rules that are easy to apply.
Yates v Langley Motor Sport Centre Ltd., 2022 BCCA 398 (CanLII)	Damages award not reduced by CERB	While the trial judge initially deducted the $10,000 the employee received in CERB from five months' salary awarded, the Court of Appeal held that the broader policy considerations and the purpose of CERB program supported a finding that CERB should not be deducted from damages awards. The Court found that (1) CERB was a matter between the individual employee and the relevant authority administering CERB that did not concern the employer, (2) that the CERB program should not result in a windfall for the employer, (3) that the actual deduction from the award should not await realization of tax implications on the employee and (4) that the combination of the CERB payment and damages awarded did not leave employees "better off" such that the deduction would be justified. Rather, CERB was an emergency measure delivering financial aid during early period of unprecedented global pandemic. The program's goal was to mitigate harm to individuals in a moment of great uncertainty and, despite the CERB payments, many people lost their livelihoods as a result of the pandemic.

Henderson v Slavkin et al., 2022 ONSC 2964 (CanLII)	Damages award not reduced by CERB	The CERB payments at issue did not amount to a compensating advantage because (1) there is a real risk that the employee will be required to repay it, (2) the employee's receipt of CERB was not sufficiently connected to the defendant's breach (so there must be a sufficient causal connection between the defendant's breach and the receipt of the benefit – here it is not clear that CERB would not have accrued 'but-for' her wrongful dismissal) and (3) the Court did not find that CERB is a benefit intended to be an indemnity for wage loss arising from the employer's breach of the employment contract. (4) Further, the Court found that this case was not meant to be an unyielding application of the compensation principle because the employee was wrongfully dismissed and should not have to bear the risk of not being made whole, especially in her advancing age (63 years old) and 30 years' of service.
Gracias v Dr. David Walt Dentistry, 2022 ONSC 2967 (CanLII)	CERB not a mitigation credit	Agrees with the reasoning in Iriotakis (below) and holds that CERB is not a mitigation credit in the immediate case.
Livshin v The Clinic Network, 2021 ONSC 6796 (CanLII)	CERB deducted from overall wrongful dismissal damages	Unspecified.
Shana Marie Gray v Safecross First Aid Ltd., 2021 CanLII 18879 (ON LRB)	CERB deducted from overall wrongful dismissal damages	The Court found that the way to ensure that the plaintiff is made whole is to require the Employer to pay the entire amount owing. There will be no "double award" as suggested by the Employer, as the employee may be required to repay any amounts determined to be in excess by the CRA. The Court reasoned that the employee should not have to bear the risk of not being whole as a result of the Employer's reprisal.

Foster v Aviva Gen. Ins. Co., 2021 CanLII 117413 (ON LAT)	It was an error of law for the Tribunal to determine that CERB is deductible from IRB	CERB is not salary of wages or "renumeration from other employment," mainly in that a claimant need not be employed prior to receiving CERB and that payments for the same are not made by an employer, but part of an ad hoc government relief program paid by the CRA.
Fogelman v IFG, 2021 ONSC 4042	CERB payments not deductible from reasonable notice award	CERB has a repayment obligation and pursuant to Iriotakis (below) should not be treated as income for purposes of mitigation.
Iriotakis v Peninsula Employment Services Limited, 2021 ONSC 998 (CanLII)	CERB not deducted from wrongful dismissal damages	CERB could not be considered in precisely the same light as EI benefits in calculating damages for wrongful dismissal. CERB was an ad hoc programme and neither employer nor employee paid into it or "earned" an entitlement over time beyond their general status as taxpayers. The level of benefit paid was considerably below the plaintiff's base salary. On balance and on the facts, it was not equitable to reduce the plaintiff's entitlements to damages by the amount of any CERB payments he may have received given his limited entitlements from the defendant post-termination relative to his actual pre-termination earnings

Wrongful Dismissal in the Time of COVID-19

Daniel Fogel | Partner, Toronto Office

Wrongful Dismissal in the Time of COVID-19

Infectious Disease Emergency Leave

Has the Pandemic Increased Length of Notice?

How Have the Courts Treated CERB Payments?

2B-10

Hicks Morley

Infectious Disease Emergency Leave

Infectious Disease Emergency Leave

Coutinho v Ocular Health Centre Ltd., 2021 ONSC 3076 (CanLII)

- Plaintiff placed on temporary lay-off due to closure of clinic during the pandemic
- The Court held that the IDEL Regulation only affected constructive dismissal under the *ESA* and did not remove the plaintiff's right to claim constructive dismissal at common law

Infectious Disease Emergency Leave

Fogelman v IFG, 2021 ONSC 4042

- Plaintiff placed on temporary lay-off because of pandemic
- Court found that in the absence of an express provision in his employment contract permitting a lay-off, the plaintiff had been constructively dismissed
- IDEL regulation did not operate to preclude the constructive dismissal claim, as the plaintiff was pursuing his common law rights, not his rights under the *ESA*

Infectious Disease Emergency Leave

Taylor v Hanley Hospitality Inc., 2022 ONCA 376 (CanLII)

- Plaintiff claimed her temporary unpaid lay-off was business decision made by her employer in response to unfavourable economic conditions and not related to COVID-19
- Motion judge found that s. 50.1 of the *ESA* and O. Reg. 228/20 displaced plaintiff's common law claim for constructive dismissal – plaintiff was on IDEL, was deemed not to be laid-off and was not constructively dismissed for all purposes
- OCA found that analytical errors "tainted" decision of motion judge and remitted action for determination before another judge in the Superior Court of Justice

Infectious Disease Emergency Leave

Parmar v Tribe Management Inc., 2022 BCSC 1675 (CanLII)

- Plaintiff not constructively dismissed when placed on unpaid leave for refusing to comply with mandatory vaccination policy due to personal beliefs
- Plaintiff did not request an accommodation on religious/medical grounds, but did propose alternatives to vaccination, including working from home. Employer refused
- Plaintiff claimed constructive dismissal, arguing it was unreasonable for her employer to not permit her to work from home as an alternative to vaccination
- Court found that strength of the plaintiff's beliefs did not entitle her to an exception to the policy

Hicks Morley

Has the Pandemic Increased Length of Notice?

Has the Pandemic Increased Length of Notice?

The economic uncertainty caused by the pandemic is a factor that may lengthen an employee's notice period where an employee has been terminated as a result of the COVID-19 pandemic and where the pandemic has impacted the employee's industry (*Williams v Air Canada*, 2022 ONSC 6616 (CanLII))

The pandemic can be a factor in longer notice periods, but not where there remains a robust market for the employee's position (*Gracias v Dr. David Walt Dentistry*, 2022 ONSC 2967; *Campbell-Givons v Humber River Hospital*, 2021 ONSC 6317)

Courts must apply a "balanced approach" in determining notice during the pandemic. Here, the plaintiff attempted to mitigate by actively seeking new employment and by upgrading her skills by completing a college course

The pandemic will not favour a longer notice period where there is no evidence that there was extra difficulty in obtaining new employment. Here, the employee's skills and experience may have made him more likely to obtain a job, given the greater use of computers for internet access and remote practices (*Marazzato v Dell Canada Inc.*, 2021 ONSC 248 (CanLII))

Length of Notice: Mitigation During the Pandemic

Henderson v Slavkin et al., 2022 ONSC 2964 (CanLII)

- 63-year old plaintiff was terminated due to business closure
- Plaintiff did not seek other employment until the end of 2020, and only secured work 18 months later
- The Court held that while taking 18 months to secure alternate employment would not meet the test for mitigation, given the pandemic, the resulting long economic recovery, the difficulty in finding work as businesses slowly began to open, the plaintiff's age and her move to a smaller locale where rent was cheaper, there should be only a three-month deduction for the length of time it took her to mitigate

Length of Notice: Mitigation During the Pandemic

Moore v Instow Enterprises Ltd., 2021 BCSC 930 (CanLII)

- Plaintiff's employment was terminated due to significant downturn in business as result of COVID-19; paid eight weeks' pay in lieu of notice
- Plaintiff had not found other employment since his termination
- The Court noted that while the same economic downturn that impacted the employer had impacted other businesses within the industry and the economy in general, the plaintiff possessed a highly specialized and specific area of knowledge
- Plaintiff was entitled to 20 months' notice less three months for failing to mitigate his losses, as his job search efforts were not active, were unduly restrictive to niche-role in one industry, and were not reasonable

Length of Notice: Mitigation During the Pandemic

Goetz v Instow Enterprises Ltd., 2021 BCSC 709 (CanLII)

- Employment of 53 year-old plaintiff terminated due to downturn in business as result of COVID-19; plaintiff had not found other employment since termination
- Plaintiff had only considered commercial sales representative roles with tire companies and did not consider applying for jobs outside that sector
- This was not deemed to be a constant, active and assiduous effort to find alternative employment, and was not a sufficient exploration of what was available through all means
- Despite the pandemic, there continued to be job postings for positions in the tire industry and in senior sales positions in other industries, and the evidence did not support a limited availability of similar employment.
- Notice was reduced by two months for failure to mitigate

2B-20

Hicks Morley

How Have the Courts Treated CERB Payments?

Two Differing Approaches to CERB Payments

Iriotakis v Peninsula Employment Services Limited, 2021 ONSC 998 (CanLII)

CERB not deducted from wrongful dismissal damages

- CERB is different from EI benefits for the purpose of calculating damages for wrongful dismissal
- CERB was an *ad hoc* programme and neither employer nor employee paid into it or "earned" an entitlement beyond their general status as taxpayers.
- The level of benefit paid was considerably below the plaintiff's base salary
- It was not equitable to reduce the plaintiff's entitlements to damages by the amount of any CERB payments he may have received

2B-22

Livshin v The Clinic Network, 2021 ONSC 6796 (CanLII)

CERB deducted from overall wrongful dismissal damages

- Unspecified

Two Approaches Resolved: CERB Not Deductible

Yates v Langley Motor Sport Centre Ltd., 2022 BCCA 398 (CanLII)

CERB not deducted from wrongful dismissal damages

- Trial judge held employee was wrongfully dismissed but deducted the $10,000 employee received in CERB from five months' salary awarded
- Court of Appeal held that broader policy considerations and purpose of CERB program support finding that CERB should not be deducted
  - *It is a matter between the individual and authority administering CERB*
  - *Should not result in a windfall for the employer*
  - *Actual deduction from award should not await realization of tax implications on the employee*
  - *Combination of CERB and damages did not leave*
  - *employees "better off"*

Oostlander v Cervus Equipment Corporation, 2023 ABCA 13

CERB not deducted from wrongful dismissal damages

- Trial judge held employee had been wrongfully dismissed and was entitled to 24 months' pay in lieu of notice, but deducted CERB from damages awarded under assumption that employee would retain CERB benefits
- ABCA adopts the reasoning in *Yates*, finding that CERB should not be deducted from wrongful dismissal damages award
- Questionable whether CERB is a compensating advantage given the employee's dismissal was not connected to the pandemic and the broader policy considerations mitigate against deductibility of CERB from damages


Hicks Morley
Thank You

Law Society of Ontario | Barreau de l'Ontario

TAB 3

13th In-House Counsel Summit

The Role of In-House Counsel During a Recession (PPT)

Kyle Plunkett
Aird & Berlis LLP

Sanjay Kutty, Co-Founder
Spark Law Professional Corporation

February 16, 2023

cpd

The Role of In-House Counsel During a Recession

Kyle Plunkett
Partner
Aird & Berlis LLP

Sanjay Kutty
Co-Founder
Spark Law Professional Corporation

February 16, 2023

Possible Insolvency Regimes

Federal Statutes

- Bankruptcy and Insolvency Act
- Companies' Creditors Arrangement Act
- Wage Earner Protection Program Act
- Pension Benefits Standards Act
- Winding-Up and Restructuring Act
- Bank Act

Ontario Statutes

- Personal Property Security Act
- Mortgages Act
- Courts of Justice Act
- Rules of Civil Procedure
- Pension Benefits Act
- Employment Standards Act
- Labour Relations Act
- Bulk Sales Act

Inward Considerations: Inside Your Company

- ***Sales Pressures:***
  - Sales teams pressured to hit sales targets in a challenging economic environment
  - Can lead to pressure on legal to "just sign off" on deals irrespective of the business and legal risk
  - Be even more vigilant in assessing risk of deals even if it means a lost sales opportunity for badly needed revenue.
- ***Layoffs and terminations:***
  - Downturns often force companies to layoff staff.
  - Can affect resources both within legal and in departments that legal interacts with
  - Be mindful of increased workload pressures on yourself and team members from these layoffs.
  - Work with internal clients to establish realistic timelines for deliverables given reduced resources.

Inward Considerations: Inside Your Company

- ***Budget Cuts:***
  - Can lead to hiring freezes (affecting resource planning for you and your team)
  - Can lead to cuts in external counsel spend
    - May force you to learn skills in your non-core areas of practice. Opportunity to grow skillset but at same time, be mindful of going too far out of core skills
- ***Beware the Fraudster:***
  - Downturns often lead to increased fraud.
  - Establish practices both within Legal and other groups (e.g. frontline staff) to monitor and prevent fraud.
  - Examples:
    - Corporate Profile searches on companies that are new customers.
    - Validate government ID for individuals purporting to have authority to instruct/conduct business (MTO tool: https://www.dlc.rus.mto.gov.on.ca/dlc/)

Inward Considerations: Inside Your Company

- ***Don't let it get too far***—if a filing is required, do it where there is still money to fund it and something worth saving
- ***Protecting directors:***
  - No "zone of insolvency" doctrine in Canada
    - Directors' duties do not flip from shareholders to other stakeholders
    - Can operate, and incur obligations, in ordinary course right up to filing
  - Make sure directors' liabilities are satisfied:
    - Source deductions
    - 6 mo wages/12 mo vacation pay
    - HST
- ***Properly documenting related party or shareholder loans***

Outward Considerations: Dealing with Third Parties

- ***Collecting Debts:***
  - Suing before bankrupting
  - In insolvency:
    - Do you have secured claim (e.g. PMSI under equipment lease)
    - 30 day goods (though not in restructuring)
    - Property claims
- ***Altering Payment Terms:***
  - Consider shortening credit terms
  - Request deposit(s) or other cash collateral
  - If requests for extended credit terms, consider adding security

Outward Considerations: Dealing with Third Parties

- ***Taking security or guarantees on goods***
  - It is possible to take security for future goods
  - Can't secure past advances—subject to insolvency laws
- ***Landlord and Tenant Issues:***
  - Distraint vs termination
  - Do you require waivers/estoppels or access rights
  - Consider prescribed claim amount under BIA/CCAA
  - Disclaimers
- ***Financial Overview:***
  - Consider keeping up to date with third party financial disclosures, where available, to monitor
  - Understand third party's financing

Outward Considerations: Dealing with Third Parties

- ***Insolvency Event/Filing***
  - Understand nature of any insolvency filing
    - Debtor in possession filing (BIA Proposal / CCAA)
    - Receivership/Bankruptcy
    - Liquidation vs going concern

Contacts

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Law Society of Ontario | Barreau de l'Ontario

TAB 4

13th In-House Counsel Summit

EDI in Corporate Canada (PPT)

Dal Bhathal, LL.B.
The Counsel Network - A Caldwell Company

Jennifer Kulyk, J.D., Legal Counsel
Kellogg Canada Inc.

February 16, 2023

EDI in Corporate Canada

EDI in Corporate Canada

Agenda

- Where are we today?
- Evolving EDI to include belonging (DEIB)
- 5 things you can do as an individual to grow
- 5 things you can do as a leader to help your organization evolve

Why EDI?

Equity, Diversity, & Inclusion (DEI) offers tremendous value to organizations, including:

- Fairness and Equity – it's the right thing to do
- Close the wage gap
- Diversified ideas
- Better client reach
- Larger talent pool and better talent retention
- Improved organizational reputation
- Increased innovation, collaboration, commitment, and productivity
- Improves bottom line.

The survey was conducted between January 25, 2022 to March 3, 2022, during the pandemic (after the peak of the Omicron variant).

Respondent profile

Industry – Top 10

1. Financial services/insurance/banks
2. Government
3. Oil & gas
4. Information technology
5. Real estate
6. Utility
7. Transportation
8. Education
9. Construction
10. Crown corporations

Base salary by gender

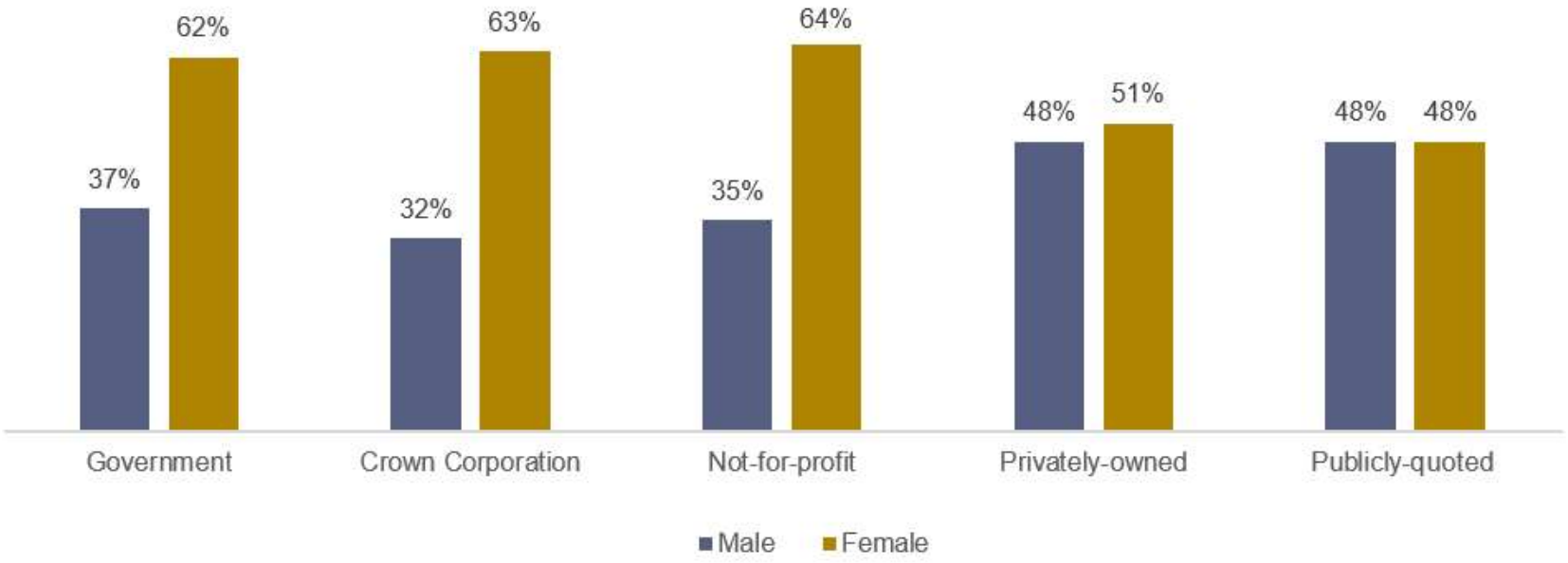
Year	Women	Men	Difference Percentage
2009	$130,500	$161,000	19%
2010	$138,500	$161,500	14%
2012	N/A	N/A	16%
2016	$152,000	$178,700	15%
2018	$154,000	$173,000	11%
2020	$158,000	$177,000	11%
2022	$169,000	$193,000	12%

Base salary by gender and job role

Title	Males (in $K)	Females (in $K)
Legal Counsel	$136K	$130
Senior Counsel	$179	$164
Assistant/Associate GC	$199	$182
GC Director Level	$214	$192
GC Executive Level	$258	$235

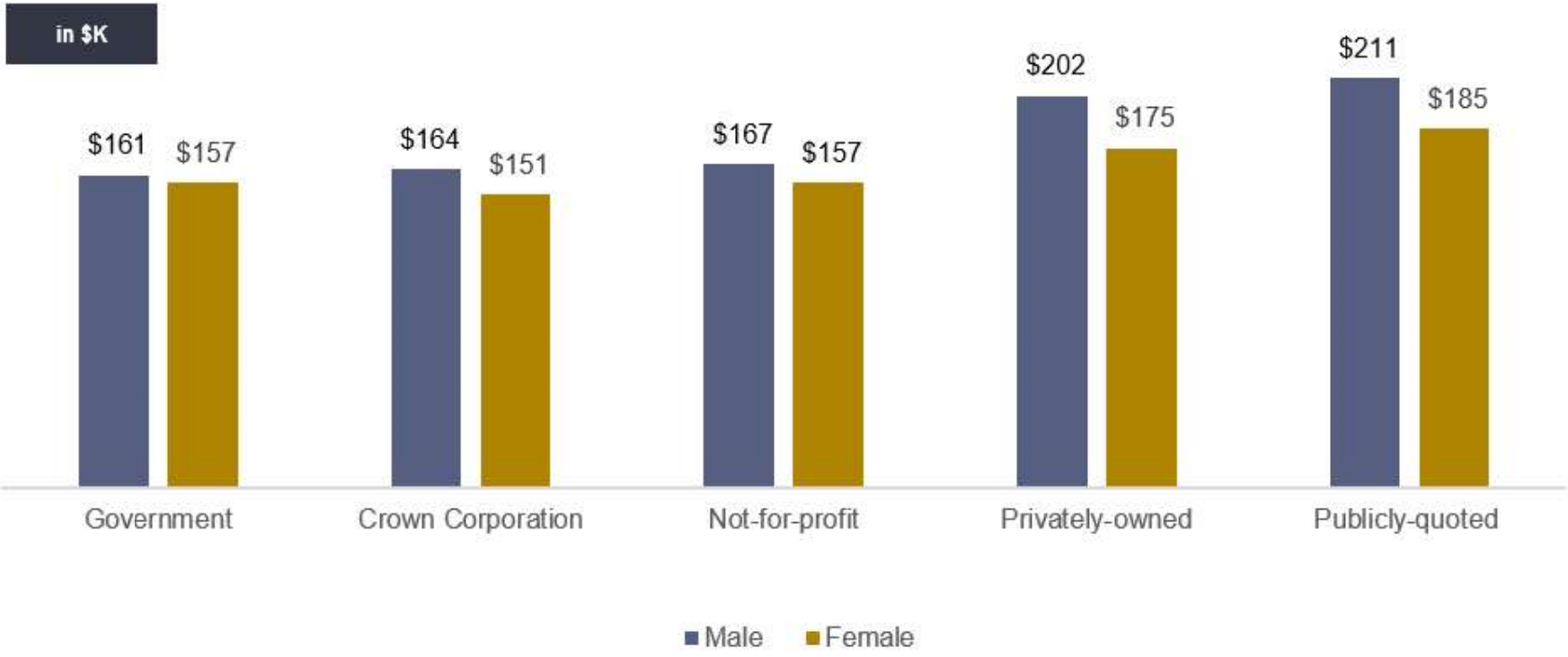
Gender and sector

% counsel by gender

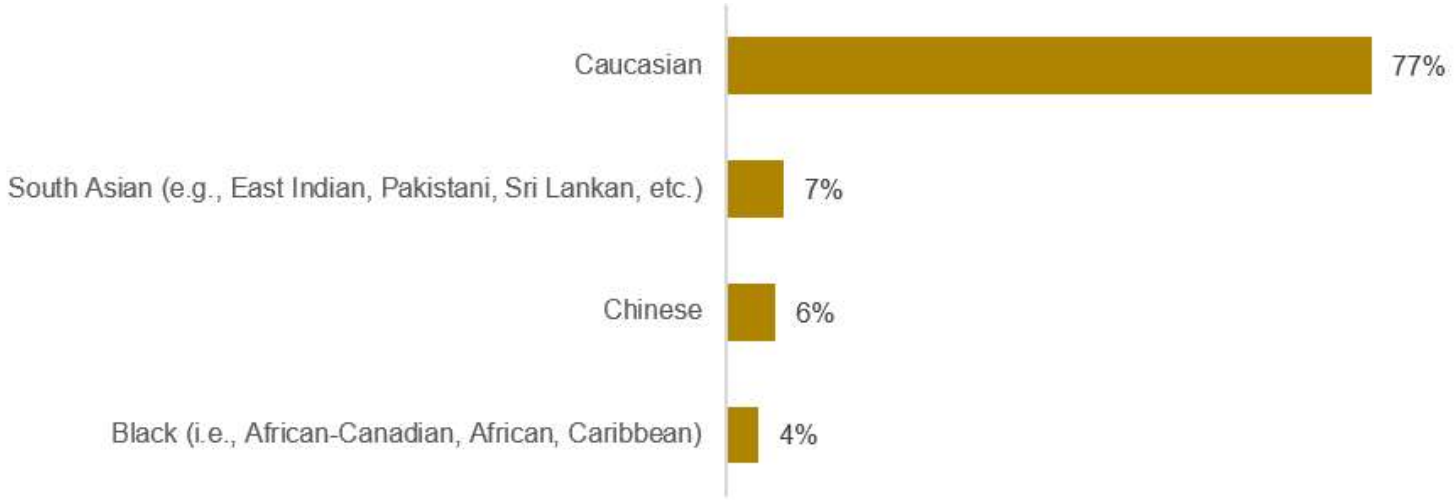


Gender and sector

Base salary by gender



Diversity – racialized lawyers



Respondents from the following groups each identified at the 1% level:

North American Indigenous, Filipino, Japanese, South-East Asian (i.e., Vietnamese, Cambodian, Malaysian, Laotian, etc.), Korean, Arab, and West Asian (e.g., Iranian, Afghan, etc.).

Diversity and compensation

	Total	Racialized			Not-Racialized		
		Total	Female	Male	Total	Female	Male
MEAN Salary	$178,500*	$171,500	$160,000	$191,000	$179,500	$170,500	$193,000

*Although the average salary for the entire survey cohort is $180,000, the average salary for those answering the diversity section is $178,500, meaning that the average of those who did not answer the diversity section is higher than for those who did.

Evolving EDI to include Belonging (DEIB)

- What is belonging?

  A feeling and a concept

- Where does belonging fit in the EDI framework?
- How to achieve belonging.

Five things you can do as an individual

1. Listen well.
2. Share power and provide access.
3. Check your biases and monitor self-awareness.
4. Question the status quo.
5. Stay committed to the process.

Five things you can do as a leader to help your organization evolve

1. Evaluate where your organization is.
2. Assess ED&I Commitments.
3. Establish ED&I Committee.
4. Cross-department engagement and collaboration.
5. Reflect, re-evaluate and discuss.

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Law Society of Ontario | Barreau de l'Ontario

TAB 5

13th In-House Counsel Summit

Shining the Light on Dark Patterns

Alice Tseng
Smart & Biggar LLP

February 16, 2023

SMART & BIGGAR

Dark Patterns: What Are They and Are They Unlawful, Unethical or Just Clever Marketing.

Presenter: Alice Tseng, Principal, Smart & Biggar LLP

Date: February 16, 2023

Dark Patterns

Unlawful, Unethical or Clever Marketing?

Definition

- Dark Patterns - describes a range of potentially manipulative user interface designs on websites and mobile apps which can have the effect, intentionally or unintentionally, of obscuring, subverting, or impairing consumer autonomy, decision-making or choice

Why important?

November 3, 2022

Vonage Will Pay $100 Million to Settle FTC Allegations of Trapping Consumers in Subscriptions

Agreement with Ericsson subsidiary represents largest penalty in FTC enforcement push to stop companies from creating obstacles to consumer cancellations

Why important? (con't)

December 19, 2022

Fortnite Video Game Maker Epic Games to Pay More Than Half a Billion Dollars over FTC Allegations of Privacy Violations and Unwanted Charges

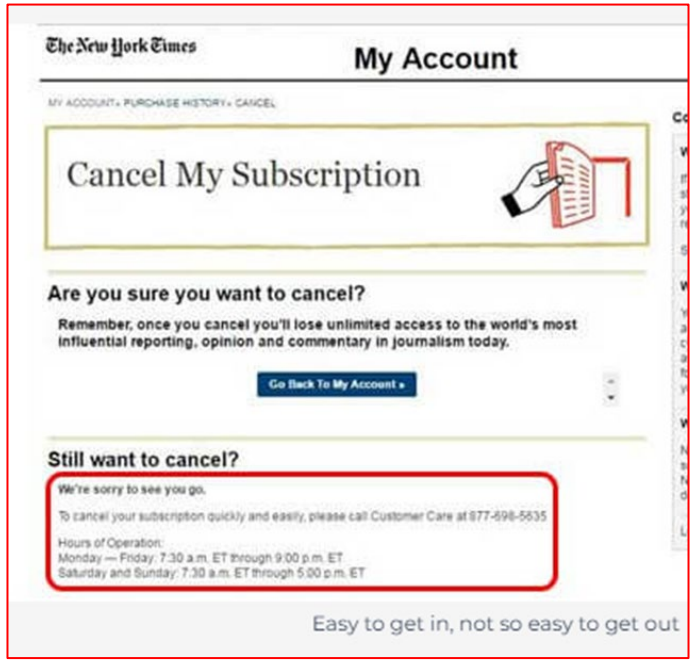
Epic will pay a $275 million penalty for violating children's privacy law, change default privacy settings, and pay $245 million in refunds for tricking users into making unwanted charges

The Federal Trade Commission has secured agreements requiring Epic Games, Inc., creator of the popular video game Fortnite, to pay a total of $520 million in relief over allegations the company violated the Children's Online Privacy Protection Act (COPPA) and deployed design tricks, known as dark patterns, to dupe millions of players into making unintentional purchases.

Examples

Roach Motel

Before



Now

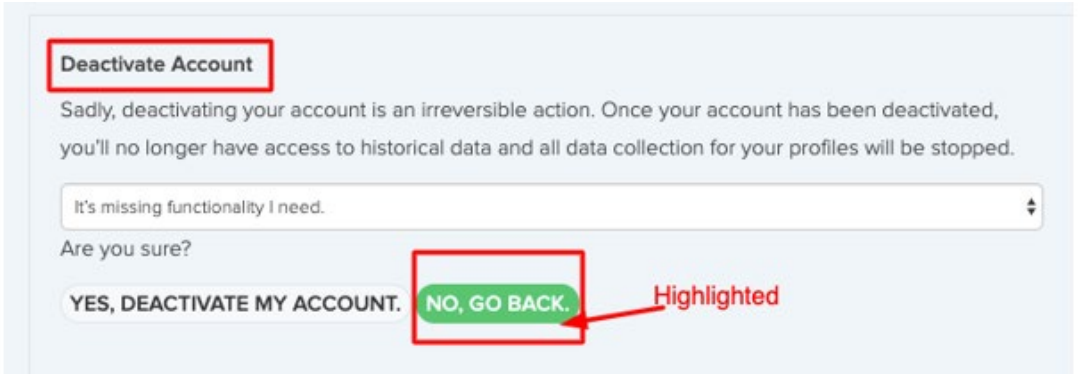
2. CANCELLATION AND REFUND POLICY

2.1. Cancellation and Refunds of Digital Subscriptions

When you cancel a subscription, you cancel only future charges associated with your subscription. You may notify us of your intent to cancel at any time, but the cancellation will become effective at the end of your current billing period.

Except in the case of certain promotions, you can change or cancel your digital subscription at any time by calling Customer Care at (866)-273-3612. If you are in the U.S. our hours are 7 a.m. to 10 p.m. E.T. Monday to Friday, and 7 a.m. to 3 p.m. E.T. on weekends and holidays. If you are outside the U.S. please see here for international phone numbers. You can also contact us via chat by clicking the Chat button on the top right of this page, 24 hours a day 7 days a week. Group Subscription billing cycles and terms of cancellations may differ and are governed by the terms set forth in the Group Subscription Purchase Order.

Misdirection



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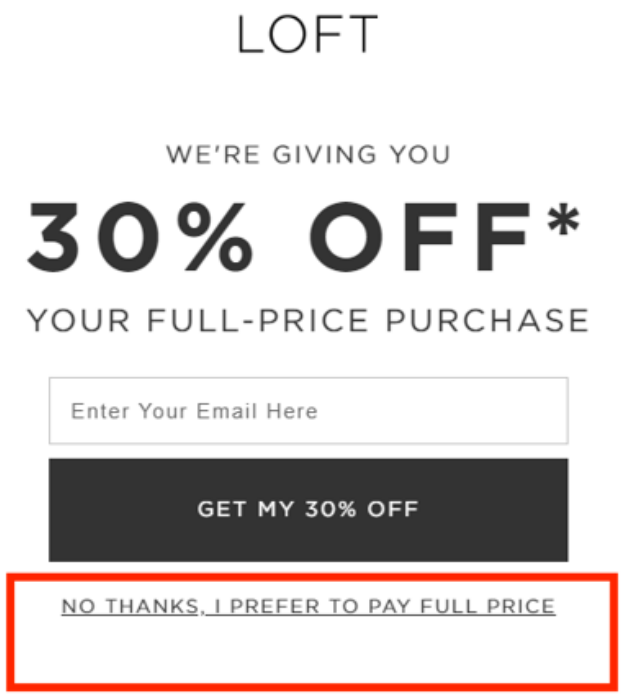
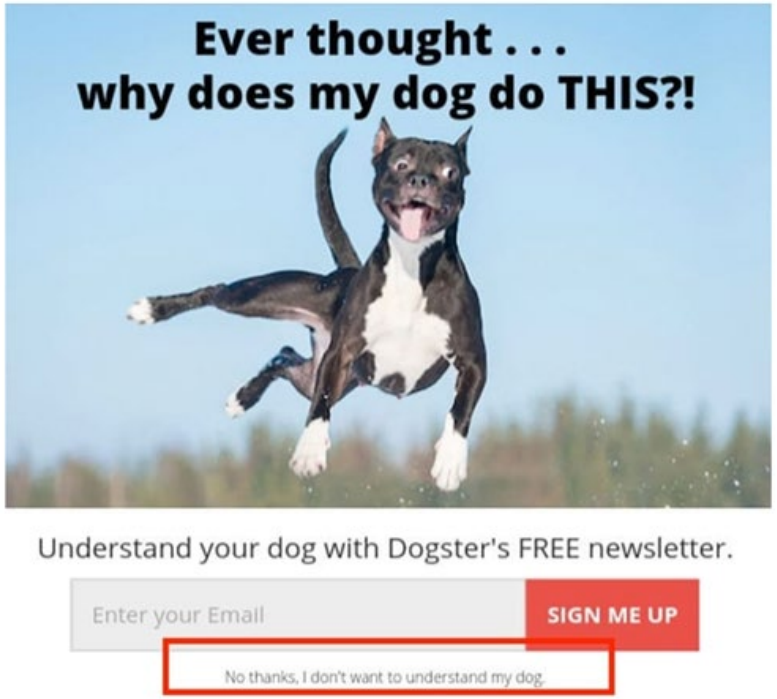
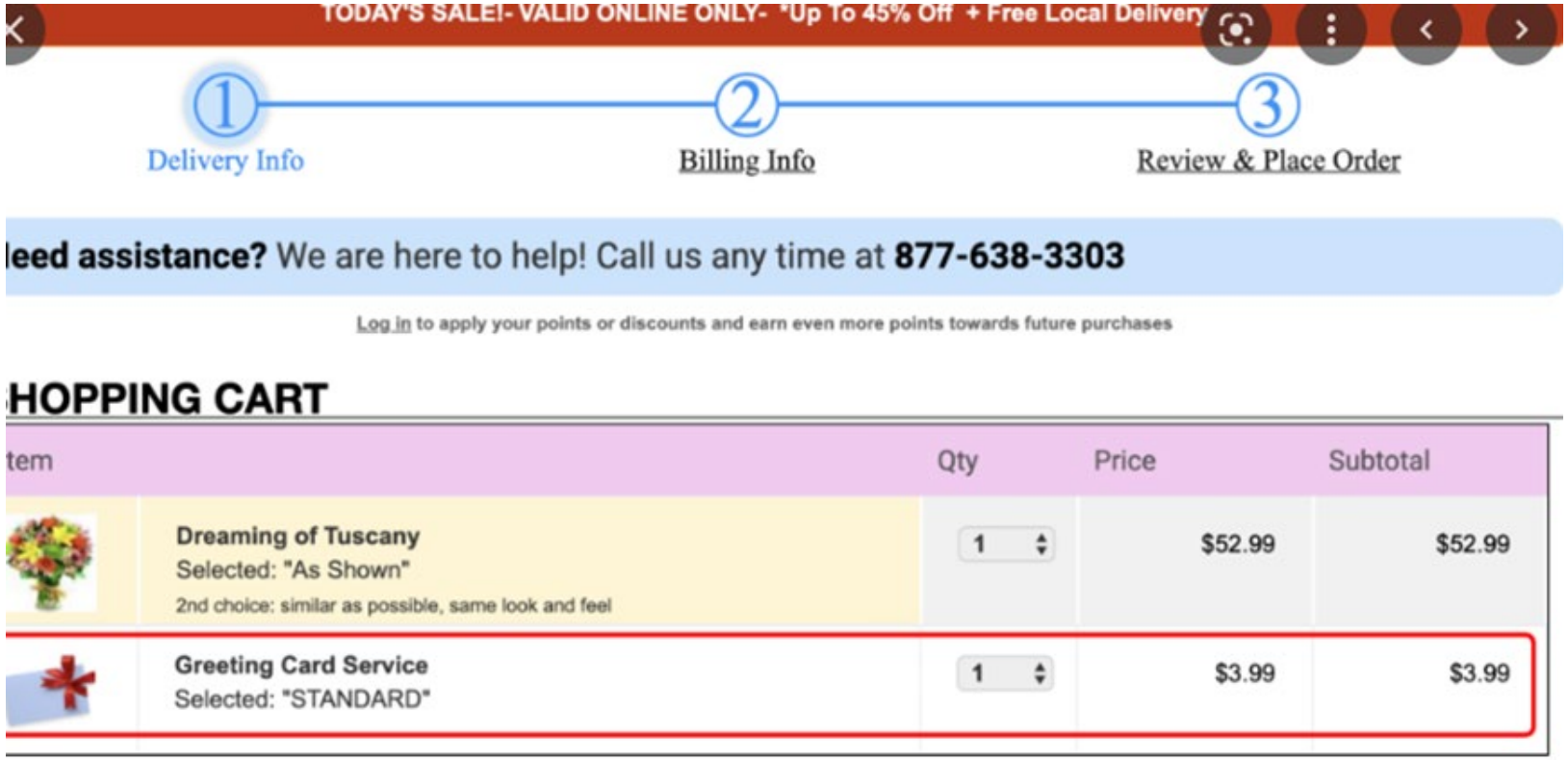
Confirmshaming





Sneak into Basket



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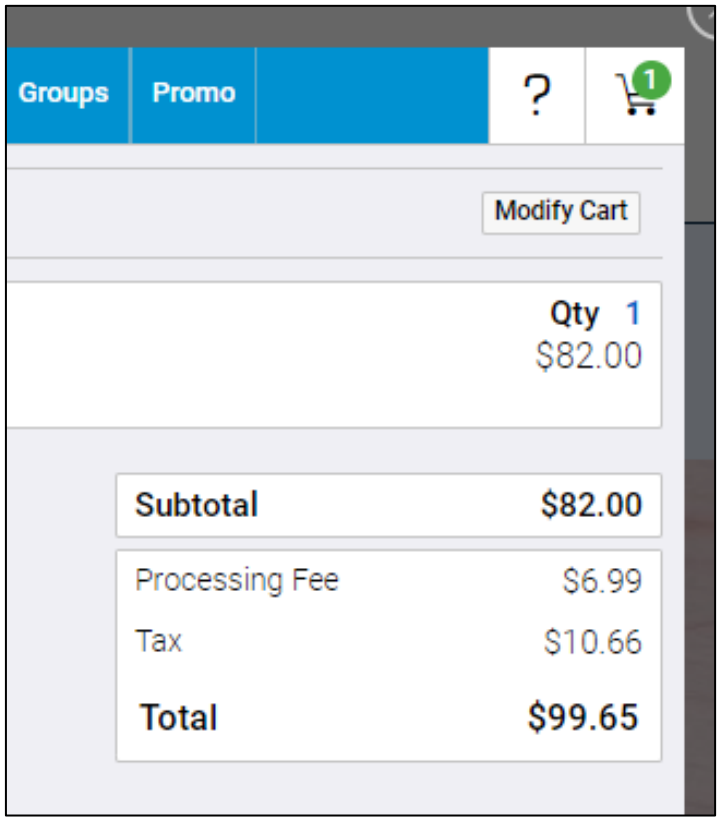
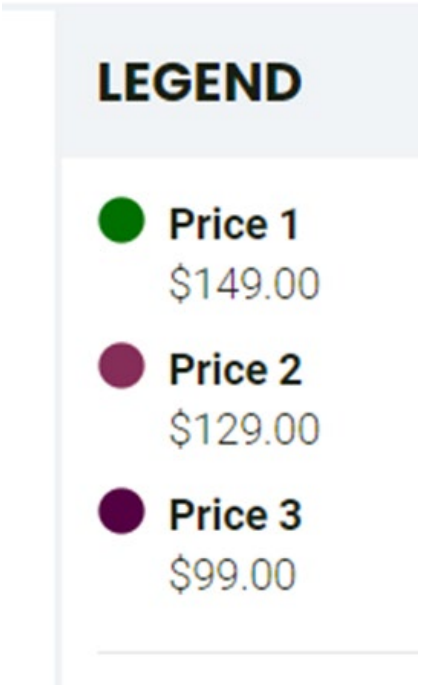
Hidden Charges

Canada's Wonderland

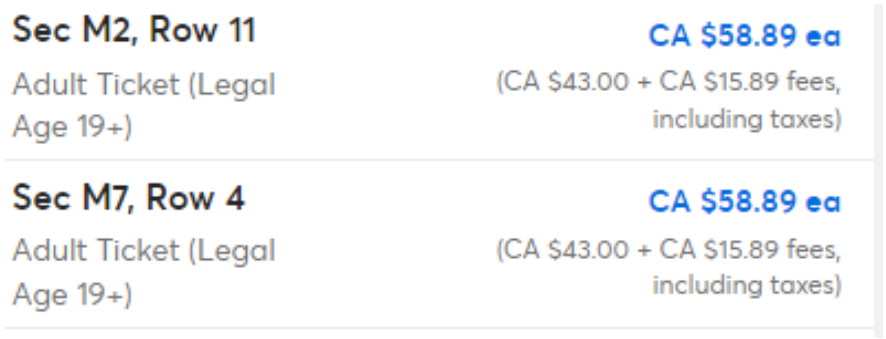


Hidden Charges (con't)

mirvish



ticketmaster



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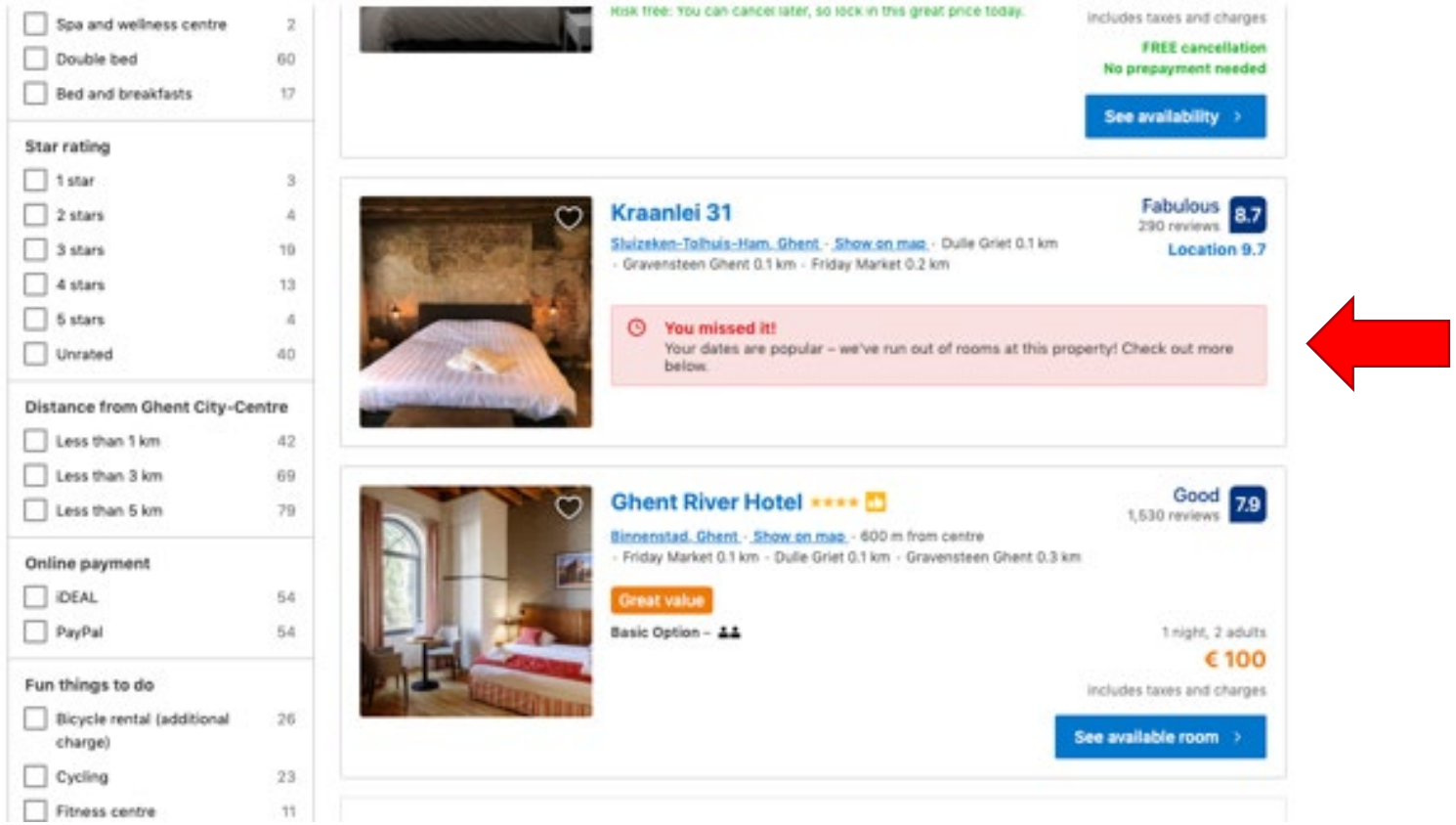
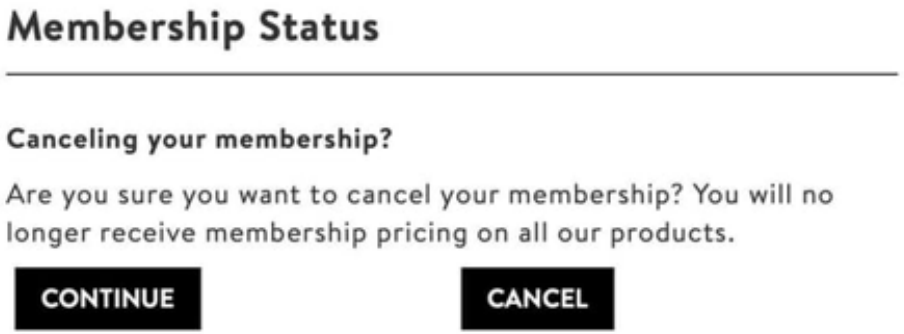
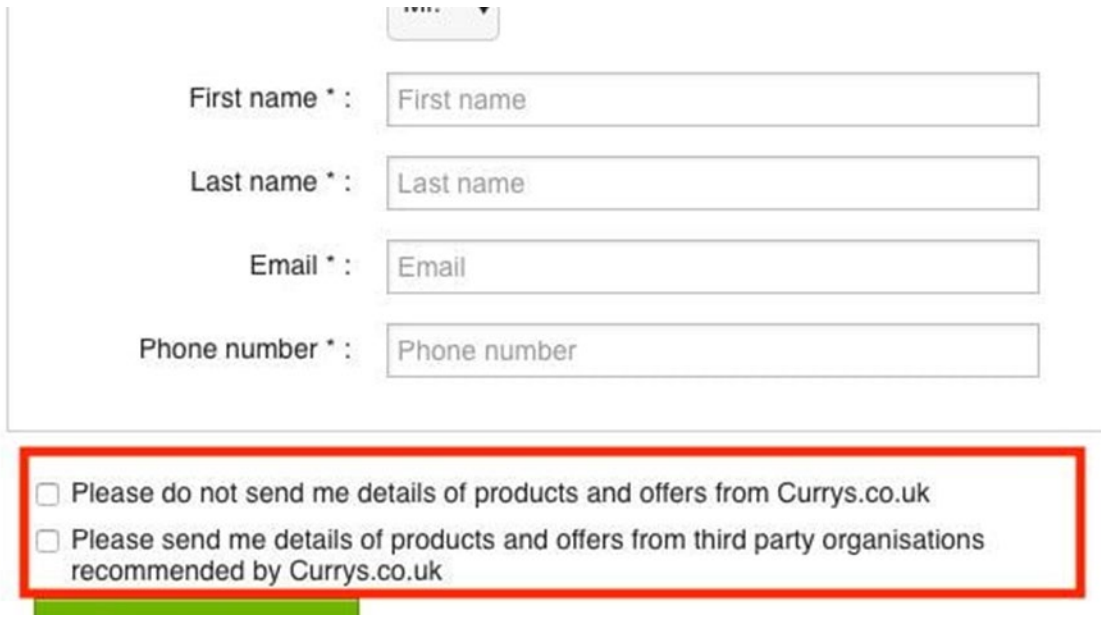
Fake Urgency Scare / FOMO



Trick Wording





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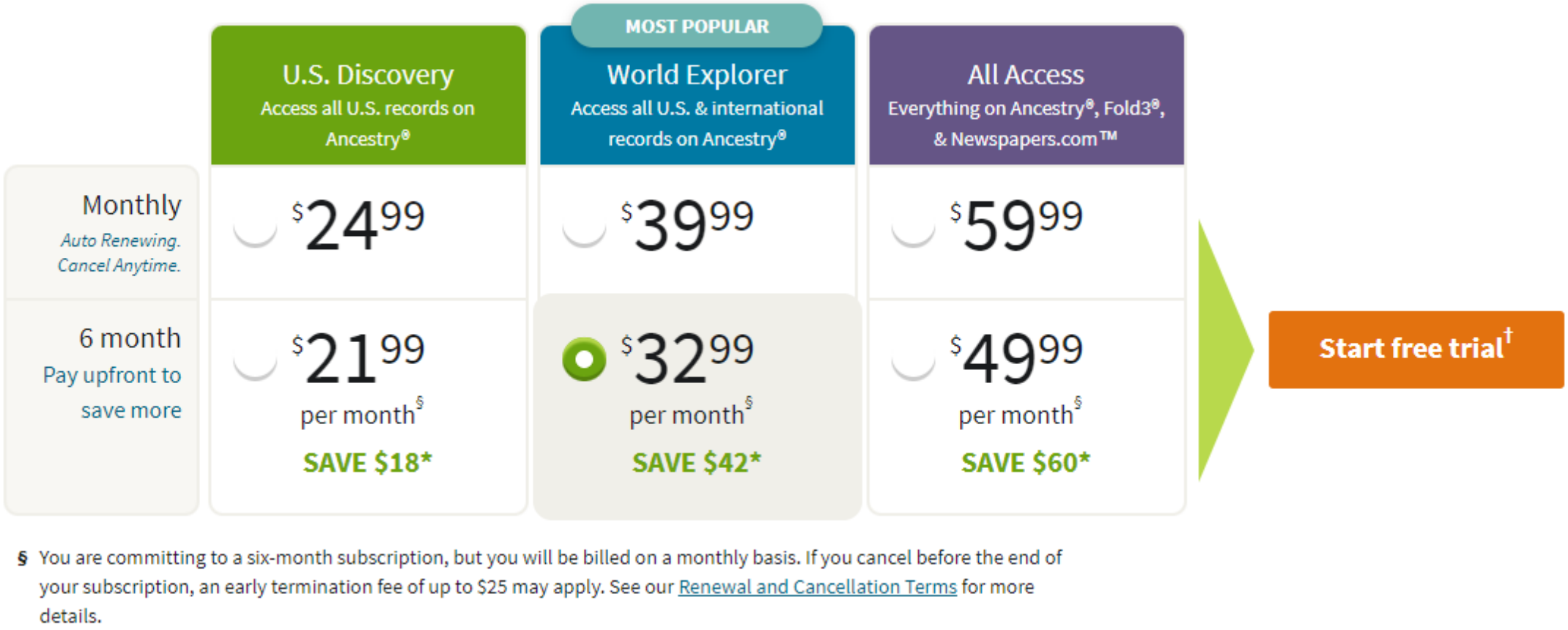
Forced Continuity

Forced Continuity (con't)



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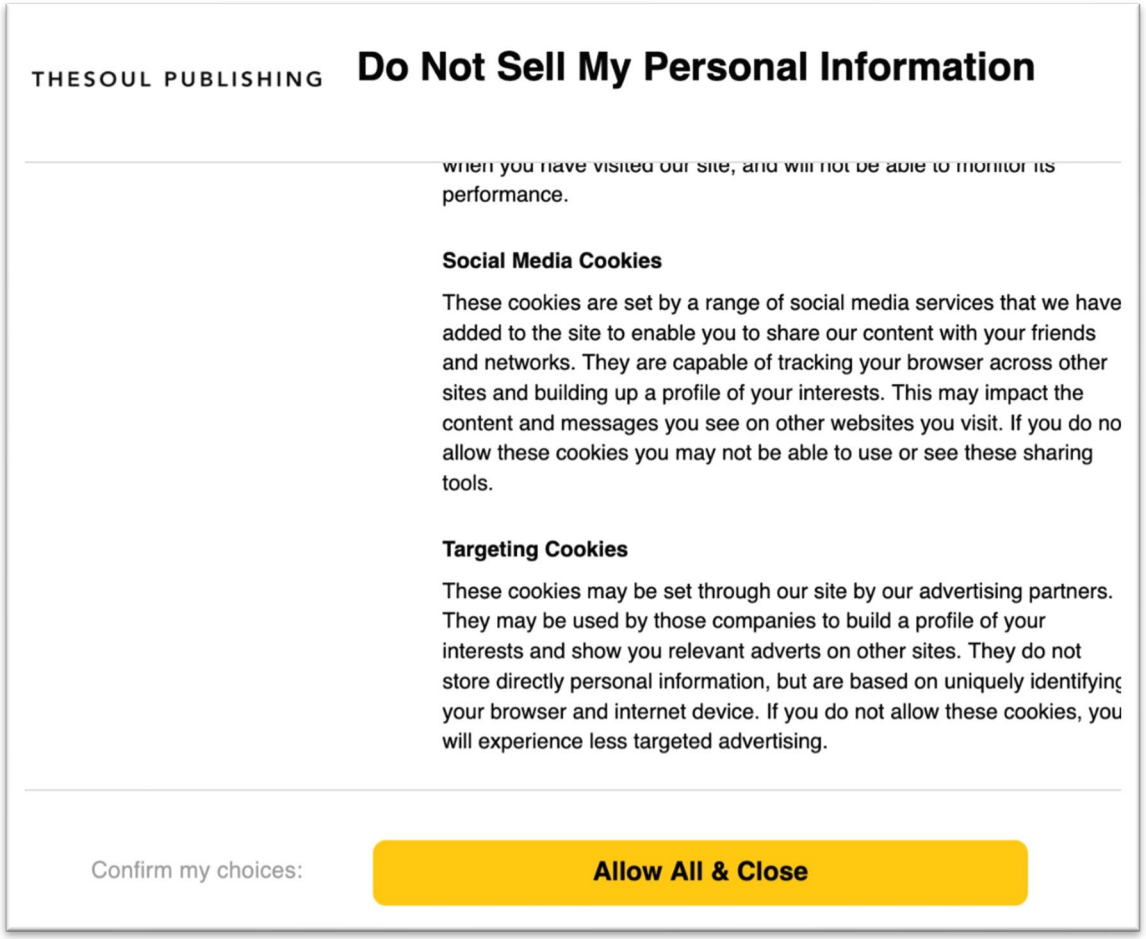
SMART & BIGGAR

Bait and Switch

Hidden Information



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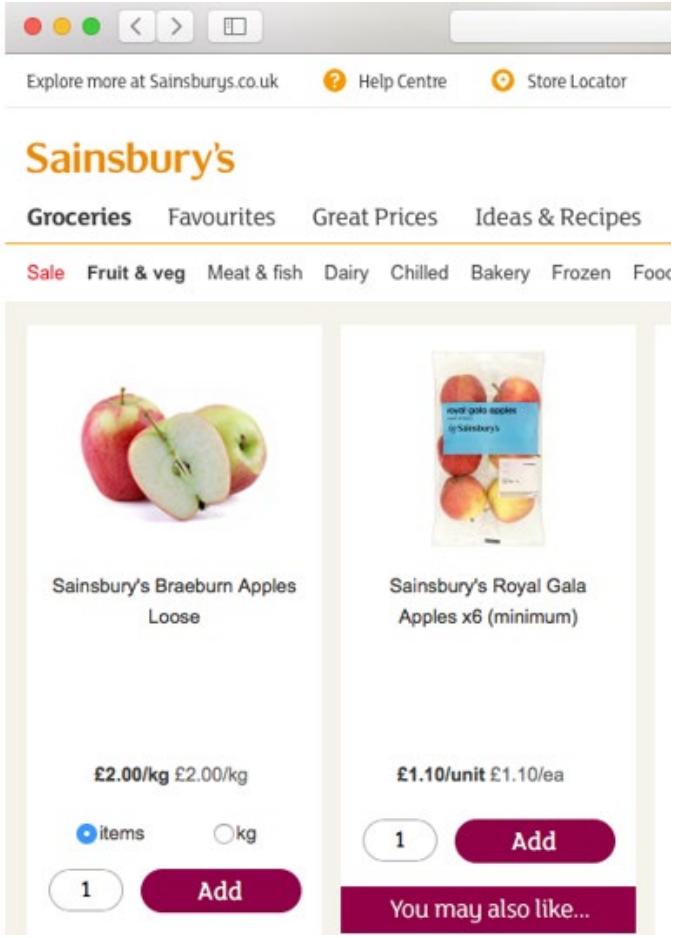
Disguised Ads

Price Comparison Prevention



SMART & BIGGAR

Privacy Zuckering

Legal Landscape

US Federal Trade Commission Press Release on the Bureau of Consumer Protection's Bringing Dark Patterns to Light Staff Report (September 2022):

"… more and more companies are using digital dark patterns to trick people into buying products and giving away their personal information. … these traps will not be tolerated."

Certain states in the **US** have enacted new privacy laws, which will be fully operative in 2023:

For example, the *California Consumer Privacy Act of 2018* and the *Colorado Privacy Act* include a definition for "consent" whereby consent cannot be obtained through dark patterns

European Data Protection Board published the draft Guidelines 3/2022 on dark patterns in social media platform interfaces (March 2022):

"Data protection authorities are responsible for sanctioning the use of dark patterns if these breach GDPR requirements."

Canada's proposed Consumer Privacy Protection Act, section 16 (First Reading, June 16, 2022; Second Reading in progress):

"An organization must not obtain or attempt to obtain an individual's consent by providing false or misleading information or using deceptive or misleading practices. Any consent obtained under those circumstances is invalid."

Q&A

Thank you!

Alice Tseng: atseng@smartbiggar.ca

Dark Patterns Checklist – Factors to Consider

February 16, 2023

Alice Tseng

E-Commerce

- ☐ Disclose all material terms upfront in clear and conspicuous manner
- ☐ Is any fee (other than government imposed fee such as tax) added which is not explicitly disclosed upfront? Consider delivery, credit card, processing / administrative or other fees
- ☐ Ensure no product / service is charged without customer explicitly consenting

Subscriptions

- ☐ Is process for cancelling not materially more difficult than subscribing initially? Consider - if can subscribe online, should be able to unsubscribe in same manner; finding process to unsubscribe should be simple; time / effort to unsubscribe should be minimal
- ☐ Is there reminder before subscription renews? If not, should there be?
- ☐ Free trial - did ad clearly specify what would happen after free trial ends? Is there reminder before charging after a free trial? Is there appropriate way to cancel before being charged?
- ☐ Avoid language / imagery which guilts / shames customer into subscribing

Design Interface

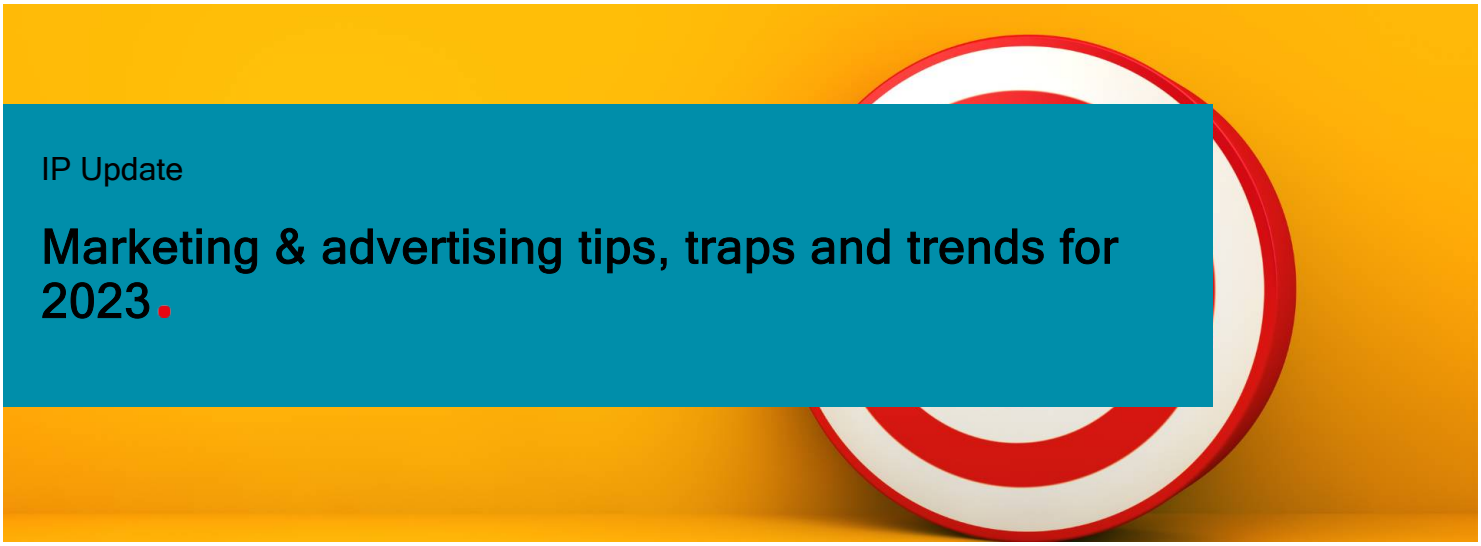
- ☐ Do not mislead or be ambiguous. Is everything intuitive? For example, green (not red) is typically used to represent “go / continue”
- ☐ Do not design in a manner where all options cannot be easily seen and selected, including through use of too small type size, colours which blend in with background, unexpected location placement
- ☐ Do not disguise ads to resemble independent content

Language Generally

- ☐ Avoid manipulative copy (e.g., Confirmshaming – suggestion that not signing up for email is because “you don’t want to understand your dog”)
- ☐ Information cannot be false or misleading (e.g., “4 hotel rooms left” (unless true); countdown clock – “Sale ends in 4 hours 10 min” - unless sale truly does end)
- ☐ Is wording clear? No double-negatives. No ambiguity. No asymmetrical choices (e.g., to avoid receiving marketing emails must answer “yes” to first question but “no” to second question). If you need to think twice to understand or are unclear what will happen when you respond a certain way, it is not sufficiently clear.

Privacy

- ☐ When consent for the collection, use or disclosure of PI is required, does the consent meet the requirements for “meaningful consent” under PIPEDA?



IP Update

Marketing & advertising tips, traps and trends for 2023.

January 18, 2023

Alice Tseng and Alexandra Johnson Dingee

This article highlights key tips, traps and trends for advertisers for the coming year. Though Canadian law is referenced, the concepts have global relevance.

Contents

1. Dark patterns

The term “dark patterns” was first coined over a decade ago but appears to only have been more widely on the radar of regulators and consumers recently. It refers to the use of deceptive user interfaces to manipulate or trick consumers to engage in certain behaviour contrary to their original intention. Dark patterns can encompass a range of tactics, ranging from “roach motel” to “misdirection” to “sneak into a basket”.

Certain jurisdictions have introduced new initiatives or actions explicitly addressing dark patterns. For example, in the United States, the Federal Trade Commission (FTC) has recently issued various notices (see FTC Report June 3, 2022 and FTC Report September 15, 2022) and entered into significant settlements relating to such practices; its settlement with Vonage in November 2022 was for USD $100 million (see FTC Report November 3, 2022), while its settlement with Epic Games for Fortnite in December 2022 was for USD $520 million (see FTC Report December 19, 2022). Individual states have also enacted legislation explicitly addressing dark patterns (e.g., both the *California Consumer Privacy Act of 2018* and *Colorado Privacy Act* include a definition of "consent" which excludes agreements obtained by dark patterns). The European Data Protection Board published and adopted the Guidelines on Dark patterns in social media platform interfaces, containing insights and practical recommendations on dark patterns which violate the General Data Protection Regulation.

In Canada, although the "dark patterns" term is not yet as widely used, regulators have also taken action against dark patterns. For example, in 2020, the Competition Bureau warned Canadians that, "Subscription traps: "no-strings attached" trial offers could leave you with your hands tied", following up the next year with a fine against a Canadian company of $15 million for a "subscription trap scam". In terms of new legislation, Bill C-27 (currently at second reading), which proposes to replace the *Personal Information Protection and Electronic Documents Act* with the *Consumer Privacy Protection Act*, regulates private-related dark patterns. Section 16 states, "[a]n organization must not obtain or attempt to obtain an individual's consent by providing false or misleading information or **using deceptive or misleading practices**".

For more information on dark patterns, see our Smart & Biggar webinar starting at 27:37 ("Digital Marketing & Advertising: The Legal Side of AI, NFTs, Virtual Influencers and Dark Patterns").

2. Drip pricing banned

In Canada, most types of dark patterns are only regulated pursuant to general provisions against false and misleading advertising (e.g., in the *Competition Act*), unfair practices (e.g., in provincial consumer protection legislation) and privacy laws. However, at least one dark pattern is already explicitly addressed by legislation, namely, "drip pricing" (see *section 74.01(1.1) of the Competition Act*). Drip pricing refers to the practice of offering a product or service at a price which is unattainable due to additional mandatory charges or fees. This practice was previously ubiquitous in certain industries (e.g., ticket sales, flights, rental cars), causing the Competition Bureau to take action against various companies in those industries. However, since drip pricing practices continued, the June 23, 2022 amendments to the *Competition Act* resulted in drip pricing explicitly deemed to be false or misleading under both the criminal and civil provisions, unless the additional fees are government imposed (e.g., sales tax) (see the *Guide to the 2022 amendments to the Competition Act*).

3. Environmental claims

Environmental claims generate significant scrutiny and interest from the public, resulting in it being a high priority area for the Competition Bureau (see the Bureau's CAD $3 million settlement on January 6, 2022 with Keurig Canada Inc. regarding recycling claims for its single-use coffee pods). For example, the Bureau is currently investigating two environmental claims, further to complaints through the "six-resident" application process. Specifically, on September 29, 2022, the Bureau announced its inquiry into the marketing practices of the Royal Bank of Canada (RBC) in response to an application supported by Ecojustice and Stand.earth regarding whether RBC made false or misleading environmental representations. Additionally, the Bureau confirmed on November 4, 2022 that, further to an application supported by the Canadian Association of Physicians for the Environment, it commenced an inquiry regarding the alleged "deceptive marketing practices" relating to the environmental impact of natural gas by the Canadian Gas Association.

Environmental claims are not only an issue of importance to advertising regulators, but securities regulators too. The Canadian Securities Administrators (CSA) published the CSA Staff Notice 51-364 in November 2022 as part of its continuous review of disclosure by reporting issuers. This Notice highlights an increase in reporting issuers making misleading or overly promotional "greenwashing" claims, and warns issuers against the broad use of "greenwashing" language in disclosure.

Any advertiser wishing to make environmental claims must consider their strategy carefully, including ensuring their claims are appropriate under the Bureau's 2022 *Environmental Claims and Greenwashing* guidance (which replaced the Bureau's more prescriptive 2008 Environmental Claims: A Guide for Industry and Advertisers). This extends to both explicit and implicit environmental claims within trademarks, which is becoming increasingly common, as noted in the European Union Intellectual Property Office's 2021 Green EU Trademarks Report.

4. Virtual influencers

In addition to the numerous categories of human influencers, ranging from mega to niche influencers, there are also virtual influencers. These CGI (computer generated images) characters can be created by a brand for themselves (e.g., Magalu, the Brazilian retail giant, created Lu) or by an agency for use with multiple brands (e.g., Lil Miquela has starred in numerous campaigns ranging from Samsung to Prada), or even a combination of the two (e.g., KFC's virtual Colonel Sanders was originally created to mock virtual influencers but, after being surprisingly successful, pivoted to endorse third party brands like Dr. Pepper, TurboTax, and Old Spice).

In principle, the rules governing human influencers (e.g., disclosure of material connection through use of #ad) generally apply to virtual influencers too. However, there are nuances and differences. For example, for virtual influencers who resemble humans (as opposed to those who are obviously not human, such as Nobody Sausage), it may be necessary to disclose that the influencer is not human. This disclosure does not have to take the form of a blunt disclaimer (e.g., #influener is not human), and can instead be creatively incorporated as part of the virtual influencer's story. Further, representations by a virtual influencer may need to be adjusted to take into account that they are not humans (e.g., "This product tastes great" instead of "I tasted this product and it's great").

For more information on Virtual Influencers, see our Smart & Biggar webinar starting at 13:30 ("Digital Marketing & Advertising: The Legal Side of AI, NFTs, Virtual Influencers and Dark Patterns").

5. Increased penalty for deceptive marketing

The *Competition Act* is the main federal legislation of general application in Canada for advertising. It regulates misleading advertising, among other marketing practices, and therefore applies to the various practices referred to earlier, namely dark patterns, drip pricing, greenwashing and adequate disclosure of material connection when influencers are used. The June 23, 2022 amendments to the *Competition Act* significantly increased the maximum penalty for deceptive marketing and, now, under the civil regime, the penalty for corporations can reach the greater of:

- CAD $10 million (CAD $15 million for each subsequent violation); and
- three times the value of the benefit derived from the deceptive conduct, or, if that amount cannot be reasonably determined, 3% of the corporation's annual **worldwide gross revenue**.

Previously, penalties for corporations were capped at CAD $10 million (CAD $15 million for each subsequent violation).

6. Accessibility

According to Canada's Disability Inclusion Action Plan, 2022, over 6.2 million Canadians live with a disability. New accessibility regimes help limit accessibility barriers, such as inaccessible web page design (e.g., by ensuring people with visual impairments can access the information). The *Accessible Canada Act*, which applies to the federal government and organizations regulated by the federal government, came into effect in 2019, and aims to create a barrier-free Canada by 2040. Several provinces have also enacted provincial accessibility laws, with Ontario setting the precedent in 2005 with the *Accessibility for Ontarians with Disabilities Act* (*AODA*). The *AODA* requires that all public websites be accessible if the website is controlled by a designated public sector organization or a business or non-profit organization with 50 or more employees in Ontario.

Another important development is making both products and packaging more accessible for people with disabilities. Although adaptive functionality is not new, it continues to grow in popularity. Microsoft famously released their Xbox adaptive controller in 2018. More recently in 2022, Microsoft released a Surface Adaptive Kit providing tactile additions for a computer to create a versatile user experience. Adaptive functionality is also notable within the beauty industry, including a computerized handheld makeup applicator and an electronic eyebrow make-up applicator (see L'Oréal's new beauty innovations at CES); braille on skincare products (see Pharrell Williams' skincare line); and inclusively designed deodorant packaging (see Degree's adaptive deodorant). Adaptive design extends to food too. In December 2022, Kellogg announced it is incorporating innovative NaviLens technology into the packaging of four of its cereal brands. Such functionality creates an enhanced user experience while making products more universally accessible.

7. Healthwashing

Though less frequently used than “greenwashing”, advertisers should be aware of the term “healthwashing”, which will likely be more well-known in the future. It refers to advertisers trying to promote their products as “healthy” because one aspect is beneficial even though the product cannot reasonably be considered healthy when considered as a whole. For example, a product may be fortified with calcium, but loaded with sugar. Alternatively, a product may be free of artificial flavours and colours but full of sodium. Per Section 5(1) of Canada’s *Food and Drugs Act*, a food label or advertisement must not be false, misleading or deceptive, or be likely to “create an erroneous impression regarding its character, value, quantity, composition, merit”. In addition to potential enforcement action by regulators, advertisers must also remember that lawsuits or negative publicity have been associated with products with brand names or other claims which suggest the product is healthier than it may be. As with “dark patterns”, “healthwashing” will increasingly be on the radar of both the public and regulators.

8. Competition Bureau takes action against Health Canada licensed product

Even though a product is licensed by Health Canada, it can still be the subject of enforcement action by other regulators for false and misleading claims. This is important since not only can regulators have different enforcement powers, but they may also have different priority areas for enforcement. For instance, the Competition Bureau, working with Health Canada, investigated NuvoCare Health Sciences Inc. in relation to certain weight loss claims, an area of interest for the Bureau. Although the products were licensed by Health Canada as natural health products (NHPs), they were not approved for weight loss claims and the necessary tests to substantiate the weight loss claims had not been conducted prior to making the claims. This ultimately led to NuvoCare and the founder entering into a settlement agreement with the Bureau for CAD $100,000 in total penalties. This enforcement action is interesting since it confirms that the Bureau, which has broad enforcement powers and is active in enforcing false and misleading claims, will take action against products already licensed by Health Canada rather than deferring to Health Canada to take action.

9. “Import for personal use” option for regulated products

Drugs (including NHPs), medical devices and cosmetics are subject to a myriad of laws before they can be sold in Canada. Complying with these requirements before the product can even be marketed in Canada can take significant time and money, and may not always be viable for a business, given the size of the Canadian population. One option foreign businesses can consider is "direct to consumer" sales, which can sometimes result in an “import for personal use” scenario, exempting the activity from complying with certain regulatory requirements. Although this approach does not mean no Canadian laws apply (e.g., this approach may not be exempt from advertising laws), this can be a very helpful option in certain circumstances.

10. Power of platforms

Advertisers have always had to navigate and comply with the terms and conditions of platforms (e.g., social media). However, the power of such platforms to make a company act a certain way is increasingly rivalling or even exceeding actual laws, especially since platforms can and do suspend accounts even faster than regulators when they view businesses as off-side. This gatekeeping power materially impacts businesses who rely heavily or exclusively on a particular platform to operate or promote their business (e.g., App Stores, Amazon, YouTube), with Elon Musk notably calling out Apple for allegedly threatening to “pull” Twitter from the IOS app store (see Apple threatening to pull Twitter from its app store).

This article highlights just some of the important developments advertisers need to know for 2023. If you have any questions or would like further information, please contact a member of our firm’s Marketing and Advertising group.

The preceding is intended as a timely update on Canadian intellectual property and technology law. The content is informational only and does not constitute legal or professional advice. To obtain such advice, please communicate with our offices directly.

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Law Society of Ontario | Barreau de l'Ontario

TAB 6

13th In-House Counsel Summit

ESG Litigation & Greenwashing
Mitigating Risk from Litigation, Enforcement and Activism (PPT)

Conor Chell
MLT Aikins LLP

Anton Tabuns, Senior Counsel, Sustainability
BMO Financial Group LLP

February 16, 2023

cpd

ESG LITIGATION & GREENWASHING

Mitigating Risk from Litigation, Enforcement and Activism

Law Society of Ontario's 13th Annual In-House Counsel Summit – February 16, 2023

Conor Chell (MLT Aikins LLP)

Anton Tabuns (BMO)

MLT AIKINS

KEY TREND

Increasing Emphasis / Scrutiny on ESG Reporting

- The rapid rise of ESG disclosures brought with it the possibility of more equitable and environmentally sustainable business practices

- But charges of misrepresentation, greenwashing and substandard targets pose challenges for disclosing issuers

- Companies increasingly face scrutiny from regulators, private litigants, activist investors, and customers

MLT AIKINS

KEY TREND

Pressure to Improve ESG Performance

- 78% of institutional investors (globally) believe companies should address ESG issues, even if it reduces short term profits (Source: *EY 2022 Global Institutional Investor Survey*)

Most Companies Do Not Understand ESG Risks

- **2021**: 75% of Boards do not understand ESG risks very well
- **2022**: 57% of Directors say ESG issues linked to corporate strategy (Source: *PWC 2021 & 2022 Corporate Director's Survey*)

ESG Reporting Will Become Mandatory

GLOBAL:

- EU rolled out mandatory ESG disclosure regime (effective in 2021; to be further refined in 2022)
- UK (starting in 2025)
- Public consultation period for US Securities and Exchange Commission proposed rule on climate-related disclosures ended June 2022. Proposed disclosures closely aligned with (and expand beyond) TCFD.

CANADA:

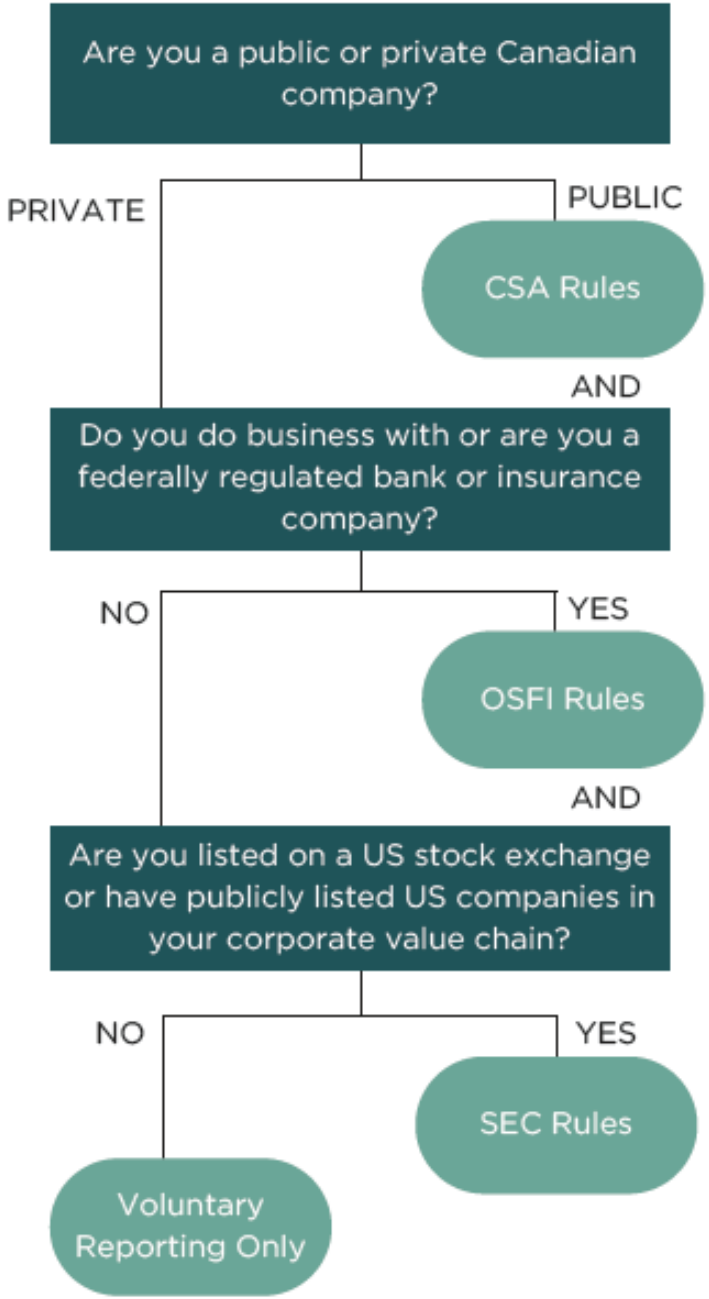
- Canadian Securities Administrators – NI 51-107 (2024)
- Office of the Superintendent of Financial Institutions (OSFI) Rules (2024)

MLT AIKINS

HOW IS YOUR COMPANY IMPACTED BY MANDATORY ESG REQUIREMENTS?

Note: Each of the CSA, OSFI and SEC Rules may eventually be aligned with the global disclosure standards being developed by the ISSB.

Reference Article: *"Worried About Mandatory ESG Reporting? Read This" (MLT Aikins LLP, July 25, 2022)*



A SUB-PAR ESG STRATEGY COULD MAKE YOU A TARGET FOR ACTIVISM

- Institutional investors are willing to take dramatic action to force companies to take ESG seriously
- Companies targeted by activism must spend heavily to defend against proxy battles and risk losing company control
- Companies are more at-risk of shareholder activism if their:
  - *Company has high perceived ESG impacts*
  - *Decarbonization plans are seen as incomplete or inadequate*
  - *ESG disclosures are seen as insufficient or greenwashing*

Reference Article: *"Boards Must Deal With ESG Issues as "Perfect Storm" of Activism Gets Underway" (Canadian Lawyer Magazine – November 2, 2021)*

MLT AIKINS

WESTERN CANADA'S LAW FIRM

KEY TREND

Activist Shareholders, Social Groups & Employees

Upstart Activist Engine No. 1 Takes Stake in GM, Supports EV Transition Plan
(CNBC, October 4, 2021)

Not ESG Enough: Investors Challenge Unilever on Healthy Food
(City Wire Selector, January 20, 2022)

Exxon's Board Defeat Signals the Rise of Social Good Activists
(New York Times, June 9, 2021)

Activist Investor Third Point Continues to Push for Shell to Restructure
(Wall Street Journal, May 9, 2022)

After Defeating Costco, Investors Push Food Companies to Detail Greenhouse Gas Input
(Morningstar, February 2, 2022)

>> Reference Article:
"The ESG Storm Rages On" (MLT Aikins LLP, April 27, 2022)

KEY TREND

ESG Shareholder Resolutions

- Shareholder resolutions focused on ESG-related issues appear to be increasing in frequency
- Many of these resolutions are related to climate change, such as those aimed at the viability of companies' net-zero strategies, and Say on Climate
- Resolutions focusing on Indigenous rights, DEI issues, and biodiversity, among many other issues, are also being brought by shareholders
- The engagement process with shareholders with these types of resolutions can be fraught with challenge

GREEN-WASHING:
AN EMERGING CHALLENGE

GREENWASHING

United States: Securities and Exchange Commission

- In 2021-2022 alone, the US SEC charged at least 5 corporations in ESG related offences (e.g. Vale, BNY, Goldman Sachs)

European Securities and Market Authority

- Asset manager DWS and its majority owner, Deutsche Bank, raided by German police accused of selling investments as "greener" than they were

Canada: Competition Bureau

- ***RBC***: investigation of bank's "green" claims regarding climate change leadership
- ***Canadian Gas Association***: investigation into CGA's representations regarding natural gas

GREENWASHING

Definition

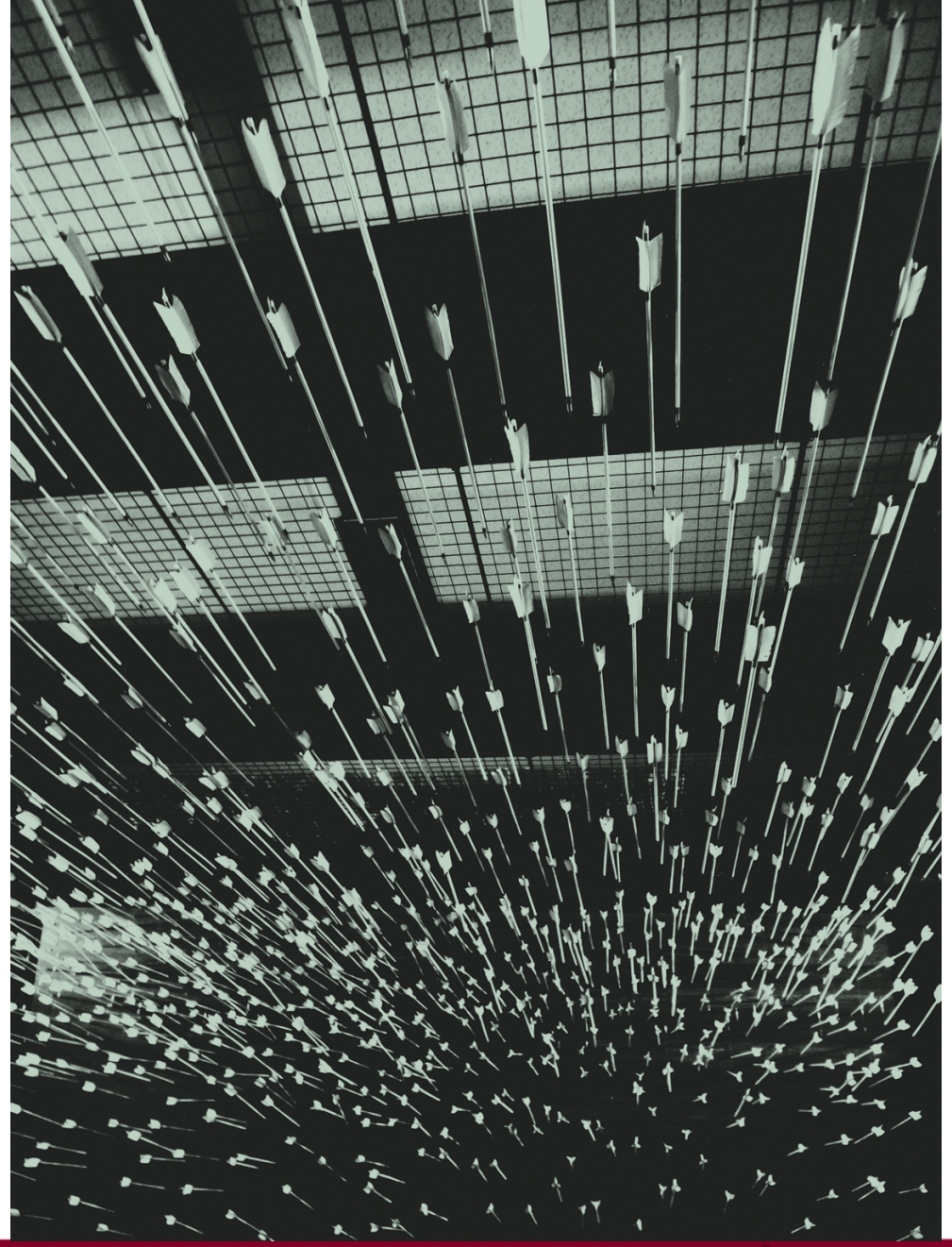
- Merriam-Webster defines greenwashing as: "the act or practice of making a product, policy, activity, etc. appear to be more environmentally friendly or less environmentally damaging than it really is"
- Often tied to a company's marketing strategy related to sustainability

Carbonwashing

- Greenwashing specifically concerning carbon emission reductions is being referred to as a "carbonwashing" to distinguish it from general greenwashing

PRIVATE LITIGATION

TRENDS & DEVELOPMENTS



KEY TREND

An Increase in Climate Litigation

- The climate-change litigation has expanded from only 884 cases prior to 2017 to over 1800 cases from 2017-2020; (over 2400 cases in total)
- Claims include those brought in tort, statute, equity, criminal, and administrative law
- Claims can result in monetary compensation, injunctions, changes to public procedure, and non-court remedies
- Recently, Shell has found themselves the centre of several high-profile cases

>>Reference Article:
"The ESG Litigation and Enforcement Wave (Or is it a Tsumani) Has Arrived" *(MLT Aikins LLP, June 2, 2022)*

SUITS AGAINST SHELL

Global oil giant the target of private litigation around the world

Milieudefensie et. al. v Royal Dutch Shell plc.
(Netherlands)

Greenpeace Canada v. Shell
(Competition Bureau of Canada)

Client Earth v. Board of Directors of Shell
(United Kingdom)

CNBC

PROTECT YOURSELF FROM ALLEGATIONS OF GREENWASHING & LITIGATION

- Ensure that meaningful progress is made in improving the company's ESG strategy, targets and addressing ESG issues
- Follow standardized reporting metrics like GRI/SASB/TCFD, treat ESG disclosures with the same attention and care as financial reports; ensure integration with risk management processes & Legal review of all disclosures
- Prepare for and anticipate regulatory change: legislation and new policies may increase risk of litigation

MLT AIKINS

WESTERN CANADA'S LAW FIRM

CONCLUSION: ESG LITIGATION AND GREENWASHING CHALLENGES ARE RAPIDLY EVOLVING

- Poor reporting or a failure to improve poor ESG performance can make organizations a target for activism, enforcement, and litigation.
- Use of transparency and avoidance of expansive and hyperbolic statements can also be tactics used to avoid greenwashing.

Q&A

Law Society of Ontario | Barreau de l'Ontario

TAB 7A

13th In-House Counsel Summit

What Does Good Look Like?
How to Successfully Litigate In-House (PPT)

Catherine Koch, National Quality Counsel, Aviva Trial Lawyers
Aviva Canada Inc.

February 16, 2023

cpd

AVIVA TRIAL LAWYERS

What Does Good Look Like?
How to Successfully Litigate In-House

Presented by: Catherine Koch, AVP National Quality Counsel

Vancouver – Edmonton – Calgary – London – Oakville – Toronto – Ottawa – Halifax – St. John's

AVIVA TRIAL LAWYERS

The Value of Best Practices

Definition of **best practice noun** from the Oxford Advanced Learner's Dictionary

best practice *noun*

/ˌbest ˈpræktɪs/

/ˌbest ˈpræktɪs/

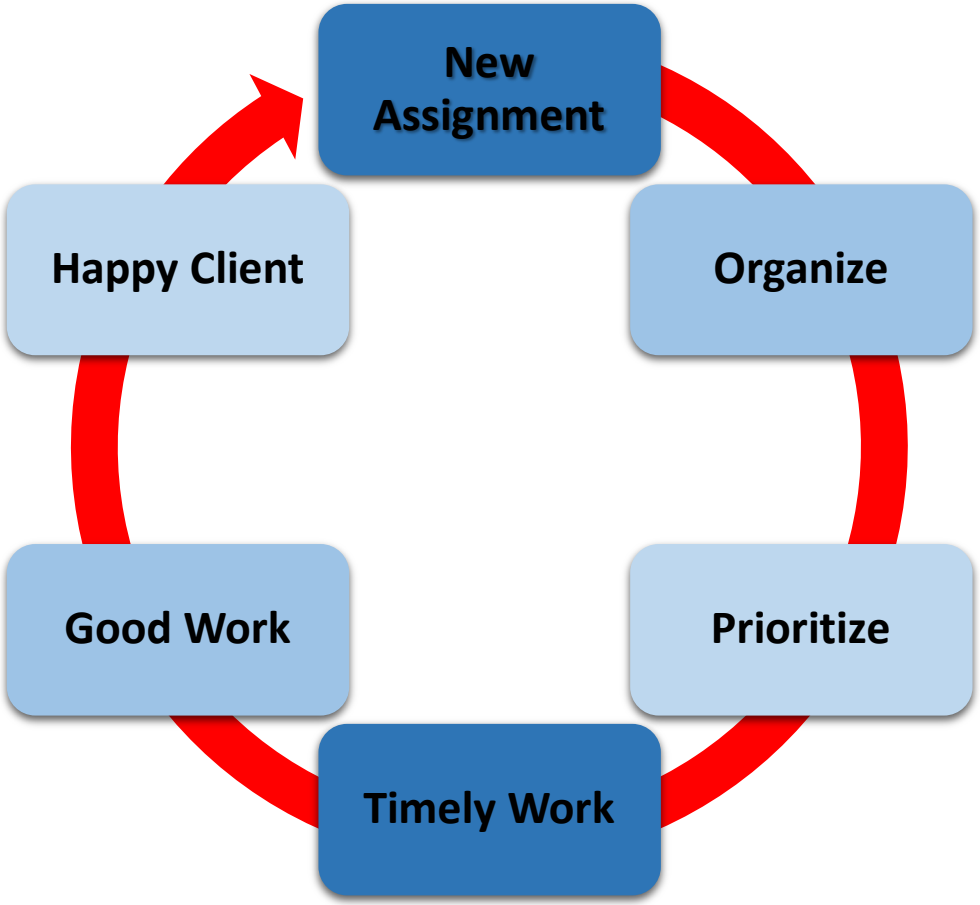
[uncountable, countable]

★ a way of doing something that is seen as a very good example of how it should be done and can be copied by other companies or organizations

- Context of the Quality Function
- Practical and positive impact best practices have on litigating in-house
- Despite the focus on insurance defence litigation, applicable to different types of practices
    - Creating efficiencies, results oriented

AVIVA TRIAL LAWYERS

New Assignment Life Cycle



Stay Organized

- **Read** the entire New Assignment email
- **Enter** file information into your chart
- **Note** your deadlines, urgent to-dos and irregularities
- **Know** your reporting requirements and any SLA
- **Contact** the client
- **Obtain** file materials
- **Generate** Statement of Defence and Litigation Plan

AVIVA TRIAL LAWYERS

Prioritize Next Steps: Where Do I Begin?

Review	file materials
Request	a waiver if needed
Serve	a Notice of Intent
Serve	the Statement of Defence
Address	outstanding items
Seek	instructions early
Update	your chart

Timeliness & Success

Assess	the case early and often
Determine	strategy
Prepare	a Litigation Plan or reporting note
Manage	expectations
Email	Litigation Plan/reporting note to the client
Update	Case management system, calendar, charts
Schedule	file reviews with legal support
Delegate	work when necessary

AVIVA TRIAL LAWYERS

Deliver High Quality Work

be persistent and follow up	consider bringing a motion	follow guidelines
follow the rules	meet deadlines	seek instructions early
seek authority early	assess exposure early and often	update the client
respond promptly	Review files weekly / monthly/quarterly	work smart

Build Quality Relationships

Conclusion


KEEP CLAPPING
THANK YOU
FOR
LISTENING TO MY
PRESENTATION
KeepCalmAndPosters.com


"All the best ideas come out of the process; they come out of the work itself."
Chuck Close

Law Society of Ontario | Barreau de l'Ontario

TAB 7B

13th In-House Counsel Summit

How to be your lawyer's favourite client! How to get the best out of external litigation counsel (PPT)

Andrew Bernstein
Torys LLP

February 16, 2023

TORYS

How to be your lawyer's favourite client!

How to get the best out of external litigation counsel

Andrew Bernstein

February 16, 2022

How can you be your lawyer's favourite client?

TORYS

Run a fast and fair RFP

Choose a lawyer who is right for your strategy

Help facilitate the relationship with the business

Be responsive to requests for instructions

Be clear about what you expect with respect to reporting and turn-arounds

Be flexible on conflicts, when it does not harm the company's interests

Be transparent on billing and payment

Run a fast and fair RFP

TORYS

You have 40 days after you are served to defend

Pre-design your RFP before the dispute arises

Once the dispute arises, launch ASAP

Announce the result once you decide

- There's an RFP from 2018 that I'm still waiting to hear about

If you know who you will retain, don't use an RFP

- We put 10-20 hours into a typical RFP
- Alternatives: ask for a budget proposal, a discount, an AFA, etc.

Be strategic in choice of counsel

TORYS

Different lawyers have different personalities that fit differently with different disputes.

- Do you want someone to ratchet up the tension or ratchet it down?
- Do you want someone who is adept at moving things along, or adept at dragging their feet?
- Do your clients need a reality check or a cheerleader?
- Do you need a different lawyer on appeal?

Pick for the lead, but don't forget the supporting characters.

- Great second chair or research lawyer can make the difference between winning and losing
- I have a law clerk that my clients insist be on their files

Strategy

TORYS

Be engaged in the strategy and process

- we will give you advice but ultimately look to you for instructions
- help us get the right documents

You know the "players" better than we do

- help us figure out who the right witnesses are
- facilitate access for discovery, to answer undertakings and for trial

Facilitate the relationship with the underlying clients

TORYS

- Our job is to make you look good
- what is the significance of the case to the company?
  - dollars
  - reputation
  - principles/precedent
- who should outside counsel be copying on communications?
- who will be giving you instructions and what are your challenges in getting them?
- 
  Your main value add is your knowledge of internal priorities and how the litigation fits in with business strategy
- 
  Our value add is familiarity with the process, our negotiation and (if necessary) our trial (or appeal) skills

Instructions and Turn-Around

TORYS

Outside counsel should be distinguishing between “this needs your attention immediately” and “I need instructions in due course.”

Most things should not be fire drills!

Conflicts

TORYS

Clients have lots of legitimate interests when it comes to conflicts:	Try to be as flexible as you can be, while insisting that legitimate interests are protected, and managing internal conflicts
• Ensuring that confidential information is not misused • Ensuring that their lawyers advance their best interests • Managing internal politics	• You might be on the other side of this some time

Budgeting

TORYS

The key is no surprises! Have the discussion up front

Good outside counsel can accommodate a lot of different styles of billing

If you are a defendant, every dollar will feel a little painful because you don't want to be in litigation in the first place

If you get a bill you have a problem with, you have options

Call your lawyer and have a discussion

You might think it's going to be uncomfortable, but we welcome the opportunity

Have a discussion ASAP if something goes wrong with your ability to pay

Result: Happy Lawyers!

TORYS

More importantly, happy clients!

TORYS

An RFP that gets you what you want (good counsel, reasonable price).

A strategy developed to meet the business' needs

Reasonable timing requests

More flexibility in your choice of counsel

A bill that you can live with

www.torys.com

TORYS

Law Society of Ontario | Barreau de l'Ontario

TAB 8

13th In-House Counsel Summit

Top 10 Considerations When Negotiating Software & Hardware Agreements

Amy Hu, Regional Vice President Legal, North America
Newmont Corporation

Wesley Ng
Stikeman Elliott LLP

February 16, 2023

Top 10 Considerations

When Negotiating Software & Hardware Agreements

2023 In-House Counsel Summit

Hosted by the LSO

Presented by

- Amy Hu *(Newmont Corporation)*
- Wesley Ng *(Stikeman Elliott LLP)*

January 2023

Newmont™ Stikeman Elliott

Presenters

Amy Hu

Regional Vice President
Legal North America
Newmont Corporation

Wesley Ng

Partner
Head of Technology Group
Stikeman Elliott LLP

Top 10 Considerations
When Negotiating Software & Hardware Agreements

- IP and Infringement
- Data, Privacy and Security
- Limitation of Liability
- Transition Assistance
- Price Control
- Audit (by Provider)
- Audit (by Customer)
- Choice of Law
- Alternative Dispute Resolution
- Aggregate Use of Data

IP and Infringement

IP indemnification and ongoing use rights can be critical

Vendors:

General standard	To provide infringement protections for their IP › *However* – this won't always be the case.
In all instances	Should be willing to provide infringement protections in exchange for having control over all IP infringement matters

Consider

IP and Infringement

Consider

- ☑ If the vendor's obligations are reflective of how the parties would respond to an infringement claim
- ☑ Whether any modifications could impact functionality
- ☑ Who will bare the costs of addressing any operational costs incurred from functionality modifications
- ☑ What participation, if any, will a customer have in any proceedings?
- ☑ Exclusions – *including:*
  - Very broad combination exclusion
  - Use of infringing product with any hardware / software ⓘ not provided by the vendor

IP and Infringement

Consider

- ☑ If the v… pond to an infri…
- ☑ Whethe…
- ☑ Who w… from functio…
- ☑ What p…
- ☑ Exclusions – *including:*
  - Very broad combination exclusion
  - Use of infringing product with any hardware / software ⓘ not provided by the vendor

Hardware / Software

- All hardware is made to operate software
- All software is made to be executed on hardware

If any inherent use of the product creates an infringement these should be covered by the indemnity

Practice Points – IP and Infringement

- IP ownership for any customization or development is usually allocated to the software / hardware provider
- One consideration for the customer is securing the necessary licensing rights to continue to use such customization, to the extent it wishes to switch service provider in the future
- Typical IP infringement indemnities (repair, replace, modify) may not be appropriate in all circumstances
- Thoughts need to be given to:
  - How an IP infringement claim is typically started, usually with cease-and-desist letter*; and*
  - Whether the repair / replace / modify remedies can be timely implemented without disruption to customer's business

Data, Privacy, Security and Cyber Obligations

Software and Hardware solutions can expose CI and PI, *and otherwise:*

↳ **Create security risks**

Service provider assumed significant risk from confidentiality and/or privacy breaches

The probability of data / cyber / security breach has grown exponentially

Best Practices and Guidelines

Data, Privacy, Security and Cyber Obligations

Best Practices and Guidelines

Previously – customers just relied on risk allocation

↳ *However*, due to potential impact there is now an increasing focus on both parties clearly **delineating security obligations and expectations**, *including:*

Detailed **Best Practices**	›	For accessing, storing, handling data, *etc.*
Specific **Guidelines**	›	On password requirements, threat detection, *etc.*

! *In addition to liability* – consider the service provider's:

- **Notification** Obligations
- **Cooperation** Obligations
- **Remediation** / **Rectification** Obligations

Practice Points – Data Breach / Privacy / Security

When dealing with a potential breach event

Reputation is a key concern

Considering…

What can be communicated:

- Externally
- Expediently
  - *In the form of breach notification, or press releases*
- By whom

Limitation of Liability

Generally

A reflection of the bargaining power of the parties as well the specific context and risks

Two Types of Limits

Monetary Cap

- Often 12 to 24 months for services / full cost for goods

Consequential Damages Cap

- Excludes certain types of losses

Limitation of Liability

General Exclusion from the Cap / Limit

- Willful misconduct, gross negligence, criminal behaviour
- IP / IT related indemnities set out in other parts of the contract
  - *e.g. breach of security, confidential and personal information obligations, intellectual property rights, etc.*

Practice Points – Limitation of Liability

- While it's market to have some type of cap or limit, more consideration needs to be given to consequential damages
  - Specifically for business interruption, as a result of the software / hardware failure
- Thoughts need to be given to:
  - Whether there is a backup / redundancy in the event the software/hardware is rendered 100% unusable for an extended period of time, and the expected remedies during any outages (*e.g.* define "extended" outage).
- Such discussions can align parties' expectations when service / product fails
  - As software / hardware companies are unlikely to agree to entirely uncapped liability making them the insurer against all business risks

Transition Assistance

Introduction of services and the exit from services often requires unique services

While transition in services are typically addressed at the outset, transition out is often relegated to a distant future when/if the relationship between the parties ends

However…

Organizations **should not wait** until they are experiencing relationship issues to discuss transition out concerns:

- ☑ Parties should be focused both on transition in ***and*** transition out at the outset
- ☑ Particularly in connection with any material / significant service transition out issues should be addressed at the outset

Transition Assistance

Any need to work with other service providers (who may be competitors to the vendor) **should be addressed**

Where the transition out issues require the performance and implementation of the services to ensure that the provider has sufficient knowledge to consider all of the relevant implications, impose timelines and deliverable requirements in the early stages of the agreement.

Consider… Requiring updates to the transition arrangements over time to ensure that they remain current and reflective of the evolving services provided

Practice Points – Transition Assistance

- A transition assistance clause allows for:

Service / Access	›	Continue for a certain period of time
Customer	›	Make alternative arrangements

Remember

- It's hard to predict the future on what transition services might be needed, which may:
  - Extend beyond the originally ordered service, *and*
  - Include a variety of data migration and transformation
- Even if the exact type of transition service is not known, it's important to lock in a rate card, or service quality reassurance

Price Control

Inflation

Impact

Fixed Fee Contracts

While not a new concept…

Has become a new flash point for contracts

Over a term of a contract…

Has become more of a memory

Re: Vendors

Price Control

Re: Vendors

- Forcing vendors to fully absorb inflation may not be the best solution
  - As the increased costs will otherwise impact the services
- Vendors should:
  - Be engaged in cost containment*, and*
  - Ensure that efficiencies are constantly being implemented to control costs.
- For larger organizations with significant negotiation power, an upper limit is often set anywhere from 2 to 5%, irrespective of actual Consumer Price Index published numbers.

Audit *(by Provider)*

Suppliers will retain audit rights

↳ *To ensure that the software and hardware is being used in accordance with the contractually prescribed licensing limitations and restrictions*

- Software audits can be a time intensive proposition
- License compliance / audits have become almost a separate business (and separate revenue generator)
- Allow minor non-compliance (or non-compliance in good faith) to be addressed without any penalties / fines in accordance with general pricing (versus retail rates)

Audit *(by Provider)*

Rights and Participation of Company

To the extent possible:

Limit audit rights and ensure participation of the company

To ensure that:

- ☑ **Systems are not compromised**

  and/or

- ☑ **Irrelevant information is not accessed**

Practice Points – Audit (*by Provider)*

Parties should be…

- ☑ Aware of the potential of disruption from an audit, *and*
- ☑ Prepared to negotiate most points of any audit provision

This includes:

- How often audits will take place
- When they will take place
- Who will cover all costs, *and*
- Whether the customer has any right to delay or constrain an audit.

Practice Points – Audit (*by Provider)*

Key Concern for Customer

How to:

Restrict Usage

Track the Negotiated Audit Obligations

Especially when instructions may not be easily passed on to all users within the company

Non-compliance may be inadvertent

Audit *(by Customer)*

Depending on…

☑ Location of the hardware	IaaS, PaaS
☑ Type of software platform used	SaaS

Customer may need audit rights

- Particularly to verify the security and controls in place

Some / all of these concerns may be addressed through:

- The provision of industry standard audits (SOC 1 and SOC2) *and/or*
- Certified response to security questionnaires

Choice of Law

Service Providers are global

↳ They often try and impose “standard terms and conditions” on their customers

This may include: › “Boilerplate” choice of law and › Forum selection clause

Consider

☑ If terms need to be revisited to reflect either customer chosen forum or a neutral location with developed commercial dispute resolution system

! Not every jurisdiction has commercial courts or have favorable process for expedient resolution of dispute

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Practice Points – Choice of Law

While each party has a preference for its home jurisdiction –
if a neutral jurisdiction cannot be agreed to, consideration should be given to the:

- *Type of breaches that may happen under the agreement and*
- *Procedural aspect of a particular jurisdiction that makes it suitable as the selected forum.*

Considerations should be given to

- ☑ Litigation costs of the jurisdiction,
- ☑ Whether the forum requires pre-trial mediation,
- ☑ Whether the forum has dedicated commercial court,
- ☑ Whether the forum has dedicated statues
  - *e.g. Uniformed Commercial Code, IP Enforcement Guideline, etc.*
- ☑ Would alternative dispute resolution be more suitable for expedient resolution

Alternative Dispute Resolution

Alternative dispute resolution can be a more expedited manner for resolving disputes

In an arbitration context

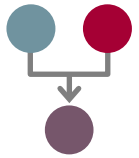
The process may not be as cost efficient as expected

↳ *This depends on the number of adjudicator selected by the parties – ranging:*

1 Adjudicator

- Adequate qualifications pre-agreed by parties

Panel of 3 Adjudicators



- Each party appoints one adjudicator
- The two adjudicators then jointly appoints third

Consider

Alternative Dispute Resolution

Consider

- ☑ Whether the adjudicator(s) can be neutral
- ☑ What would constitute adequate expertise in the field
- ☑ Whether the parties intend for arbitration to be binding and final
- ☑ The exclusive jurisdiction for all claims
  - Including injunctive relief

Aggregate Use of Data

Vendors typically preserve a broad right to use feedback and other usage data to help improve its product

Consider

- ☑ If the feedback could contain underlying customer information that is sensitive
  - Such as: know how, trade secrets (such as processes) *etc.*
- ☑ If personal information is involved:
  - Will it be anonymized*, and*
  - Does the anonymized usage require any consent
- ☑ Whether any information can be reverse engineered
- ☑ Whether the customer company's consumer data strategy and assurances are consistent with any rights afforded to software vendor

Practice Points – Aggregate Use of Data

Whether aggregate data clauses are included in the agreements…

↳ *Is often a point of contention – where both parties will work to draft a provision centered around the granting of the rights*

These rights are necessary to…

Enhance product development,

Protect of source data and

Restrict scope of usage

Additional Considerations ▶

Practice Points – Aggregate Use of Data

Even if the customer does not have consumer data concerns…

↳ *Consider if the software vendor's usage could provide customer's competitors with an advantage that customer paid for*

When Considering Permitted Usage

Can distinctions be made with:

"General Product Improvement Usage" *vs* **"Customization"**

- Provided to the customer alone for a year or two of exclusive access

For more information

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