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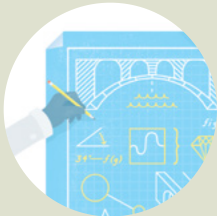
2014 Litigation Report: Managing Risk

Osler, Hoskin & Harcourt LLP



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Introduction

The impact of the highly litigious environment which is gaining momentum in Canada is the explosive growth in risk facing organizations in every aspect of their business and in every sector of the economy. Aggressive regulatory oversight, the willingness of many courts to expand their jurisdictions, extended supply chains and a litigious consumer base have all increased corporate exposure to lawsuits in Canada and around the world.

While it is true that class actions and other suits are on the rise in Canada and the United States, it is also true that a more sophisticated approach to risk management and litigation defence is taking hold in corporate Canada.

In the following pages we share our observations of the current trends and the areas of greatest concern for in-house lawyers, along with examples of risk management best practices to help prevent issues and to manage litigation if it arises. Using examples from key industries and sectors, our experienced litigators illustrate and examine current and expected developments in corporate risk management and complex commercial litigation.

While we have taken a sectoral approach – discussing current issues in high-risk industries such as food and beverages and financial services, the lessons learned and our recommended best practices are globally applicable.

We are pleased to share our observations and analysis of the most important litigation trends and to offer our perspective on recommended approaches to proactive risk management. Should you wish to discuss any of the topics addressed in this publication, please do not hesitate to contact any of our litigators.

We hope you enjoy Osler's *2014 Litigation Report: Managing Risk.*

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Managing Mounting Litigation Risk in the Food and Beverage Industry

by Deborah Glendinning, Sonia Bjorkquist & Craig Lockwood

Consumer awareness of issues relating to food and beverages has been heightened by public debates over health regulations, by documentaries, and by actual – and sometimes tragic – health scares.

Not surprisingly, consumer litigation against the food and beverage industry has similarly increased in recent years in North America. Such litigation has been directed at a number of different aspects of the manufacturing and marketing process. Accordingly, food and beverage companies should not only consider the extent to which each of these areas of potential liability arise in the context of their own products, but also how they can minimize the risk of litigation through sound management practices and well-considered marketing, business and legal strategies.

Osler comments

A recall is not just a recall

The very fact of a product recall is often a triggering event for subsequent consumer litigation, even when the recall may not be attributable to the conduct of the product manufacturer or distributor. Indeed, class proceedings are often commenced in the immediate wake of an announced product recall, well before issues of "fault" or even the existence of injury have been established.

Public health authorities require only reasonable grounds for a belief that a product is a threat to health or safety, and err on the side of safety when confronted with a health risk. A company facing a recall of one of its products will therefore typically have to deal with the direct costs of the recall itself, with the costs of follow-on litigation, and with a loss of brand confidence that is all but inevitable. Further, a company whose products have been recalled and have later been found to be uncontaminated has no recourse against the inspecting agency – a principle confirmed in the B.C. Court of Appeal's 2013 decision in *Los Angeles Salad Co. v. Canadian Food Inspection Agency*.

Regulators are growing increasingly stringent in response to food safety failures that have put the public at risk, and the federal government's Safe Food for Canadians Action Plan, being implemented over the next few years, will give greater powers to inspectors and will increase testing capacity. Food products companies would be wise to assume that the risk of recalls is only going to increase.

Selected Best Practices

1. **Develop a distribution list**
   Ensure your company's products are able to be traced in the manufacturing process and identified in distribution channels.
2. **Communicate effectively**
   Consider utilizing a 1-800 number, a website, newspaper/magazines, and other media (including social media) to effectively communicate with customers and others to whom the recall must be directed.
3. **Implement a recall response team**
   Have a product recall "team" and response protocols in place in the event of a recall. The best defence is a good offence.

Minimize the risk of litigation through sound management practices and well-considered marketing, business and legal strategies.

Avoid health claims that may mislead

Claims about a product's positive effects on health are another common trigger for litigation. In May 2013, for example, the Canadian division of an international food manufacturer settled a class action in Québec for approximately C$1.7 million, the case having been founded on an allegation that some of the company's products improperly advertised certain positive health effects of probiotics in the absence of a scientific consensus. The case was also an example of "copycat" litigation which parallels similar and more common actions in the U.S., a phenomenon that has become an increasing source of concern for food products companies despite Canada's distinct legal and regulatory landscape.

Though products sold in Canada must have their health claims pre-approved by the regulator, this does not prevent future litigation over the adequacy of information provided about a product, but increases the onus on companies to consider how they market their products and make accurate disclosure. This onus may become all the more burdensome as the Supreme Court's recent articulation of the consumer standard in *Richard v. Time* – namely that of a "credulous and inexperienced" consumer – plays out in the food products arena.

Selected Best Practices

1. **Know your product**
   Understand how it is made, and where its ingredients are sourced. Substantiate all health claims on labels or websites with research and reports before it hits the shelves.

2. **Know your customer**
   Consider how the average consumer might interpret your label, and confirm this through focus groups and other marketing research.

3. **Integrate your teams**
   Ensure your marketing department and your product development team are working with legal counsel at an early juncture to ensure that potentially false or misleading claims are headed off at the pass.

Failure to warn

The inverse of a misleading claim about health benefits is a failure to warn about a product's harmful effects. In the U.S., recent class actions of this type have targeted products such as energy drinks and fast food. In Canada, by contrast, energy drinks are regulated as "natural health products," and while this may explain why litigation in respect of such products has not been as prolific in this country, no amount of regulation offers immunity from litigation. Companies should anticipate that as consumer awareness of health risks grows, as U.S. cases establish additional points of comparison, and as the legal and regulatory framework becomes increasingly stringent, the risk of such litigation will only grow.

Selected Best Practices

1. **Back up your warnings**
   Document potential adverse health effects with research, which may be leveraged to establish a due diligence defence.
2. **Consider your target market**
   Where appropriate, avoid any perception of marketing to sensitive or vulnerable segments of the population (e.g. children).

Supply chains are no place to hide

The era of the family farm down the road is – for most people – long gone. Extended agricultural supply chains now link local retailers with distributors, growers, and feed producers, only some of which may be located in the same country as the consumer. Yet despite their complexity, the various members of these supply chains are increasingly exposed to a variety of consumer claims. Where suppliers are located outside of the jurisdiction of sale, the distributor of the product will often be the target of litigation. The fact that liability is "joint and several" means that entities at the end of the supply chain will be responsible for any consumer loss even where the source of the harm is attributable to one of its suppliers down the chain. Accordingly, it will be important to ensure that adequate contractual protections are in place so as to protect all rights of recovery and indemnity along the supply chain.

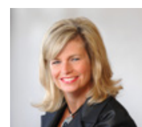
At the same time, suppliers who are not at the end of the supply chain should not assume that they are insulated from direct consumer actions. To the contrary, the Supreme Court recently affirmed that claims of anti-competitive behaviour (including price-fixing) can be lodged not just by direct purchasers one step along the chain, but also by end-users. (*See further commentary on this topic in this report's Securities and Consumer Class Actions section.*) While this jurisprudence arose outside of the food products arena, at least one recent action has been launched in response to alleged price-fixing against manufacturers of high-fructose corn syrup (the Court ultimately denied class certification in this case for lack of evidence). Going forward, food and beverage companies will be well advised to design and manage their supply chains to minimize this risk.

Selected Best Practices

1. **"KYS" (know your supplier)**
   Develop a thorough understanding of the players along your supply chain – their jurisdiction, their assets, their processes, etc.

2. **Review and upgrade legal protections**
   Consider the scope of supplier warranties and indemnities, and consider exclusion of liability clauses for consequential or indirect damages (e.g. lost profits).

For more information on the issues above and risk management strategies, please contact:



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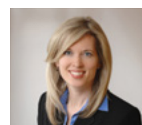

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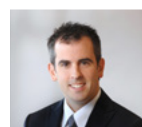

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It will be important to ensure that adequate contractual protections are in place so as to protect all rights of recovery and indemnity along the supply chain.

Best Practices to Manage Risk

by Roger Gillott & Paul Ivanoff

Procurement has been much in the news in recent years as a series of scandals at all levels of government – municipal, provincial, and federal – has tarnished reputations and increased scrutiny of the public sector and its vendors.

All buyers, however, whether public or private, must grapple with the more mundane but more common risks of today's procurement process – risks that stem from perennial issues of fairness, human error and complexity.

Osler comments

Defending the award decision against allegations of non-compliance

In today's context of intensified scrutiny, running a clean procurement process has never been more important. A critical element is the selection of a winning bidder, as losing bidders are apt to seize on any chance to prove that the winner is not in fact compliant with the criteria set out in the tender.

Traditional protections for buyers – like "exclusion of liability" clauses meant to prevent litigation over lost bids – may not protect against liability in all circumstances. In 2010 the Supreme Court held in *Tercon Contractors v. B.C.* that although exclusion of liability clauses are often enforceable, British Columbia could not seek liability protection through its particular limitation clause after the province awarded a highway-building contract to a joint venture that was ineligible to bid. The Supreme Court's elimination of the doctrine of "fundamental" breach of contract in this same decision means that limitation and exclusion clauses will both be treated more seriously and analyzed more rigorously to determine their actual scope of applicability.

A more recent case, 2013's *Rankin Construction v. Ontario*, involved the disqualification of the low bidder after a government investigation showed that the company had failed to comply with a requirement to declare the value of imported steel in its proposal – an omission which reduced its pricing and rendered the bid non-compliant. In this case, interestingly, the Court held that the government's exclusion clause would have successfully fended off the challenge from the disqualified bidder in any event.

To guard against non-compliance allegations, buyers need to develop procurement processes with carefully considered selection criteria. Even more importantly, they need to adhere to their processes and ensure that those processes are clear.

Selected Best Practices

1. **Avoid unnecessary criteria**
   The more criteria a selection process uses, the less likely that winning bidders will be 100% compliant with them – and the more likely that that selection will be challenged.
2. **Use "substantial" compliance language to create flexibility**
   Using language requiring "substantial" compliance gives the buyer the flexibility to select a winning bidder whose bid contains minor technical flaws.

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Upholding the duty of fairness

Treating all bidders fairly is one thing when none of them have worked with the purchaser's company before; it's quite another when one of the bidders is an incumbent, and therefore already knows the ins and outs of the purchaser and the practical details of the service being performed.

In fact, this information asymmetry is often so pronounced that some buyers find themselves relying on the incumbent vendor to define (and even write) the selection criteria in the RFP.

When the purchaser's relationship with the incumbent or approach to the RFP breaches the duty of fairness to the other bidders, it exposes a purchaser to significant liability. After two failed bids (in 2002 and 2004) for lucrative multi-year contracts involving the relocation of personnel, Envoy Relocation Services sued the federal government for awarding the contracts to the incumbent vendor who had tailored its bid based on its inside knowledge of actual service volumes. In 2013 the Ontario Superior Court agreed that government employees had knowingly favoured the incumbent, and awarded Envoy $29 million in compensation for lost profits.

Purchasers wishing to ensure that they do not breach their duty of fairness to bidders – and that they receive the benefit of being able to choose the best vendor – should consider how to redesign their processes and train their staff so that the incumbent's advantage of holding information that no one else has is minimized.

Selected Best Practices

1. **Enforce clear guidelines**
   Develop consistent, best-practice-based guidelines for procurement. Involve your lawyers in this process, and then train your procurement team.

2. **Invest in training**
   Ensure that all relevant staff attend internal training programs on the implications of mistakes in the procurement process and how to avoid pitfalls.

Avoid complexity, minimize error

Errors in bids and the procurement process are an ongoing source of litigation risk. When discovered after the process is completed and the winner has been selected, some errors can be used by successful bidders to get out of contracts they are no longer comfortable with – or by unsuccessful bidders to argue that their bids should be reconsidered in light of the corrected information. They are also used, as shown by the case of *Rankin Construction v. Ontario* (above), by purchasers to disqualify bidders if an investigation indicates that the details presented in the bid are not in fact true.

Ironically, a favoured method of making procurement processes fairer has made this particular problem worse. Purchasers tried to reduce litigation risk by making criteria more detailed and more complex – and less subjective – but as a result the complexity and level of detail required in a given bid went up in equal measure. As with any system, increasing its complexity means increasing the potential for errors: the more fields to fill in, the more fields to possibly get wrong – particularly so if a bidder depends on subcontractors or other suppliers for much of its information.

Selected Best Practices

1. **Push towards simplicity**
   To avoid mistakes in the first place, use simple tender forms that do not require excessively detailed information (like unit prices) that might be nice to have but is not truly necessary.

2. **Obtain security**
   Use bid bonds to recover value from bidders who refuse to contract by alleging mistakes. Use a simple bid bond clause so that the bid bond itself does not become a ground for non-compliance.

3. **Clarify your rights**
   Explicitly include a clause explaining the procurer's approach to and rights regarding mistakes (e.g. to correct or disqualify in its sole discretion).

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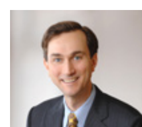

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Changing Risks for Domestic and Foreign Companies

by Allan Coleman & David Morritt

Goods, services, and money cross borders frequently, often bringing the risk of litigation with them. In 2013, Canadian courts have confirmed their willingness to accept jurisdiction over consumer class actions aimed at foreign corporations, and over securities class actions aimed at foreign issuers.

Meanwhile, an increase in the stringency of the "leave test" for pursuing a securities class action under the civil liability provisions of the *Securities Act* represents a greater likelihood that defendants will be able to avail themselves of the opportunity to defeat unmeritorious claims earlier on.

Foreign issuers may now find themselves subject to Ontario securities law

In recent decisions, the Ontario courts have shown that they are prepared to assume jurisdiction over securities class actions with significant foreign elements, posing an increased risk for foreign issuers.

In *Abdula v. Canadian Solar Inc*. the Ontario court held that an Ontario resident who purchased shares of a reporting issuer in the United States over a U.S. exchange could commence a securities class action against the company in Ontario provided the company has a "real and substantial connection" to Ontario. In that case, among other things, the company had its registered office and principal executive office in Ontario, held its annual meeting in Ontario, and the alleged misrepresentations were contained in documents that were released or presented in Ontario.

Most recently, in *Kaynes v. BP, plc*, the Court went even further, holding that all Canadian residents who purchase securities of a foreign defendant over a foreign exchange can sue under Ontario's statutory regime, even where the defendant otherwise has no real connection to Ontario. This is the opposite result than the approach that U.S. and other courts have taken. The court found that Ontario's statutory cause of action had no territorial limits, and that its "deemed reliance" on misrepresentations meant it was similar to a tort having been committed in Ontario. While currently under appeal, if the BP decision is upheld, it would likely have a significant impact on foreign issuers who trade over the TSX or other Canadian exchanges, wherever they are in the world, since the impact of the decision is that those issuers can be sued in Ontario by Canadian investors, even if those investors purchased that issuer's securities over a non-Canadian exchange and the foreign issuer otherwise had no real connection to Canada.

The Ontario approach stands out when compared to the views taken by courts in other jurisdictions, which have not been as willing to assume jurisdiction over foreign issuers for misrepresentations included in their public disclosure. For example, the Superior Court of Québec in *Mouaikel v. Facebook Inc*. recently refused permission for a class proceeding mounted by Québec residents who purchased Facebook stock on the NASDAQ exchange as a result of its IPO on the basis that mere residency in Québec by a purchaser of Facebook shares over a foreign exchange was not sufficient to provide the Québec court with jurisdiction. Similarly, in *Morrison v. National Australia Bank*, the U.S. Supreme Court invoked a well-understood "presumption against extraterritoriality" in deciding that it would only assume jurisdiction over the purchase or sale of securities that occur over a U.S. exchange or are otherwise considered a domestic transaction.

Selected Best Practices

1. **Develop a robust Ontario strategy**
A foreign issuer that has been sued both in Ontario and abroad for misrepresentations in its public disclosure, and the shares of which may have been purchased by Ontario residents, should work with counsel to develop a robust defence strategy that would ensure that the approaches taken in both jurisdictions are complementary to each other and to reduce any possibility of double recovery (any such strategy in Ontario may include contesting jurisdiction and contesting leave in the event that the Ontario court finds that it has jurisdiction – see below).

The requirements for obtaining leave to commence a securities class action based on misrepresentations in an issuer's public disclosure have been applied meaningfully, creating new opportunities for the defence

In an effort to encourage improved disclosure practices, Ontario and other Canadian jurisdictions have made it easier for investors to commence class actions in respect of misrepresentations in an issuer's continuous disclosure documents. Similar to the American "fraud on the market" doctrine (as it presently stands), the Ontario *Securities Act* does not require proof of individual reliance by shareholders on the alleged misrepresentation before an action is permitted by a court to proceed. While the intent of the civil liability provisions in the *Securities Act* is to assist in keeping capital markets transparent and healthy, issuers and their shareholders could face additional burdens in responding to unmeritorious claims. This was addressed in the legislation through the requirement for the Court to grant leave before a *Securities Act* proceeding was commenced. Early cases, however, appeared to indicate that the "leave test" – which requires that plaintiffs show that their claim is made in good faith and has a reasonable possibility of success – represented little more than "a bump in the road" for plaintiffs, and suggested that defendants may have little to gain, and perhaps much to lose, by filing extensive evidence in opposition to a leave motion. For example, filing evidence in response to a leave motion could result in early documentary discovery, exposure of key witnesses to cross-examination and the early revelation of litigation strategy. However, more recent cases have given defendants some hope that the leave test will provide a meaningful opportunity to defeat unmeritorious claims, as the courts have been demonstrating a willingness to apply the test for leave as a genuine screening mechanism which requires the court to assess and weigh the evidence and to decide whether the plaintiff's claim truly has a reasonable possibility of success.

These decisions, including *Gould v. Western Coal Corporation*, show that a strong defence at the leave stage can yield big returns and provide defendants with extra incentive to mount an early and robust defence, as the result may be the complete dismissal of the action. A further and longer-term benefit of these changes, of course, lies in the deterrence of future unmeritorious claims and of "strike suits" meant to extract settlements as a way of avoiding protracted and expensive litigation.

Selected Best Practices

1. **Mount an early defence**
   Consider vigorously contesting a leave motion using competing evidence and by testing the plaintiff's expert evidence.

Foreign corporations selling goods to Canadians – even through distributors or other links in the supply chain – may be as exposed to locally brought actions as anyone else

Consumer class actions have been on the rise in Canada and in the United States, with a frequent focus on anti-competitive behaviour and price-fixing. In 2013, the landscape for consumer class actions in Canada was clarified by a long-awaited trilogy of Supreme Court of Canada decisions on class certification. Resolving competing approaches that had emerged in the B.C. and Québec courts, the Supreme Court held that companies may be subject to litigation by indirect purchasers in Canada for damages suffered as a result of price-fixing effectuated at the top of the distribution chain, even if that conspiracy is alleged to have been formed in a foreign jurisdiction, on the theory that the overcharge has ultimately been passed on to them through the chain of distribution. Nonetheless, defendants in antitrust and other class actions are prevented from raising the passing-on defence under restitutionary law in response to claims by direct purchasers, i.e. that direct purchasers have not suffered any loss because they have passed on the overcharge to their customers (the indirect purchasers). The Supreme Court found that although there is a risk of double or multiple recovery where actions by direct and indirect purchasers are pending at the same time or where parallel suits are pending in other jurisdictions, this is a risk that can be managed by the court, and defendants may submit evidence so as to prevent overlapping recovery.

The Court also reaffirmed the low bar to class certification established by previous Canadian cases, which only requires "some basis in fact" that the certification requirements have been met, including a "credible or plausible" methodology to demonstrate that losses have been experienced across a proposed class. In Québec, meanwhile, a court's role in the authorization stage is to do no more than filter out frivolous cases.

The willingness of Canadian courts to permit indirect purchaser claims exposes foreign corporations to an increased risk of consumer class actions in Canada. Indeed, foreign companies with no direct presence in Canada may be required to defend competition class actions in Québec, and possibly other provinces, brought by persons who have allegedly suffered losses in those jurisdictions caused by a price-fixing scheme entered into in a foreign jurisdiction.

Selected Best Practices

1. **Prevent anti-competitive conduct before it happens**
   Develop a comprehensive competition compliance policy and have it regularly reviewed. Train employees involved in pricing decisions and conduct annual audits to ensure compliance.

2. **If litigation commences, defend in multiple jurisdictions**
   Coordinate your defence in all relevant jurisdictions to ensure complementary defence strategies and minimize the risk of double recovery and of overcompensating plaintiffs.

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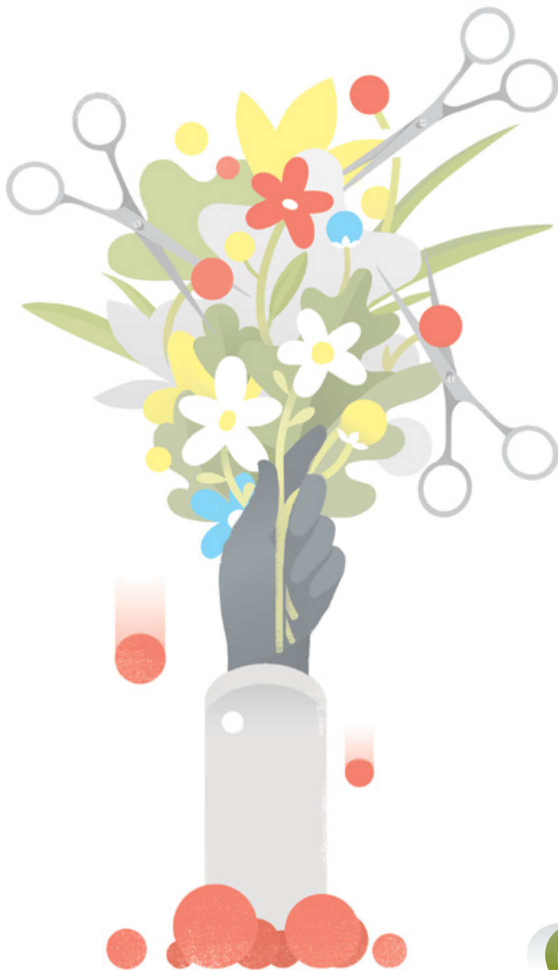
Minimizing Litigation Risk Through Robust Internal Controls and Customer Data Protections

by Larry Lowenstein & Shawn Irving



Canadian financial institutions continue to live in a world shaped by the 2008 financial crisis and by the various regulatory responses to that event, both in their home market and in other jurisdictions.

In 2014, top areas of focus for management should include the risks posed by insufficient internal controls on risky or unlawful behaviour, and the challenge of rigorously addressing customer privacy amid rapid increases in the scope and volume of personal data.

Osler comments

The potential cost of tolerating ineffective internal controls is higher than ever

While the global trend of increased enforcement activity in the financial services sector associated with the failure to maintain adequate internal controls was largely caused by the accounting scandals of the early 2000s and then amplified by the 2008 financial crisis, recent colossal regulatory sanctions in the U.S. and elsewhere have again drawn attention to compliance risks.

In the United States, JPMorgan Chase & Co.'s recent agreement to pay approximately $13 billion in a civil settlement to the U.S. government for the bank's allegedly lax practices in the vetting and packaging of mortgage-backed securities represents the largest settlement in history between a government and a single corporate entity. It is expected that this settlement may well presage comparable settlements against American and non-American banks involved in similar practices. Similarly, the sub-prime mortgage scandal has continued to make headlines and will likely result in very significant regulatory activity or penalties.

Administrative penalties in Canada have traditionally been small by comparison. However, it is becoming increasingly clear that Canadian regulators seeking to achieve tangible changes in corporate behaviour are also willing to target a company's bottom line, and to adopt a similarly hard-line approach to penalties. A more immediate reality is that Canadian companies already face potential exposure to large penalties if they are doing business in the U.S.

If large potential administrative penalties are not reason enough to make internal controls and compliance high priorities for management and boards, another is the very real risk of securities-related class proceedings stemming from criminal or unlawful conduct. Class proceedings can be expected to accompany or follow regulatory investigations. To cite one example, subsequent to its scandal involving the alleged bribery of foreign officials, a class proceeding was commenced against SNC-Lavalin alleging that the company misrepresented in its public disclosures the adequacy of its internal controls.

Finally, the US$2 billion in trading losses generated by JPMorgan's "London Whale" trading fiasco should remind financial institutions of the basic preventative purposes of risk management, compliance procedures and internal controls. In today's volatile and fast-paced market environment, the cost of such behaviour can add up very rapidly if not detected and rectified early on. Once again, prevention is better than a cure.

Selected Best Practices

1. **Drive from the top**
   A well-communicated commitment to effective risk management, compliance procedures and internal controls should start at the board and senior executive levels.
2. **Use risk to prioritize controls**
   Thoughtful risk assessment should focus initial efforts on areas with the greatest potential for harm.
3. **Implement a system of risk management**
   Typical policies include whistleblower programs, internal audit and investigation and compliance functions.
4. **Focus on prevention**
   Effective controls should help prevent or detect potential misconduct early on; more lenient administrative penalties may be available if a company "self-reports."

Privacy and Data Retention

As the volume and scope of personal data collected and retained by financial institutions increases, so do privacy-related litigation risks.

With the rapid development and now nearly universal customer usage of digital channels for financial transactions and advice, as well as with the digitization and storage of customer documentation in general, financial institutions now find themselves directly exposed to litigation risks arising from the collection and retention of "big data" and client expectations of privacy. Though the precise level of risk introduced by the retention of personal and financial information is difficult to quantify, recent class actions in Canada indicate the risks are indeed real.

Following the Ontario Court of Appeal's 2012 decision in *Jones v. Tsige* – a case in which a bank employee repeatedly snooped on the private financial records of her boyfriend's former spouse – there is now an established common law tort of "intrusion upon seclusion" in Ontario. Although the tort is limited to "moral" damages and is not based on economic loss, the Court has confirmed that a person may be liable for intentional or reckless invasions of another's privacy where the invasion would be regarded as "highly offensive" to a reasonable person. Intrusions into financial matters are regarded as "highly offensive", and, therefore, actionable under the common law tort. This new common law right of action, together with statutory rights of action in certain other provinces, has led to the commencement of numerous class actions in the past year across Canada. One lawsuit, for example, was recently commenced in response to the loss of an external hard drive at Ontario's Ministry of Human Resources and Skills Development containing the personal information of approximately 583,000 Canadians, while another was launched after cybercriminals accessed the personal data of more than 12,000 customers of the Peoples Trust Company.

The spectrum of liability currently varies from province to province, and as privacy and data retention issues increase and new lawsuits are advanced, the way losses are defined and quantified will remain an open issue to be considered by Canadian courts.

Another emerging privacy risk stems from the implementation of the United States' *Foreign Account Tax Compliance Act* (FATCA) in July 2014, requiring foreign (e.g. Canadian) financial institutions to identify and report to the IRS all financial accounts belonging to specified U.S. persons – including U.S. citizens resident in Canada – and certain U.S. owners of non-U.S. entities. Financial accounts include bank, brokerage and

The way losses are defined and quantified will remain an open issue to be considered by Canadian courts.

other custodial accounts. By some estimates, this could impact almost one million Americans living in Canada. Depending in part on the Canadian government's response to the act, which is yet to be finally determined, FATCA's requirements make privacy-based litigation against Canadian financial institutions a serious possibility.

Even in the absence of specific litigation, in this digital age Canadian financial institutions face significant reputational risks from unauthorized or reckless use of their customer's personal information. As the issues become better understood by the public and regulators, financial institutions will come under greater scrutiny for their privacy and data retention practices. This alone should warrant sustained attention from the executive suite.

Financial institutions will come under greater scrutiny for their privacy and data retention practices.

Selected Best Practices

1. **Get the right tools**
   Obtain IT security protection, hire a qualified system administrator, and invest substantially in recovery capabilities.
2. **Be proactive**
   Obtain and retain the necessary customer consents.
3. **Implement effective policies**
   Implement robust data collection, data destruction, and overall privacy policies. Review and revise periodically to stay current with the times.
4. **Develop a communications strategy**
   Be prepared to communicate transparently and comprehensively with customers in the event a breach occurs.

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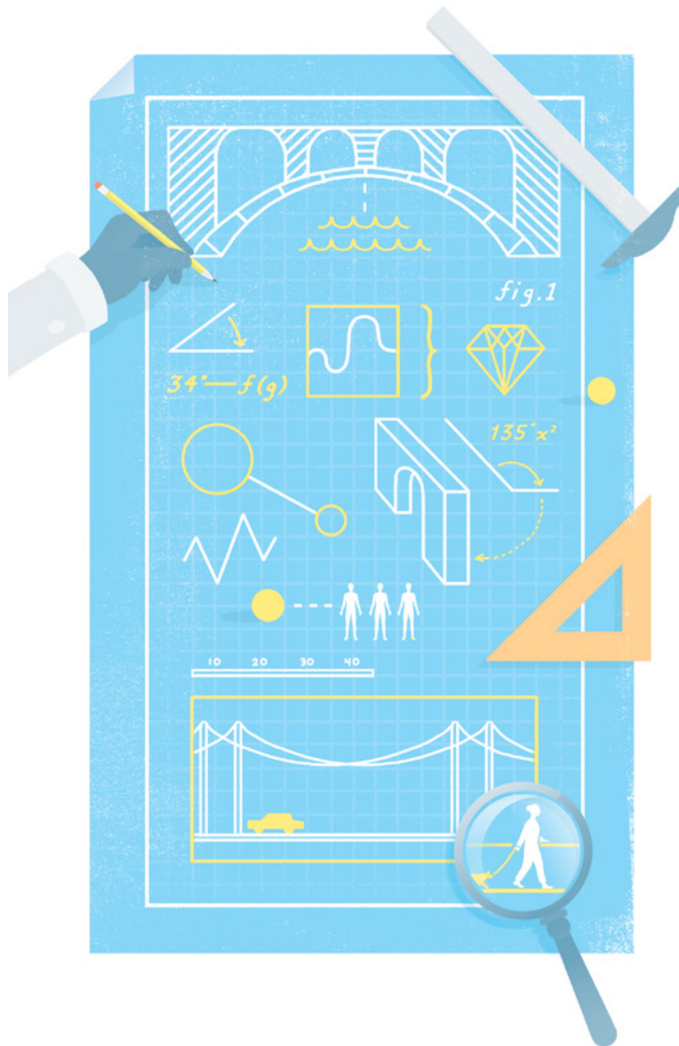
Beginning with the End in Mind

by Maureen Killoran Q.C. & Thomas Isaac



The management of litigation risk in the resources sector is an activity that begins on Day 1 of a proposed project's life, and continues through all project development phases.

In Canada, top risks for 2014 include the increasing number and scope of Aboriginal-related consultation litigation, changes to regulatory policy in certain provinces that have, sometimes unduly, "downloaded" responsibilities to project proponents, and disputes between proponents and governments over procedural fairness regarding governmental approval processes and Aboriginal issues.

Litigation can now be expected at every stage of a project's consultation process

Canada's recent surge in energy and mining projects has brought with it an increasing amount of litigation by affected First Nations and Aboriginal groups. The Crown's "duty to consult," and the modern project consultation process that instantiates it, are at the centre of this litigation, with actions occurring now at every stage of a given process – from pre-project planning all the way to the issuing of permits for construction.

Decisions in 2013 have helped to limit the scope of consultation to a specific proposal at a specific time. For example, in response to a challenge brought forward by the Stellat'en First Nation in *Louis v. British Columbia*, the B.C. Court of Appeal made it clear that the Crown's duty to consult Aboriginal groups only pertains to new or "novel" impacts to Aboriginal rights and does not extend to the re-visitation of previous authorizations – a ruling similar to 2011's *Upper Nicola Indian Band v. British Columbia*, by the B.C. Supreme Court. In *Behn v. Moulton Contracting Ltd.*, meanwhile, the Supreme Court of Canada affirmed that the duty to consult cannot be used as a "collateral attack" to challenge decisions that were not opposed at the time they were being made.

All-stage litigation can obviously impact the success of an entire project, and shareholder returns are normally contingent upon the project moving along at a reasonable pace. What is more, "duty to consult" is only one aspect of the more general principle of the "honour of the Crown" – the requirement for government to treat Aboriginal peoples fairly in all dealings with them. We anticipate novel forms of litigation arising in the next few years from other ways the principle of the "honour of the Crown" could be used by Aboriginal peoples to challenge Crown decisions and actions.

Selected Best Practices

1. **Plan and implement an airtight consultation process**
   Approach the process in a manner that is reasonable, transparent, and that is properly and thoroughly documented. Ensure a sufficient level of government involvement and oversight.

Recent regulatory changes have increased burdens on proponents

With the avowed intent of reducing uncertainty, new consultation frameworks have been developed recently by Alberta, Newfoundland and Labrador, and Ontario that effectively shift responsibilities from the Crown to project proponents. In Alberta, the province's new Policy on Consultation with First Nations on Land and Resource Management has centralized the consultation process in the Aboriginal Consultation Office (ACO), and is in the process of allocating responsibilities among First Nations, project proponents, and the ACO itself. A revamped Ontario *Mining Act* now requires the submission by proponents of thorough "exploration plans" before activities begin, along with detailed consultation at each stage of the project development process, while Newfoundland and Labrador's new policy involves an unprecedented shift in the burden of consultation from the Crown to project proponents: companies are to pay the full costs of consultation on behalf of Aboriginal groups, for example, and are also required to provide financial "accommodation" for adverse effects on Aboriginal rights (a duty that rests with the Crown as the Supreme Court of Canada has already confirmed).

Such changes being new, and certain important concepts (like accommodation) being still only loosely defined, the net result of these policies may be to increase uncertainty, not lessen it. Further, a substantial transfer of responsibilities to proponents may not meet the standard required by the honour of the Crown. Nevertheless, it is clear that for proponents, more thorough and thoughtful efforts must be made to meet the legal, policy and regulatory standards now required.

Selected Best Practices

1. **Plan holistically**
   A proponent's strategic consultation process should align with its government relations, legal and regulatory strategies, and vice versa.

The net result of these policies may be to increase uncertainty, not lessen it.

Questions of procedural fairness may spark litigation by proponents

With new burdens and new uncertainties come the risk of disputes among participants and even of litigation by proponents against the Crown, particularly if a given regulatory regime is not being effectively managed. While such action would typically be a remedy of last resort, a recent case illustrates that such scenarios have already begun to occur.

In fall 2013, Northern Superior Resources filed a Statement of Claim against the Government of Ontario alleging that the government failed to properly discharge its duty to consult with First Nations in regard to a number of gold properties in northwestern Ontario. Stemming from this failure, says the company, disputes arose between Northern Superior and affected First Nations, eventually halting any opportunity for further development. Its mining claims now abandoned, Northern Superior now seeks damages for the amounts it spent on exploration and for the decline in value, estimated at $110 million, of the properties themselves.

Similar litigation may also arise if it is perceived that a company is being treated unfairly by government or subjected to arbitrary decision-making – in cases of major procedural delays, for example, or where a proponent believes that its own interests are not being kept in balance with Aboriginal interests.

Selected Best Practices

1. **Litigate as a last resort**
Though proponents have a right to a fair, transparent, and reasonable regulatory process, they should consider their options very carefully before embarking on litigation against the Crown – and they should ensure that their own participation in the consultation process has been carried out to a high standard throughout.

To discuss any of the issues and risk management strategies raised above, please contact:

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