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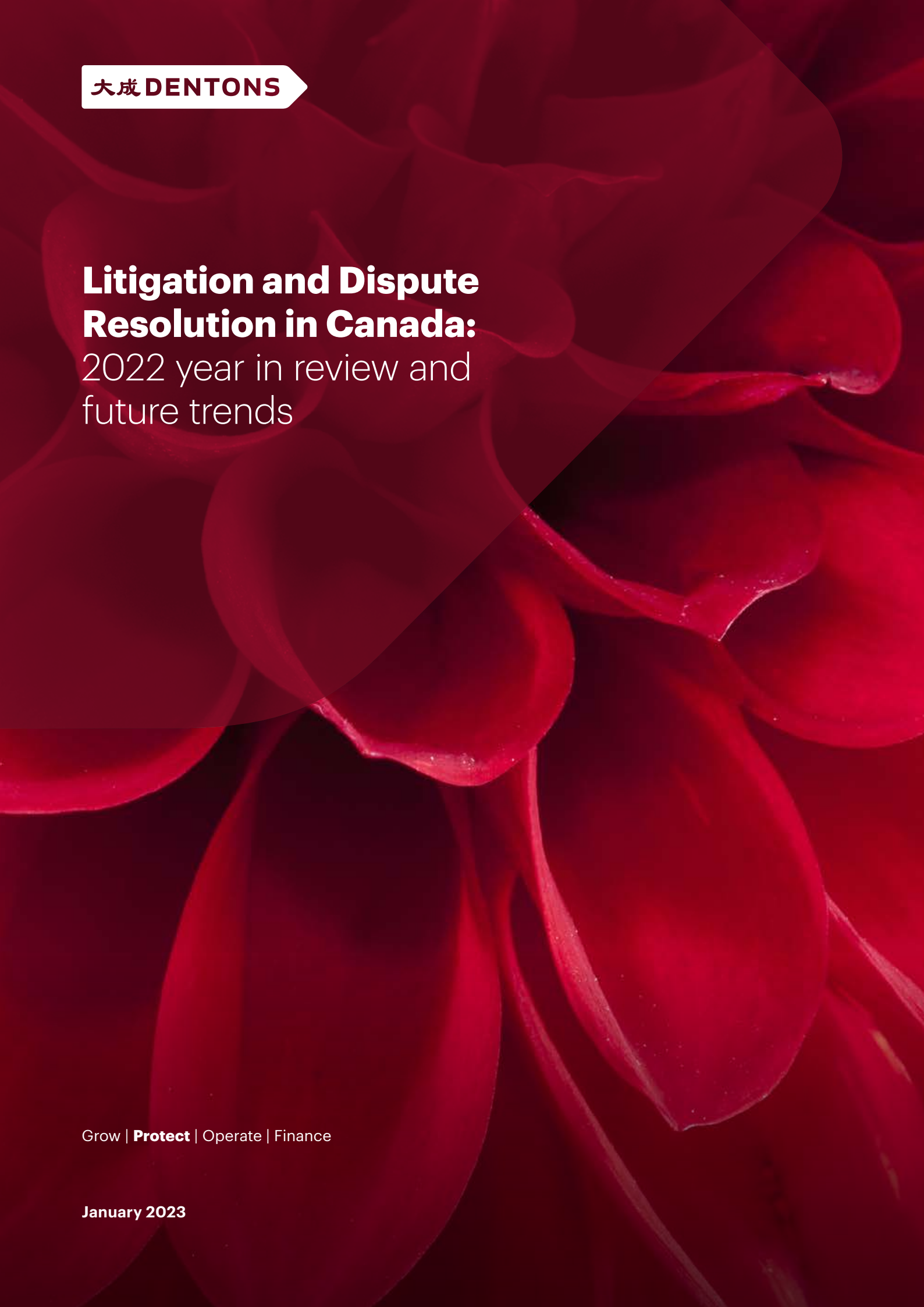
Litigation and Dispute Resolution in Canada: 2022 year in review and future trends



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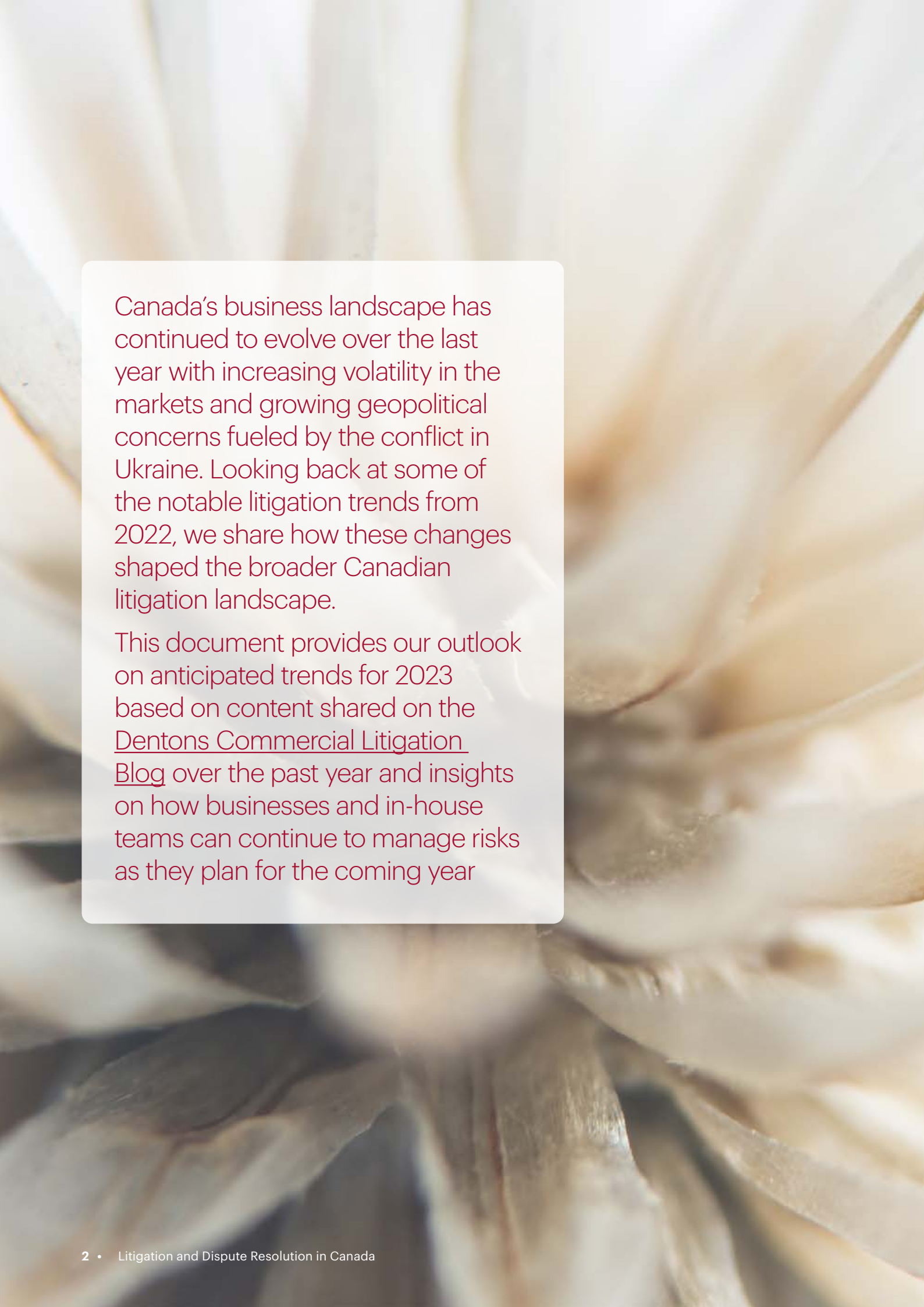


Canada's business landscape has continued to evolve over the last year with increasing volatility in the markets and growing geopolitical concerns fueled by the conflict in Ukraine. Looking back at some of the notable litigation trends from 2022, we share how these changes shaped the broader Canadian litigation landscape.

This document provides our outlook on anticipated trends for 2023 based on content shared on the Dentons Commercial Litigation Blog over the past year and insights on how businesses and in-house teams can continue to manage risks as they plan for the coming year

Trend #1

Class action (privacy, product liability and employment)

Privacy class actions

Privacy class actions continue to be at the forefront of class action trends. The privacy litigation landscape has substantially changed over the last decade, driven by new technologies, the introduction of common law privacy torts and changing privacy laws. Data breaches remain a significant risk to institutions of all sizes. As the law continues to develop and privacy and cybersecurity remain top of mind, we expect this trend to follow through 2023.

Here are some key takeaways from our blogs over the last year:

The common law tort of intrusion upon seclusion continues to develop as does its use in the class action context

In the last year, there have been a number of decisions that have challenged, and in the process allowed, courts to clarify the use of intrusion upon seclusion in class action proceedings. The tort typically arises in class actions involving data breaches by a ransomware attack or a third party otherwise obtaining access to the defendants' databases of employee or customer information. These cases mark an important turning point for the use of the tort in large data breach cases.

A growing tendency for courts is to weed out privacy-related class action claims at the certification stage. The courts have clarified that for the purposes of intrusion upon seclusion, the type of information intruded upon is not determinative of whether the intrusion is highly offensive. The circumstances in which the intrusion took place (including the purpose of the intrusion) will also be relevant.

Courts have further recognized that evidence of any impact on putative class members as a result of the intrusion (or lack thereof) may be relevant in determining whether the tort is made out; despite the fact that the tort of intrusion upon seclusion does not require evidence of damages.

Read more: Ontario Divisional Court overturns certification of claim for intrusion upon seclusion: Review of *Stewart v. Demme*

Accordingly, businesses should ensure that they take steps to implement and document policies and procedures for the safeguarding of personal information in accordance with industry standards. They should also provide up to date training for their employees with respect to the handling of personal information and take steps to appropriately sanction or discipline employees failing to comply with such obligations.

While this line of cases will have a cooling effect on privacy class actions in Ontario it remains to be seen whether the other provinces will follow suit in 2023. It is now settled in Ontario that such defendants cannot be sued for the tort of intrusion where no material facts are pleaded that allege the respondents acted in consort with, or were vicariously liable for, the conduct of hackers. It is not yet clear what impact these decisions will have on claims based on vicarious liability. The extent to which other claims (based on contract or negligence) can be successful on these types of facts is also unclear.

Read more: Ontario Court of Appeal holds no intrusion upon seclusion for third-party data breaches in a trio of decisions

The courts' increasing skepticism towards the certification of privacy-related class actions

In the past, courts were often content to let the strength of plaintiffs' claims be tested at trial. Now, they seem prepared to exercise a gatekeeping function at the certification stage. A business finding itself embroiled in such litigation will want to expose any qualitative issues in the plaintiffs' pleadings and evidence to persuade the court that there is a fatal absence of any "basis in fact."

Read more: Increasing skepticism towards the certification of privacy-related class actions: Review of *Chow v. Facebook*

Product liability litigation

The product liability litigation trend in Canada is dominated by a variety of products including automotive, pharmaceutical and other consumer goods. It's critical to understand the risks involved, and keep up with the most recent developments in product liability class actions with the emergence of mass torts in Canada as a substitute for conventional class actions.

In a multi-jurisdictional landscape, overlapping or duplicative class actions are a regular occurrence in product liability claims – and cannot always be resolved by stay motions

In *Kirsh v. Bristol*-Myers Squibb, 2021 ONSC 6190 *(Krish)*, the Court provided guidance on circumstances where two national class actions seeking the same or similar relief may be allowed to proceed concurrently. *Kirsh* highlights that defendants must carefully consider strategy when dealing with class actions in multiple jurisdictions. An overlapping class action is not abusive simply because it is duplicative of a class action in another jurisdiction. The Courts will look at a variety of factors including the history of the proceedings, the benefit to class members, fairness to the parties' and upholding the administration of justice.

Class actions aim to serve three goals: judicial economy, behaviour modification and access to justice. *Kirsh* may appear to run counter to these goals, specifically, that of ensuring judicial economy. But perhaps the biggest takeaway from *Kirsh* is that courts will continue to carefully balance all of these goals.

Read more: Overlapping class actions: To stay or not to stay?

Court found that compliance with federal manufacturing guidelines insulated the manufacturer from liability for allegedly contravening the federal Competition Act

Rebuck v. Ford Motor Company illustrates that defendants are not liable for misleading advertising where the underlying representation complies with government regulations (in this case, the fuel efficiency test used for the EnerGuide label). Further, plaintiffs alleging misleading advertising due to failure to disclose material information under consumer protection legislation must have persuasive evidence of what class members were led to believe by the label and that the Defendant actually knew of the label's alleged use or non-use by the average purchaser. Similarly, a breach of misleading advertising under the *Competition Act* must establish that the defendant made misleading representations willfully or recklessly. Omissions are not sufficient to make a label misleading.

Read more: *Rebuck v. Ford Motor Company:* Ontario Court grants summary judgment dismissing certified false advertising class action related to fuel efficiency claims

Product liability class action defendants should consider what proactive steps they can take to remedy negligent design issues and compensate potential plaintiffs to mitigate the risk of class action certification

For plaintiffs, *Coles v FCA* Canada Inc., 2022 ONSC 5575 *(Coles)* illustrates the importance of timely progression and/or timely resolution of class actions, particularly in product liability class actions where a product is alleged to be dangerous to the public. For corporate defendants, *Coles* illustrates the importance of risk mitigation and proactive steps, including recall programs that can be implemented broadly and efficiently.

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

Employment class actions

Another trend in class actions is the rise in employment-related class action claims with an increase in wrongful dismissals, discrimination, harassment and wage related claims. Our team discussed three recent decisions from the courts with key takeaways for businesses.

***Lewis v. WestJet Airlines Ltd, 2022 BCCA 145 (Lewis)* provides several important takeaways for class action lawyers and employers**

First, an employer's failure to uphold anti-harassment workplace policies may leave them vulnerable to class action lawsuits. Second, defendants proposing an alternative procedure to a class action on a certification motion must show that the alternative provides class members with substantive and procedural access to justice. Finally, *Lewis* confirms that plaintiffs seeking to certify the remedy of disgorgement as a common issue must provide a class-wide methodology for calculating aggregate damages.

Read more: Flight Attendants' Harassment Class Action Certified: An Update on the Preferable Procedure Analysis in Class Actions

Establishing oppression in connection with a wrongful dismissal

Although employees have advanced oppression claims in the past, the oppression remedy is not generally a vehicle for non-shareholding employees to advance wrongful dismissal claims. In almost all cases, there was some element of internal corporate maneuvering, used as a tool to defeat the employee's legitimate claim for damages. Such corporate maneuvering included examples where the employer wound up the business, or where the employer's assets were transferred out of the company, leaving the corporation unable to satisfy the outstanding claims of the employees.

Read more: The Ontario Superior Court of Justice reaffirms that the statutory oppression remedy cannot be used to advance common wrongful dismissal claims

The Court considered privacy rights in the context of a statutory tort of privacy along with the broader implications for businesses as a result of unauthorized employee access to customers' personal information

When setting internal policies that limit how employees can use customers' personal information, organizations should also consider and establish monitoring and enforcement mechanisms to prevent or detect misuse. Otherwise, they may be found to have created a foreseeable risk for privacy breaches at the hand of their employees and, as a result, be vicariously liable. In finding vicarious liability, an employer's vicarious liability is a strict liability that does not depend on the fault of the employer.

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

Trend #2

Preserving privilege

Things you didn't know you didn't know about legal privilege

The common use of "privilege" is not the same as legal privilege. Legal privilege identifies and classifies relationships and communications that are presumptively protected from disclosure, including communications between a lawyer and client, communications and documents prepared for the dominant purpose of litigation and communications between parties exploring settlement.[1]

"Privilege" is used in a variety of contexts, and this article begins with a background on "privilege" and outlines the various types of legal privilege and best practices including solicitor-client privilege, litigation privilege, settlement privilege, common interest privilege and reputation management privilege.

Read more: Things you didn't know you didn't know about legal privilege

When discretionary statutory privilege cedes to the public interest in the proper administration of justice

The Supreme Court of Canada released its decision in the appeal brought by the Transportation Safety Board concerning disclosure to the civil litigants in a passenger class action. The Supreme Court of Canada upheld the decision of the Nova Scotia courts below to order disclosure under so-called "stringent conditions" limiting the disclosure to the litigants and their experts, consultants, insurers and lawyers.

Read more: Privilege and the search for truth: The Supreme Court of Canada clarifies process and test for disclosure of Airplane black box in civil litigation in Canada (Transportation Safety Board) v. Carroll Byrne, 2022 SCC 48

Trend #3

Settlement disclosure obligations

Partial settlement agreements that change the adversarial landscape of the litigation must immediately be disclosed

The Court of Appeal for Ontario has confirmed that a partial settlement agreement which changes the adversarial orientation of the litigation must immediately be disclosed to the non-settling defendants. The failure to comply with this "well-established rule" is an abuse of process and in Ontario the consequence will be an automatic and permanent stay of the litigation. If a settlement agreement changes the litigation landscape so as to alter the adversarial position of the settling parties to one of cooperation, then it must immediately be disclosed to the non-settling defendants.

Read more: A trap for the unwary? Partial settlement agreements that change the adversarial landscape of the litigation must immediately be disclosed

1. *R v. Nguyen, 2015 ONCA 278 at pars 16.*

Trend #4

Environmental litigation

Climate change-related litigation has been a growing trend each year following the signing of the 2015 Paris Accords, and the volume of cases filed should increase further in the upcoming year. Recent Canadian climate change actions have often been against governments, alleging Charter right violations for issues such as the Greenhouse Gas Pollution Pricing Act (GGPPA)[2]. An increase in this type of climate change litigation may encourage a shift in corporate governance mandates to increase the focus on emissions-related commitments, and add momentum to calls for stricter regulations on business activities.

Climate based private law claims are often brought as class actions, and will continue to be challenged by common law doctrines. In addition to the legal requirement of proving causation of loss, the principles limiting recovery for economic loss, as clarified by the Supreme Court of Canada in *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 (*Maple Leaf*), are of particular importance in these types of claims. Until *Maple Leaf*, certification of environmental class action claims based on purely economic loss might be obtained on the basis that the law was unclear as to whether such claims could be recovered.

The perceived uncertainty in the law risked disincentivizing economically beneficial behavior, giving unfair settlement leverage to plaintiffs, and creating unrealistic expectations among class members as to what claims might be viable. *Maple Leaf* made clear that claims for economic losses unconnected to physical injury to the claimant or physical damage to the claimant's own property cannot succeed except in specific and very limited circumstances. This significant clarification of the law concerning recovery for pure economic loss was applied to an environmental class action in the 2022 Alberta Court of Appeal decision in *Rieger v. Plains Midstream Canada ULC, 2022 ABCA 28* (*Plains Midstream*) where claims of those outside the physical "footprint" of an oil spill were dismissed. *Plains Midstream* and *Maple Leaf* should have the effect of restricting recovery to those persons physically impacted or with lands that are directly and physically impacted by environmental events, including climate change. This would seem to run contrary to the types of broad class action claims brought against private companies in New York, Colorado, and other jurisdictions seeking redress for climate change impacts.

2. *See Environnement Jeunesse c. Procurer general du Canada, 2019 QCCS 2885; LaRose v. Canada, 2020 FC 1008; Mathur v. Ontario, 2020 ONSC 6918*

Public interest climate change based litigation, like the recently dismissed legal challenge to Alaska's natural resources policies brought by a group of youths, and similar class actions by Canadian youths against the Canadian federal government and several provincial governments, could also be challenged on this basis. The requirement of physical harm to a person or property (including loss of use and enjoyment of property) as applied in *Plain Midstream* Not only may this prove a difficult hurdle for plaintiffs seeking to advance climate based tort claims, it may indirectly buttress other public law arguments that legislatures, not courts, are the proper forum to resolve the broad societal issues involved with climate change causation, prevention, and mitigation.

Read more: How one environment-based class action is challenging the path for plaintiffs

Read more: If you don't plead it, you can't appeal it: Ontario Court of Appeal confirms you can't raise new theory of defence on environmental contamination appeal

Trend #5

Supply chain issues

Supply chain issues have impacted nearly every part of the Canadian economy this past year, crossing sectors and industries indiscriminately. As businesses in Canada face the practical contractual realities of these issues, which can lead to contractual disputes (including but not limited to supply or pricing obligations), they also face developing legislation against modern slavery, increased securities disclosure obligations on ESG matters and risks of project complaints against parent companies that are expected to see an increase in litigation. Where delays and disruption to supply chains emerge, contractual disputes inevitably follow, as businesses seek to recoup the losses that result. There are a number of considerations that businesses should bear in mind when facing supply chain disputes.

Read more: Supply chain issues impacting the mining industry

Over the past year, Canada has implemented a significant and increasing number of measures relating to modern slavery. While the underlying concerns driving such measures are not necessarily new, the measures are of significant consequence for international business, and specifically international supply chains. These measures are part and parcel of an increasing focus on environmental, social and governance (ESG) considerations, both as a matter of compliance with law and as part of responsible business practices.

Read more: Canada's modern slavery framework: New reporting obligations

Trend #6

Securities litigation will continue to occupy the attention of the market

In 2023, securities litigation will continue to occupy the attention of market participants. Expect the regulatory focus on crypto assets and the risks they pose to investors and the markets to increase this year. Similarly, expect continued regulatory and plaintiff focus on disclosure-related issues (including ESG related disclosure), trailing fees, suitability and conflict of interest issues. The hearing schedules of the provincial securities commissions are also peppered with enforcement proceedings pertaining to fraud on the market in various forms. We anticipate that the trend toward increased regulatory proceedings being commenced against registered firms will continue. In addition, we expect that pre-hearing motions will continue to play a vital role in ensuring irrelevant and improper evidence is excluded from the record in these proceedings.

Effective January 1, 2023, the unification of IIROC and the MFDA into a single SRO brought their respective registrants and markets under one regulatory umbrella. A new rule book and fee structure may be rolled out later this year along with a new name for the unified regulator.

Read more: How one decision illustrates the importance of timely pre-hearing motions

Read more: Respondents' cross-examination rights in securities enforcement proceedings: *First Global Data Ltd (Re)*

Trend #7

Rise in professional negligence claims

Many professionals owe their clients a general duty of care. Often, professionals are held to the higher standards imposed by their professional regulatory bodies. In 2022, we saw a number of landmark cases reshaping and refining the duties of professionals' responsibility across numerous different professions. Here are some notable cases and key takeaways for professionals in 2022.

Colleges bear costs of investigating and conducting disciplinary hearings

Allegations of misconduct to a professional regulator often results in professionals being subject to an investigation and hearing to determine the merits of the complaint and, if appropriate, the sanction. Professional regulators (such as Colleges) are given the discretion to award substantial or full-indemnity costs against the regulated member, which may amount to hundreds of thousands of dollars. The Alberta Court of Appeal in *Jinnah v Alberta Dental Association and College, 2022 ABCA 336 (Jinnah)* both clarified and substantively restricted the instances where Hearing Tribunals may award costs against regulated professions – colleges are now presented with an onus to prove that there is a "compelling reason" to award costs against the regulated member. A "compelling reason" will only exist in one of four circumstances: (i) where the regulated member engages in "serious unprofessional conduct" that the regulated member must have known was "completely unacceptable," such as sexually assaulting a patient; (ii) where the regulated member is a "serial offender" who "engages in unprofessional conduct on two or more occasions;" (iii) where a regulated member fails to cooperate with a College investigation, forcing the College to expend more investigatory resources than necessary; and (iv) where a regulated member engages in hearing misconduct, which is "behavior that unnecessarily prolongs the hearing" or unjustifiably increases costs of prosecution. The Court in *Jinnah* recognized that these exceptions are narrow, and will result in the profession bearing full costs in most cases; however, the Court states "this presumption has merit and makes good sense." *Jinnah* therefore provides clear guidance and certainty on when regulated members may expect to bear some or all of the costs of a Hearing, while simultaneously increasing the accountability of Colleges' exercising the privilege of self-governance.

Read more: The privilege of self-governance: Alberta Court of Appeal restricts awarding costs against members of regulated professions

Damages and liability in professional negligence actions

The principles applied in *Ashraf v Zinner, 2020 ABCA 207 (Ashraf)* have significant implications for professional negligence based actions. The decision on liability makes clear that a lawyer may not continue to be held liable to a client endlessly. Once a client has taken steps, either on their own or with new counsel, to remedy the negligent action, the original professional is no longer considered to be the "but for" cause of any damages sustained from that point forward. The decision on damages is equally instructive, as it makes clear that a professional is only responsible for the associated costs to rectify the negligence, and that any harm sustained thereafter is not recoverable.

Importantly, unlike situations where a lawyer's negligence was the "but for" cause of a poor settlement or decision, *Ashraf* demonstrates that the oft-used trial within a trial may be unnecessary to quantify damages. Lastly, *Ashraf* is helpful in that it again notes that a defendant cannot be held responsible for the totality of a claimant's mental and physical ailments when there are other contributing and underlying factors.

Read more: Damages and liability in professional negligence actions: The case of *Ashraf v. Zinner*

Zero tolerance for sexual relationship between a health practitioner and a patient

The Supreme Court of Canada recently dismissed a dental hygienist's request for leave to appeal from a decision revoking his license for treating his spouse. The Court had the opportunity to reconsider the matters at issue, but declined to provide leave to appeal. This confirms the set law in Ontario that there is a "bright-line" prohibition of any form of sexual relationship between a health practitioner and a patient under the *Code*, which describes these types of relationships as a form of "sexual abuse." A very narrow exception exists for parties that are married or have been in a conjugal relationship for a minimum of three years prior to treatment being administered. This rule remains staunchly enforced, at peril of one's licence, and neither the prohibition generally, nor the penalty of revocation, impugn one's Charter rights. It would therefore be imperative for any health practitioners to avoid any form of sexual relationship with a patient, and proceed with caution even if that patient is a spouse.

Read more: Supreme Court of Canada refuses to hear appeal challenging zero tolerance rule for health care practitioners

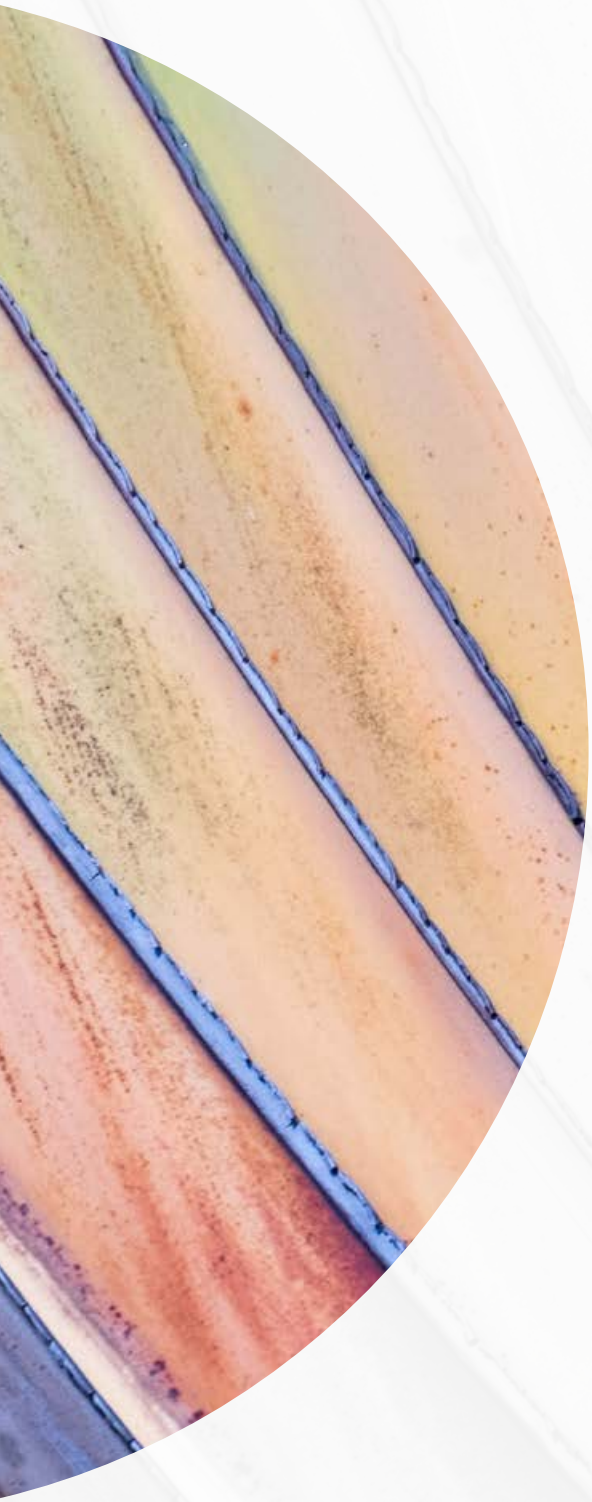
Individuals subject to an administrative disciplinary process are required to first exhaust the remedies before the administrative tribunal before applying for court intervention, including matters involving a *Charter* claim

Goodwin v Alberta College and Association of Chiropractors, 2022 ABQB 177 (Goodwin) reaffirmed that Courts "should decline to grant declaratory relief 'where there exists an adequate alternative statutory mechanism to resolve the dispute or protect the right in question." Notably, in *Goodwin*, the Court found that, even in the face of a Charter challenge, it was the disciplinary tribunal that was in the best position to make an initial determination. Given the Applicant had the ability to appeal the tribunal's decision to the Alberta Court of Appeal, there was sufficient jurisdiction present in the College's complaint procedure for the Charter challenges to be heard. As such, *Goodwin* stands as a good reminder that the administrative dispute resolution process cannot be bypassed, and a claimant subject to such a process must state their case first in front of the administrative tribunal before bringing the matter to the Court.

Read more: Not so fast! Court of Queen's Bench of Alberta rules that the administrative disciplinary process ought not be bypassed

Trend #8

Growing power of administrative tribunals



The COVID-19 pandemic, even three years later, only added to the pre-existing scheduling challenges the courts were facing. It caused an even greater amount of court backlogs and delays. Additionally, there has been a shortage of available judges, resulting in the postponement, or even the cancellation, of court hearings.[3] The relief valve for that pressure going forward may be an increased role for administrative tribunals in order to move matters out of the court system. Whether it was in anticipation of the role of administrative tribunals expanding, or just increased interest in judicial review following the Supreme Court of Canada's 2019 *Canada (Minister of Citizenship and Immigration) v.Vavilov, 2019 SCC 65 (Vavilov)* decision, over the course of 2022 we saw a number substantive decisions in the area of administrative law including a key analysis by the Supreme Court of Canada of what qualifies as "undue delay" in disciplinary proceedings and its creation of a new category of correctness, and a particular focus by many courts, including the Alberta Court of Appeal, to reinforce the standards expected of administrative tribunals.

3. *See, for example, this article on a lack of judges which resulted in the cancellation of an entire week of provincial court hearings in Quebec: https://www.cbc.ca/news/canada/montreal/nunavik-justice-delays-1.6525714*
4. *Abrametz v. Law Society of Saskatchewan, 2020 SKCA 81 at para 12*

Supreme Court upholds "Delay without more" is not enough in administrative law

In *Abrametz v. Law Society of Saskatchewan*, 2022 SCC 29 (*Abrametz*), the Supreme Court of Canada allowed an appeal of the Saskatchewan Court of Appeal's decision to dismiss a professional disciplinary proceeding for abuse of process. In doing so, the Supreme Court reaffirmed the law on delay in administrative proceedings: delay, without more, will not constitute an abuse of process, and a stay of proceedings will only be granted in the most significant of cases.

The Saskatchewan Court of Appeal attempted to take *Blencoe* "a step forward"[4] in an effort to better serve all parties involved in the administrative decision-making process. However, the Supreme Court of Canada has returned the jurisprudence respecting delay in administrative proceedings to a high threshold for a prospective claimants to clear. Delay, in and of itself, will not constitute an abuse of process, and a stay of proceedings, as a remedy, will only be available in the clearest of cases.

Read more: No Jordan-like time limits in administrative proceedings: Supreme Court upholds "Delay without more" is not enough in administrative law

The Supreme Court of Canada creates a new category of correctness in judicial review

The Supreme Court of Canada has added a sixth category of correctness review: concurrent jurisdiction. Concurrent jurisdiction occurs in rare circumstances and is set out clearly in legislation. It is unlikely that the recognition of an additional category of correctness of concurrent jurisdiction has opened the floodgates to further categories of correctness. The presumption of reasonableness and the stability provided by *Vavilov* continue to persist in Canadian administrative law.

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

The Alberta Court of Appeal reminds administrative tribunals that reasons require reasoning

The Alberta Court of Appeal (ABCA) took issue with a regular practice of administrative decision makers to draft reasons that set out the applicable statutory framework, regurgitate the evidence before them, then state a result without providing a rationale for how one led to the other. The ABCA found that practice to be unreasonable and fatal flaw that requires rehearing. For an administrative decision to be upheld as reasonable, where reasons are required they must disclose an internally coherent, rational chain of analysis that led to the result.

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

The Alberta Court of Appeal reinforces that full disclosure is required when producing the record of decision in judicial review

The ABCA confirmed that full disclosure is expected when a tribunal produces a record of proceeding for a judicial review application. When a decision maker has a bifurcated proceeding where one body hears the evidence and makes a recommendation to the final decision maker, the first body is not a private legal advisor to the decision maker and all communications between the two bodies must be disclosed as part of the record of proceeding.

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

Trend #9

Arbitration trends continue to change the way disputes are managed

A number of recent key decisions have impacted arbitration practice in Canada.

BC Court upholds high bar to public policy defence in enforcing foreign arbitral awards

On February 24, 2022, in *Enrroxs Energy and Mining Group v. Saddad*, 2022 BCSC 285 (*Enrroxs*), the Supreme Court of British Columbia confirmed the threshold to establish that enforcement of an international arbitral award would be contrary to Canadian public policy. Local enforcement of an arbitral award possibly amounting to double recovery does not automatically meet that threshold. Further, relying on issues that could and should have been raised during the arbitration itself will also not support a public policy defence – an important reminder that parties should not wait to the enforcement stage to raise new arguments.

Read more: BC Court upholds high bar to public policy defence in enforcing foreign arbitral awards in *Enrroxs Energy and Mining Group v. Saddad*

SCC affirms primacy of parties' arbitration agreement, creates narrow exception for insolvencies

On November 10, 2022, the Supreme Court of Canada released its highly anticipated decision in *Peace River Hydro Partners v. Petrowest Corp. (Petrowest)* In two concurring sets of reasons, all judges agreed that the appeal should be dismissed, with the effect that the pre-insolvency arbitration agreement to which *Petrowest* Corporation and its affiliates had freely agreed was not binding on its court-appointed receiver. In the majority's view, this was because
an otherwise valid arbitration agreement may, in some circumstances, be inoperative or incapable of being performed because it would compromise the integrity of court-ordered receivership proceedings as in the case at bar.

Read more: Petrowest: SCC affirms primacy of parties' arbitration agreement, creates narrow exception for insolvencies

Ontario appeals court confirms narrow appellate jurisdiction over arbitration awards

On December 13, 2022, the Court of Appeal for Ontario released a very important decision affecting the scope of statutory appeals on "questions of law," as provided in s. 45(2) of *Ontario's Arbitration Act, 1991*, SO 1991, c 17 (Domestic Act), which the parties had agreed was to be the only appeal remedy in this case. Other provinces have similar provisions, and so this decision will undoubtedly transcend Ontario.

The Court held that "questions of law" means only "extricable questions of law" and not "questions of mixed fact and law." The Court found that the judge hearing the appeal had erred in characterizing as questions of law matters that, correctly understood, were really questions of mixed fact and law. The Court thus reinstated the arbitrator's decision. Referring to several authorities, including *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Court again reiterated that judges hearing appeals on questions of law should be cautious about extricating questions of law from the contractual interpretation process. The Court also reminded appellate judges that they are not to consider the substance of the dispute when considering statutory procedural fairness set aside provisions, such as s. 46 of the Domestic Act.

Read more: Ontario appeals court confirms narrow appellate jurisdiction over arbitration awards

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