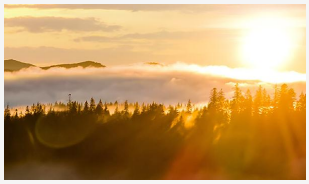
OSLER

2023 OSLER LEGAL OUTLOOK

Presenting our Legal Outlook



DECEMBER 11, 2023 14 MIN READ

Authors: Jacqueline Code, James R. Brown

After many successful years of publishing the Legal Year in Review (LYIR) outlining our reflections on significant developments in the Canadian legal and business landscape over the previous year, we were inspired to make a change. We are still providing the same high quality, insightful commentary on significant developments over the past year that our readers have come to rely on. This year we also hope to include our outlook on what to expect in 2024 and beyond as a result of these developments. The new Osler Legal Outlook was born from this expansion.

Providing valuable and insightful guidance about legal implications, potential trends and "what ifs" presents a challenge at the best of times and in the best economic conditions. This certainly wasn't the situation in 2023. Ongoing economic uncertainty, including persistent inflation and high interest rates, as well as ongoing geopolitical instability, continue to colour markets and transactional practice. M&A and capital markets volumes were markedly lower, especially compared to the prior "boom" period of 2018 to 2021.

Perhaps one of the most transformational events of 2023, which will have as-yet untold implications in 2024 and beyond, was the unprecedented growth in the adoption of artificial intelligence (AI) technologies. Although ChatGPT launched only at the end of 2022, it has had a profound impact on modern technology in a short time, acting as an impetus for widespread adoption of AI and the creation of many new use cases and AI tools. However, like all technologies, AI carries with it some risks that developers and users need to address and plan for. Regulators worldwide are debating how best to regulate this rapidly changing technology. Several initiatives in Canada are on the table and will likely move forward in 2024. Having a robust AI risk management framework will be key to ensuring that organizations can capitalize on the benefits of AI, while managing the related pitfalls.

We also witnessed an ongoing focus on matters involving the environment and climate change.

Moving to a carbon neutral economy requires extensive change. The global focus on critical minerals and electrification that we saw in 2022 continues. One of the Canadian government's key priorities in this effort is the widespread adoption of electric vehicles (EV) in place of combustion engine vehicles. This shift alone will require massive new investment, given the significant need for key commodities, battery components, battery manufacturing, electricity supply and more. The EV supply chain represents a significant opportunity for investment and growth. Canada offers a variety of competitive advantages and the Canadian

government has shown significant willingness to provide incentives and implement measures aimed at removing legal and economic barriers.

At the same time, political disagreements regarding appropriate climate-related policies and the most appropriate way to regulate environmental and climate-related matters dominated the landscape. Key litigation revisited the topic of which of the federal or the provincial governments has constitutional authority to pass environmental laws. The Supreme Court of Canada struck down portions of the federal government's *Impact Assessment Act* as outside the scope of federal jurisdiction, despite having previously upheld the federal government's greenhouse gas pricing regime. Further jurisdictional wrangling is inevitable. We witnessed some progress towards aligning climate-related disclosure around the world, but we also witnessed extensive climate litigation dealing with so-called "greenwashing" claims, challenges to businesses with respect to their environmental or disclosure practices, as well as claims against governments in connection with shifting climate change policy.

Meanwhile, Canada's proposal to directly regulate the generation of electricity – a matter that is expressly within provincial authority under the Constitution – raised the ire of a number of provincial governments. In Alberta, Premier Danielle Smith has introduced a motion seeking a resolution under the as-yet untested *Alberta Sovereignty within a United Canada Act*. The resolution contemplates an order requiring, among other things, provincial entities not to recognize the constitutional validity of the federal government's *Clean Electricity Regulations* under the *Canada Environmental Protection Act*. Further challenges are likely, leaving the proposed *Clean Electricity Regulations* uncertain. Nevertheless, investments in low- and non-emitting electricity generation are progressing at a significant pace from coast to coast to coast. It is clear that developments in the electricity sector are on the horizon for the years ahead.

Additionally, land use priorities are shifting. Government action regarding environmental protection, the exercise of Indigenous rights, as well as the overarching goal of reconciliation with Indigenous people, among other policy initiatives, are affecting permitted land uses. Shifting land use priorities can effectively sterilize resources and preclude development of a project. Depending on the effect of the particular measure, resource developers may have a cause of action against governments where policy decisions have effectively precluded resource developers from exercising their property rights.

In other areas, governments across the country undertook actions that will affect a variety of industries and sectors in the coming years.

Governments around the world are promoting increased corporate transparency in ownership structures. In keeping with this trend, most Canadian jurisdictions have imposed mandated disclosure in the form of a "transparency register." This disclosure of beneficial ownership of corporations is intended to increase transparency and foster accountability by identifying individuals with significant control over a corporation. However, the new requirements are often unclear in their application to complex ownership structures. Hence, they create significant compliance burdens for private equity and venture capital firms, in particular. Corporations and their owners need to be mindful of these evolving requirements both when structuring their affairs and in ensuring ongoing compliance with these record-keeping obligations.

Financial institutions are poised to be subject to extensive new financial services laws and regulations. These include a new mandate for the Office of the Superintendent of Financial Institutions to address threats to the integrity and security of federally regulated financial institutions. Additionally, draft regulations under the *Retail Payment Activities Act* are expected to be enacted in 2024. Payment services providers will need to be aware of registration requirements, as well as other obligations. Significant changes are also coming to Canada's

anti-money laundering laws. Further, amendments to the *Criminal Code*, if enacted, would materially lower the criminal rate of interest, as well as make certain other changes affecting the basis for calculating the interest rate. This could have widespread effect on providers of credit who may be required to stress test their lending arrangements to ensure compliance.

Significant changes in the regulation of competition in Canada have been enacted, with substantial amendments now proposed through the federal government's fall economic statement and budget implementation bill. Among other things, proposed amendments to the *Competition Act* will strengthen the law, by (among other things) making fundamental changes to the existing legislation in numerous areas, as well as providing new enforcement tools. With a substantially increased budget for the Competition Bureau, the Commissioner of Competition will likely be emboldened to take stronger enforcement action. Businesses will need to take into account these changes in their operations and transactions going forward, as well as monitoring this rapidly changing legislative environment.

In the other major transactional regulatory environment – foreign investment – significant changes are also pending. The government has proposed important amendments to the *Investment Canada Act* that are anticipated to be implemented in 2024. The focus is on national security concerns, including an expansion of foreign investments that will be subject to mandatory pre-closing national security clearance. While more national security reviews are expected, it is not anticipated that there will be a material increase in the number of investments rejected on national security grounds. Whether these changes strike the right balance between welcoming investment and protecting Canada's national interests remains to be seen.

The Canadian government continued to take significant action both in its on-shoring efforts to build and protect domestic supply chains and in its friend-shoring efforts to develop supply relationships with economies in friendly democracies. We also witnessed continued international cooperation among allies on various countermeasures, particularly the adoption of sanctions and export controls. Domestic businesses and businesses with a nexus to Canada should prepare for the compliance requirements arising from the adoption of modern slavery legislation. Potential initiatives to address climate change through trade measures, steps to modernize free trade agreements and ongoing free trade disputes also bear close monitoring.

Regulatory and enforcement reform in the prosecution of economic, or "white collar," crimes continued. Further reform is likely forthcoming in 2024. Canada will be looking to improve its reputation for successfully investigating and prosecuting these crimes following negative reports from the United Nations and the Organization of Economic Cooperation and Development. Several recent prosecutions have provided guidance on the scope of corruption-related offences. Additionally, we have already seen increasing oversight and enforcement in relation to supply chain and human rights issues.

Enforcement activities in the securities sphere are also becoming increasingly aggressive as regulators continue to take action against activities that are perceived to be exploiting investor appetites for sustainable or innovative technologies. Securities regulators are also seeking greater powers to impose penalties and to use penalty funds obtained through enforcement actions, with British Columbia adopting a new notice-based penalty regime for lesser violations. It remains to be seen whether this practice will spread more broadly across the country.

Enforcement action in the crypto and digital asset space was a particular focus for securities regulators. Two long-awaited staff notices provided further views on expectations regarding registration and regulation of crypto trading platforms, as well as the regulatory approach to "value reference crypto assets," commonly referred to as "stablecoins." While this year has

brought welcome regulatory growth and industry maturation, questions remain. The year ahead may bring further clarity regarding stablecoins whose status as securities remains undetermined. Similarly, in a report on decentralized finance from the International Organization of Securities Commissions, the Ontario and Québec securities regulators may have foreshadowed their views on how they intend to regulate this area.

In an emerging trend in the litigation arena, plaintiffs are launching proposed class actions even though no person has suffered any meaningful harm from the alleged wrongdoing. Many industries have been targets of these actions, which have focused on IT breaches, as well as product recalls, among others. On a positive note, however, even before a class action is filed, businesses can take steps to strengthen their positions and mitigate harm in the face of an incident that could result in litigation. Where an action has been commenced, many defendants have been able to persuade courts to end these cases at an early stage precisely because the plaintiff has not suffered compensable harm or such harm has been mitigated. Businesses should be proactive in addressing incidents that could spark a class action and preparing their defensive strategies.

Solicitor-client privilege is a cornerstone of our legal system. A principle of fundamental justice, privilege acts as an impenetrable cloak of confidentiality, capable of being displaced only in narrow circumstances. In 2023, several courts shed light on the parameters of the doctrine — specifically, in the context of waiver and legislative abrogation — further affirming that solicitor-client privilege will only be disturbed in the clearest of cases. Understanding the foundational principles of solicitor-client privilege and best practices for organizations will enable the cloak of privilege to be upheld going forward.

Meanwhile, employers continue to grapple with issues arising from employment transition coming out of the pandemic. While many employers are taking steps to draw their employees back to the office, remote and hybrid work environments remain attractive for employees. While these arrangements do provide benefits, they also create new operational and legal compliance challenges for employers. One emerging challenge is created by “moonlighting,” where employees acquire a second job while working remotely for their primary employer. It is critical for employers to mitigate risks associated with remote work and hybrid work environments, including by clearly identifying and communicating expectations. At the same time, employers will still want to provide flexible workplaces and accommodate genuine needs that have become table stakes for employees in many settings.

Although progress has been made in increasing the representation of women on boards of directors, public companies continue to face pressure to expand their diversity, equity and inclusion practices to address diversity beyond gender. As global standards and practices shift, boards are also encountering numerous areas where heightened oversight is or may be expected. These include modern slavery initiatives and cybersecurity. Climate-related disclosures and decision making are also on the board agenda. To date, although disagreements among stakeholders on the appropriateness of issuer climate action plans raise the prospect of litigation in relation to board oversight of climate matters, courts are maintaining their deference to board decisions made in good faith on an informed basis. Directors will want to adopt best practices to lay the foundation for such a defence in the event of future challenge.

Corporate boards will also need to take stock of new listing standards from major U.S. stock exchanges that have come into effect. These requirements mandate that companies adopt policies providing for the clawback of executive compensation in certain circumstances. These changes apply to foreign private issuers as well as Canadian issuers filing under the Multijurisdictional Disclosure System. Affected issuers should already have designed or revised their clawback policies accordingly and be considering compliance with related disclosure requirements as we move into 2024.
Legislative activity in the tax area has the potential to significantly affect a broader group of

persons. In response to important decisions from the Supreme Court of Canada regarding the application of the general anti-avoidance rule under the *Income Tax Act* (GAAR), the federal government has proposed a series of amendments. Among other changes, the proposed legislation adds a novel preamble to the GAAR, a modified threshold for identifying an avoidance transaction and a new test that creates a rebuttable presumption of abusive tax avoidance where a transaction is found to significantly lack "economic substance." The draft amendments also impose a penalty in relation to transactions subject to the GAAR and extend the normal limitation period by three years in certain circumstances. If enacted, these changes will have a material impact on tax planning in the future.

Separately, the government has also proposed a variety of amendments to transfer pricing rules. These proposals and related developments have significant implications for audits and disputes regarding the interpretation and application of the arm's length principle in Canada. The draft amendments, if implemented as currently proposed, would, at a minimum, introduce uncertainty and could harm Canadian competitiveness. Taxpayers will have to be proactive in addressing these changes in their tax planning going forward.

Shifts are also occurring in the transactional area. With the benefits of cheap capital and higher valuations, many private companies, particularly in the technology space, undertook an initial public offering over the past few years. Unfortunately, more recent challenges in the capital markets have reversed the prior trends of high valuations and readily available capital. With many issuers' shares now trading well below the initial public offering prices, many of these issuers must give consideration to strategic reviews or going private transactions. These transactions bring with them many important considerations for boards of directors relating to, among other things, conflicts of interest and governance.

With cheaper capital squarely in the rear-view mirror for the time being, private equity funds across all asset classes have turned their minds to capital sources to manage their liquidity, reduce and bring a regular cadence to capital calls and enhance investment returns. Subscription line facilities, or capital call facilities, have become a common source of liquidity to fill this need. Although these facilities are now an established fixture of private equity funds across all asset classes, their use is broadening as a result of challenging fundraising, credit and M&A markets. We anticipate that their use will continue to evolve in the coming year.

Last but certainly not least, the rapid pace of legislative reform in the privacy arena continues. Many provisions of Québec's revised *Act respecting the protection of personal information in the private sector* came into force, imposing new and onerous requirements regarding consents, data profiling and security breach notification. Privacy impact assessments are required in certain circumstances, including disclosures or transfers of personal information outside Québec. Contraventions potentially attract very severe penalties and businesses must therefore be proactive in adapting their policies and processes to ensure compliance with the new regime. At the same time, the federal government continues to advance its reforms of private sector privacy legislation, which will also require active engagement to ensure compliance and avoid potentially severe penalties. The federal legislative agenda also includes legislation regulating the creation and use of AI systems, with particular requirements being imposed in relation to "high impact systems," a concept that is still to be defined. A new regulator will be created under this legislation.

The federal government is also pursuing two legislative reforms to address online streaming and online news content, bringing both under the regulatory umbrella of the Canadian Radio-television and Telecommunications Commission (CRTC). The *Online Streaming Act*, which has received royal assent, will require online streaming and social media platforms to pay for and promote Canadian content on a similar basis to traditional broadcasters. Online streaming services will be subject to registration requirements, with certain exceptions, and be subject to conditions of service. Under the *Online News Act*, which comes into force at the

end of 2023, digital news intermediaries, which include online communications platforms such as search engines or social media services, will be required to pay for news content produced by eligible Canadian news outlets pursuant to negotiated agreements. Intermediaries can apply for an exemption from the CRTC in certain circumstances. Further legislative reform to address online safety is anticipated.

We have seen a variety of important legal and business developments through 2023. Many of these developments have the potential to significantly affect businesses and organizations going forward into 2024 and beyond. There are many evolving areas for the business community to monitor. Businesses should be proactive in responding to anticipated change, including by seeking expert advice where warranted, not only to mitigate risks, but also to remain competitive.

We hope you enjoy reading our new Osler Legal Outlook. As always, we would be pleased to discuss these developments and the implications for your business with you.

2023 Osler Legal Outlook

Visit the 2023 Osler Legal Outlook page to read or listen to the full content.

Read or listen here