



ACC San Francisco

CANADIAN UPDATES
AND COMPARISONS:
CYBERSECURITY,
EMPLOYMENT & OTHER
CONSIDERATION FOR
THE COVID-ERA &
BEYOND

June 17, 2021



Land Acknowledgment

We acknowledge we are gathered today on the unceded ancestral territories of the Coast Salish peoples, the Musqueam, Squamish and Tsleil-Waututh Nations

About Blakes

- Leading Canadian law firm with offices in Toronto, Calgary, Vancouver, Montréal, Ottawa, New York & London
- Blakes delivers business-centered legal solutions in Canada and around the world
- In the past 10 years, Blakes has been involved in more than 1,350 global public and private M&A transactions, with an aggregate dollar value of US \$1.4 trillion
- We offer a cross-office multidisciplinary team of lawyers with significant corporate, commercial, employment, privacy and litigation expertise





How has COVID-19 impacted due diligence in corporate transactions?

- Increased reliance on counsel and other advisors
- Departure from traditional methods
- Looking beyond profit margins and the financial ratios of a business
- Highlighted areas of vulnerability
 - Supply and distribution chain risks
 - Insurance coverage
 - Government grants and loans
 - IT systems and data security
 - Debt covenants

How has COVID-19 impacted negotiations in corporate transactions?

- **Valuations**

- Shift from historical financials to the financial effects of COVID-19 on the business

- **Earnouts**

- A general rise in the number of earnouts and the use of creative structures across most industries

- **Representations and Warranties**

- Small shift towards a more 'buyer-friendly' approach



What re-opening challenges have businesses faced in Canada?

- **Courts siding with health authorities**

- *Hudson's Bay Company ULC v. Ontario (Attorney General)*, 2020 ONSC 8046
- *Beaudoin v. British Columbia*, 2021 BCSC 512



How have courts interpreted contracts and contractual negotiations during COVID-19?

- **Material Adverse Effect (MAE)**

- “The occurrence of unknown events that substantially threaten the overall earnings potential of the target in a durationally-significant manner”
- MAE carve-outs interpreted as shifting systemic risks to the buyer and company-specific risks to the seller
 - *Fairstone Financial Holdings Inc v Duo Bank of Canada*, 2020 ONSC 7397

- **Ordinary Course of Business**

- Emphasis on reasonableness of actions in light of similar economic circumstances in the past and the behavior of analogous businesses in current market or industry
- Prudent steps in response to an economic contraction, that have no long-lasting effects and do not impose any obligations on the purchaser, should not be viewed as outside of the ordinary course
 - *Fairstone Financial Holdings Inc v Duo Bank of Canada*, 2020 ONSC 7397

How have courts interpreted contracts and contractual negotiations during COVID-19?

- **Force Majeure:**
 - Limited case law on interpretation of force majeure provisions in context of COVID-19
- **Exercise of Discretion & Contractual Performance**
 - Duty to exercise contractual discretion in good faith, which requires parties to exercise discretion in a manner connected to the purposes for which the discretion was granted
 - *Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage*, 2021 SCC 7
 - Duty of honest performance, which requires parties to be honest with each other in performing their contractual obligations
 - *Callow Inc. v. Zollinger*, 2020 SCC 45



What do Canadian COVID-19 Occupational Health and Safety Laws permit concerning Vaccinations and Testing?

- OH&S regulations do not require employees to be vaccinated to report to work
- The duty to ensure a safe workplace does not include requiring employees to be vaccinated
- OH&S regulations do require detailed Covid-19 safety plans for all workplaces





Can Canadian Employers require Employees to be Vaccinated?

- Mandatory Vaccination policies trigger a number of employment issues:
 - Constructive Dismissal
 - Human Rights
 - Employee Privacy
 - Labour Relations



Can Canadian Employers require Employees to be Tested and/or Vaccinated?

- While vaccinations may decrease transmissibility of disease, there remains a risk of contracting Covid-19 in the workplace and variants remain a concern.
- At this time all Covid-19 safety protocols are required to remain in place.
- OH&S regulators across the provinces have not implemented safety protocols that treat vaccinated people differently with respect to the Workplace.
 - Some provincial governments have started ease self-isolation requirements for fully vaccinated individuals.

What Measures, if any, has Canada implemented to Encourage Employee Vaccination?

Vaccination Leaves

- Across some Canadian provinces – AB, BC, SK, Employees are now entitled to job protected leave to get vaccinated.
- Leaves policies for vaccination vary from province to province but generally employees are entitled to 3 hours of paid leave for each personal vaccination.
- Employers cannot request a medical certificate, record of immunization or health information



Paid Sick Leave

- In most provinces Employees are now entitled to job protected paid sick leave related to COVID-19.
- BC, ON, AB - Employees are entitled to 3 days of paid leave for reasons related to Covid.
- MB – Entitlement is up to 5 days
- Eligible employers can apply for reimbursement, subject to maximum limits in some provinces.



Canada's Patchwork of Privacy Legislation

- Federal private sector privacy statute
- Three provinces have enacted private-sector privacy legislation
- Public sector privacy laws at the federal, provincial and territorial level
- Health sector legislation
- Sector-specific requirements (eg. IIROC, OSFI, CSA)
- Statutory reforms

Reporting Obligations

- **Poll Question 1:**

In our recent cyberstudy, what percentage of individuals were required to be notified of the incident?

- (a) 18%
- (b) 26%
- (c) 76%



Reporting Obligations

- **Poll Question 2:**

What percentage of incidents were reported to a Canadian (federal or provincial) Privacy Commissioner?

- (a) 5%
- (b) 10%
- (c) 25%



Reporting Obligations

- Not all Canadian privacy laws have mandatory breach reporting requirements
- Private sector: Federal and Alberta
- “Real risk of significant harm”
 - the sensitivity of the personal information involved in the breach; AND
 - the probability that the personal information has been misused.
- Timing
- Law enforcement



Reporting Obligations

■ **Poll Question 3:**

What percentage of incidents were reported to law enforcement?

- (a) 6%
- (b) 11%
- (c) 17%





Preparedness

- **Poll Question 4:**

What percentage of companies indicated they had some sort of internal cybersecurity policy in place?

- (a) 40%
- (b) 50%
- (c) 60%



Preparedness

■ **Poll Question 5:**

What percentage of companies indicated they have a chief security officer or designated committee of directors to manage cybersecurity risk?

- (a) 15%
- (b) 26%
- (c) 32%



Preparedness

- **Poll Question 6:**

What percentage of companies indicated they have some form of cyber insurance?

- (a) 17%
- (b) 50%
- (c) 71%



Preparedness

- **Poll Question 7:**

Poll Question: What percentage of companies indicated they maintain encryption protection measures for confidential and sensitive information?

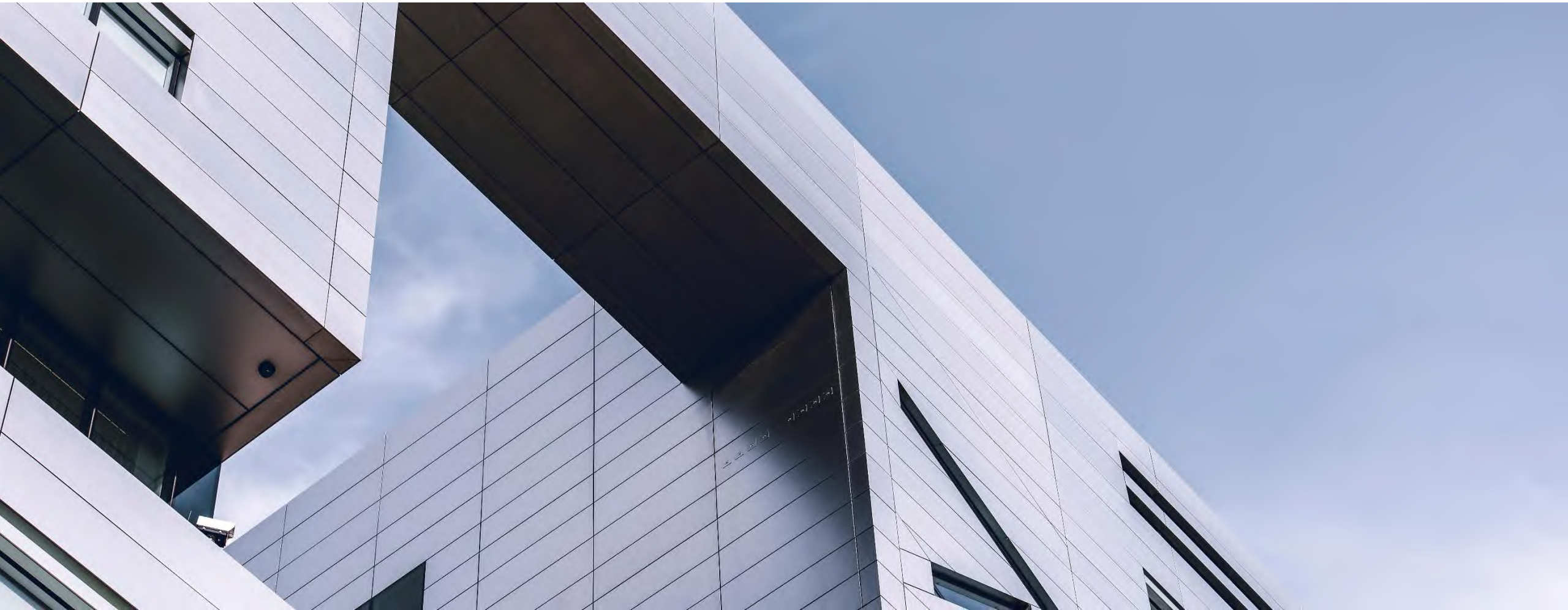
- (a) 17%
- (b) 50%
- (c) 71%

Litigation Trends

- Privacy class actions
- Privacy commissioner investigations
- Settlement values in privacy class actions
- Directors and officers
- Expert reports and privilege



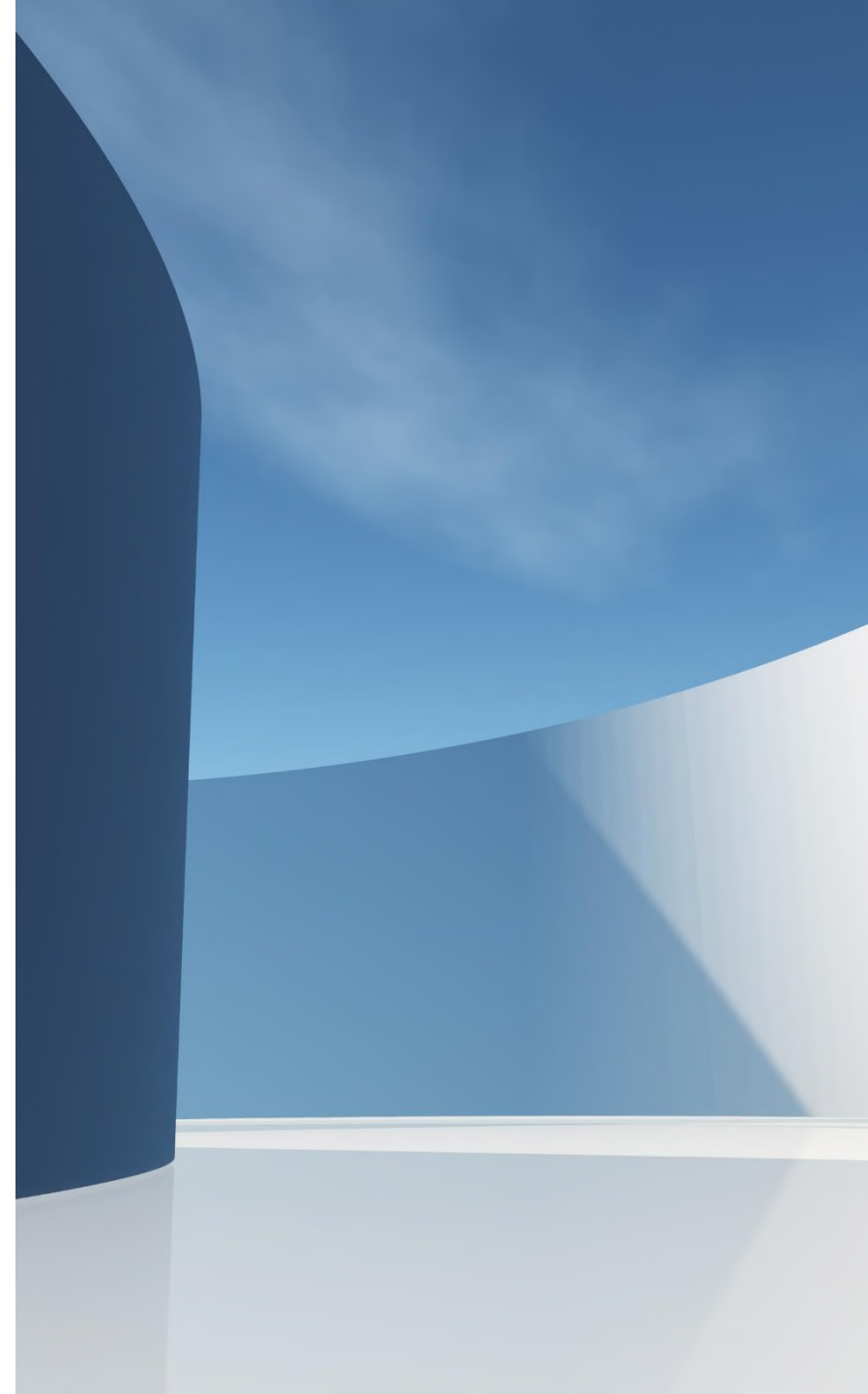
Questions?



To receive a copy of Blakes Canadian Cybersecurity
Trends Study, please contact:

Stacey Evans Greenberg

Client Relations & Business Development, New York
Blake, Cassels & Graydon LLP
+1 212-893-8414
stacey.evansgreenberg@blakes.com



Your Presenters



Arash Amouzgar (he/him)

Partner, Vancouver
Blake, Cassels & Graydon LLP
+1 604-631-4201
arash.amouzgar@blakes.com



Michael Howcroft (he/him)

Partner, Vancouver
Blake, Cassels & Graydon LLP
+1 604-631-3366
michael.howcroft@blakes.com



Alexandra Luchenko (she/her)

Partner, Vancouver
Blake, Cassels & Graydon LLP
+1 604-631-4166
alexandra.luchenko@blakes.com



Adrian Ishak (he/him)

Senior Corporate Counsel - Global Labour &
Employment
647-256-6407
salesforce.com

