Litigation trends and risk management in the COVID-19 era

Class Action Alert

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These are extraordinary and unparalleled times. The Coronavirus Disease 2019 ("COVID-19") has thrown the world into an unprecedented pandemic which has jeopardized the health and livelihood of individuals and businesses alike. The federal government has implemented various emergency measures to combat the pandemic including, among other things, closing the Canada-US border to all "non-essential" travel (recently extended to May 20, 2020), declaring travel requirements (e.g., all air passengers must now use non-medical masks or face coverings during travel) and issuing Emergency Orders under the Quarantine Act (e.g., travellers, whether by air, sea or land, arriving in Canada must confirm a suitable place to isolate/quarantine or stay at a place designated by the Chief Public Health Officer of Canada for 14 days).

Across Canada, provincial governments have declared states of emergency and/or public health emergencies and have ordered “non-essential” businesses to close, placed limits on public gatherings and, in many cases, issued restrictions on interprovincial travel. Businesses continue to adjust to these challenging realities and are adapting to protect their business, employees, shareholders, and other stakeholders. One of these unfortunate realities is the inevitable threat of COVID-19 related litigation.

To help our clients anticipate and protect against the threat of litigation in these already difficult times, we are monitoring all COVID-19 related litigation filings, assembling the collective knowledge and experience of our lawyers.
across DLA Piper's global practices, sectors and jurisdictions to anticipate future trends, and proactively partner with our clients. This client alert provides a brief summary of the litigation trends that have emerged and which we expect will emerge, both in terms of class actions and other litigation, and offers some practical tips to minimize risks based on these developing trends.

**Outlook based on US trends**

Although, to date, Canada has not experienced a flurry of COVID-19 related litigation, class actions, or global redress proceedings, we expect that this inactivity is, in large part, due to the closure of most of the courts in Canada, the temporary suspension of limitation periods, and the lack of electronic filing capabilities in most jurisdictions. For the time being, except for urgent or emergency matters, most regular court operations remain suspended.

Based on the significant influx of COVID-19 related court filings we have already seen in the US, we fully anticipate a significant increase of activity in Canada once our courts reopen and operational restrictions are lifted. Indeed, some courts have already started to recommence certain activities.

Looking to the US experience as a tool to attempt to predict Canadian filings, as of April 28, 2020, we have seen a total of 680 individual actions and 176 COVID-19 related class actions filed in the US.

- Almost half of the individual actions filed are civil rights actions (388) but a substantial number of the filings involve insurance (69), contract (64), employment matters (46) and negligence/personal injury (32).
- The vast majority of the class actions filed so far involve consumer protection related claims. There are, however, also a number of insurance, breach of contract, employment, and securities class actions across numerous sectors, with the travel, financial services and manufacturing sectors, not surprisingly, being the most frequently targeted. Many more filings against a variety of sectors are expected in the coming weeks and months.

**US Class Action filings as of April 28, 2020**

Since Canadian class action plaintiff lawyers closely monitor US Court filings, decisions, and public statements (such as from global regulators) and frequently work closely with their US counterparts, we anticipate a host of “copy-cat” class proceedings in Canada that will mirror those filed in the US.

Although the litigation landscape remains uncertain given these unprecedented times and it is too early to tell whether Canada will in fact experience a plethora of COVID-19 related litigation, we nonetheless anticipate, based on US trends, a robust increase of litigation in the following areas:

- **Consumer protection - competition and anti-trust**: Including price-fixing/collusion, bid-rigging, alleged deceptive advertising and marketing practices, and misrepresentation, unconscionable practices and fraud related claims.

  While the Canadian Competition Bureau has issued an official statement relaxing competition enforcement on competitor collaborations for a limited duration and scope during these unprecedented times, it nonetheless underscored its zero tolerance for attempts to abuse any such flexibility for unnecessary conduct contrary to the *Competition Act*. Certainly during these volatile times, we fully anticipate that the Competition Bureau (and...
other competition authorities elsewhere) will closely monitor the market and scrutinize any potential anti-competitive conduct.

We have already seen a number of warnings issued by Health Canada with respect to the unregistered and unlicensed marketing of cleaning products as “hand sanitizers” or “disinfectants”. Similarly the Competition Bureau has issued compliance warnings to numerous businesses across a number of sectors for allegedly making false, misleading claims about products and services related to COVID-19.

- **Consumer protection - price gouging**: These include disputes over alleged price gouging, particularly in relation to personal protective equipment and/or cleaning products. We have already seen the first Canadian claim filed by a manufacturer in relation to alleged price gouging and false affiliation by a reseller of personal protective equipment. This is also a key focus for provincial governments and regulators, who have passed legislation in various jurisdictions implementing penalties for price gouging in relation to the pandemic.

- **Consumer protection - contractual breaches and refunds**: These include disputes over fees and charges, refund policies, memberships and subscription services, failures in providing goods and services, and expiration of time limited services. Such claims, including multiple class actions, have already been initiated in Canada.

- **Securities and secondary market claims**: These relate to allegations that issuers failed to fully disclose or misrepresented the impact of COVID-19 on the issuer’s financial performance or business. In addition to common law misrepresentation claims, each of the Canadian provinces have secondary market liability for misrepresentations in public documents which can be brought against the issuer as well as its directors, officers, and specific professional advisors.

- **Privacy**: As businesses move their work force to remote working environments which utilize remote working software systems such as video conferencing and cloud based data services, the risk of cyber incidents and privacy breaches has significantly increased. The Canadian Centre for Cyber Security has already warned against an increase in reports of malicious actors, phishing campaigns and malware scams and on April 5, 2020 we saw a leading Canadian accounting firm issue a company-wide shut down following a cyber-attack. Any data breaches during these heightened sensitive times may result in class actions against the breached company and, potentially, its directors and officers.

- **Negligence and bodily injury**: There have been allegations that organizations and businesses failed to take adequate steps to protect individuals, their employees and/or clients and customers from exposure to COVID-19. We have already seen Canadian class actions filed in relation to outbreaks of COVID-19 at certain long-term care homes and jails and several other such actions are currently in the investigation stage.

- **Product liability, negligent design and manufacture**: These include disputes over the design and manufacturing of alleged product defects or failures of Personal Protective Equipment and medical devices used to treat COVID-19 patients.

- **Employment**: These include claims relating to unpaid overtime, mass layoffs, reduced salaries and unsafe working practices or conditions (e.g., failure to provide Personal Protective Equipment and other protections).

- **Contractual business disputes (commercial, real estate, construction)**: These include disputes arising from the failure of businesses to deliver a host of goods and services in a timely fashion, or at all, and payment for those goods and services on the basis of *force majeure* provisions, material adverse change provisions, cancellation policies, indemnification requirements, rejection of goods, minimum volume purchase requirements, service interruptions, payment extension requests, rent abatement requests, delayed payments, and mandated business closures.

- **Insurance**: These include disputes over coverage for a host of COVID-19 related issues including property insurance claims, commercial general liability claims and travel interruption and cancellation claims. We expect that business interruption insurance claims, in particular, will be a substantial area of risk for potential litigation and we have already seen several such filings across Canada.

**COVID-19 Actions in Canada - What Have we seen so far…**

A relatively small wave of COVID-19 litigation in Canada has already begun. In the last month and as of April 28, 2020, a total of 17 COVID-19 related class actions were filed across Canada and many more are currently under investigation. There have also been a number of high profile non-class action claims commenced.

**Types of class actions**
The majority of COVID-19 related class actions to date are negligence claims, followed by breach of contract cases (including insurance) and consumer protection related claims, as depicted below.

Class actions by sector

Unsurprisingly, the insurance, healthcare (including care homes) and transportation sectors have been early targets of class action lawsuits. Claims have also been initiated against a property management company and the government.

Class actions by Province

The vast majority of filings so far have been in Québec with eight class actions, followed by Ontario with four class actions. There have also been actions commenced in the British Columbia, Saskatchewan, and the Federal Courts. It is likely that Québec will continue to be a leading jurisdiction going forward as it is generally considered to be a more plaintiff-friendly jurisdiction and the bar for authorization (certification) is generally lower than in the other common law provinces.

Individual and Other litigation

Several high-profile individual claims have also been commenced. Thus far, these claims have been diverse, but early themes have included: (a) litigation for damages arising out of price gouging in the resale of personal protective equipment; (b) breaches of fiduciary and contractual duties in the sale of securities; (c) litigation seeking
to challenge regulators on alleged advance rulings on the sufficiency of vouchers for cancelled tickets; and (d) challenges to steps taken by provincial governments in response to the pandemic as violations of the *Charter of Rights and Freedoms*.

**Minimizing Risk**

We have already seen a flurry of COVID-19 related litigation in the US and the beginnings of similar activity across Canada. As businesses struggle to deal with the significant and complicated health, safety, economic, and operating issues the pandemic presents, it is therefore essential that they also take action to mitigate related litigation risks. Businesses and their counsel would, among other things, be wise to consider the following proactive steps:

- Perform an internal risk analysis, implement measures to curb or minimize flagged risks and develop a consistent pre-litigation strategy for any anticipated or potential areas of risk identified.
- Monitor media and publicity and implement internal and external communication protocols relating to flagged areas of concern.
- Where applicable, ensure compliance with Federal/Provincial Emergency Measures and applicable legislation, orders and regulations.
- Review all relevant or material contracts that may be impacted by COVID-19 related circumstances and identify key rights and obligations. Consider specifically provisions dealing with indemnity, *force majeure*, representation and warranties, refunds and cancellations, events of default, insurance requirements, material adverse change, notice requirements, dispute resolution provisions (such as mandatory arbitration provisions) and jurisdiction clauses. In Québec, there are *force majeure* provisions in the *Civil Code of Québec* that supplement the terms of contractual agreements, although these provisions can be expressly excluded by the contracting parties.
- Pay particular attention to consumer-related contracts that may be subject to various provincial consumer protection legislation. For example, the British Columbia *Business Practices and Consumer Protection Act*, and in Québec, the *Civil Code of Québec* and the *Consumer Protection Act*, provides specific rules for the cancellation and refunding of continuing service contracts.
- Review and update customer service policies and ensure your employees are responding to customer complaints consistently and in a uniform manner. Consider strengthening your organization’s customer service policies where possible to get ahead of anticipated disputes.
- Examine any product claims, labels and advertisements and, if applicable, conduct appropriate supply chain compliance and/or risk analysis. Review and consider revising supply chain contracts to address any added risk/exposure as a result of COVID-19 paying particular attention to indemnity provisions.
- Where contractual commercial/business disputes arise such as non-performance or failure to provide services as a result of COVID-19 related issues, consider Alternative Dispute Resolution mechanisms to attempt to resolve matters which may allow for more flexible and practical solutions in the circumstances (particularly where business relationships are ongoing).
- Ensure your organization has an appropriate cybersecurity plan that is up to date and responsive to the additional security threats arising from remote-working environments. Properly manage and monitor your cybersecurity plan and ensure appropriate guidance is provided to your organization and its employees, especially those working remotely.
- Monitor your business frequently given the rapidly changing COVID-19 circumstances and ensure timely and adequate disclosure. Carefully consider forward looking statements and consider whether it may be necessary to revise or withdraw such statements as a result of COVID-19 circumstances.
- Review and update employee safety standards and protocols and implement COVID-19 specific policies. Ensure that changes made in respect of employees comply with the law. In Québec, any such change should be compliant with the *Act Respecting Labour Standards* and the *Act Respecting Occupational Health and Safety*.

We would be pleased to assist you and your organization in evaluating any of the above or to provide additional advice, including implementation of risk management and pre-litigation strategies specific to your organization or business. Please contact your DLA Piper Canada relationship partner or any one of the authors for more information.

You may visit our Canadian COVID-19 Resource Center or our US COVID-19 Resource Center for further information on navigating this challenging time.
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This article provides only general information about legal issues and developments, and is not intended to provide specific legal advice. Please see our disclaimer for more details.

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