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CURRENT LITIGATION AND DISPUTE RESOLUTION TRENDS IN BRITISH COLUMBIA

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In this bulletin, McMillan's Vancouver Litigation & Dispute Resolution Group discusses current trends, shedding light on top issues affecting businesses.

The following trends are highlighted:

- A general increase in commercial disputes overall;
- The use of arbitration as a primary method for resolving disputes in the construction industry;
- The continued popularity of British Columbia as a venue for class action lawsuits;
- The growth of ESG-related claims;
- Multiplicity of claims faced by employers in different venues;
- Rise of critical mineral disputes; and
- Increase in asset freezing orders.

General Increase in Commercial Disputes – Companies are Making Business Decisions to Invest in Claims

Canada's economic climate of higher interest rates and inflation levels—paired with lower growth—has been shifting the types of disputes that McMillan's Vancouver Litigation & Dispute Resolution Group is seeing. Although debt claims and breach of contract claims are not uncommon, we are seeing an increasing number of these types of claims as a result of parties being unable to meet their contractual obligations due to financial constraints.

Although plaintiffs appear to be more willing to invest money into litigation to recover amounts that they believe are owed, there is correspondingly an increased willingness of defendants to accept a lower, guaranteed, settlement amount or payment plans, in lieu of taking the risk associated with proceeding through trial and dealing with enforcement costs, if a judgment is eventually obtained.

Construction Industry using Arbitration as Primary Method for Dispute Resolution

In recent years, arbitrations have become the primary method of dispute resolution in the construction industry. This arises out of the need to balance cost-effectiveness with maintaining ongoing business

relationships between parties. Arbitrations provide several benefits, in particular:

- **Efficiency**: arbitrations are often faster than traditional litigation, providing more expeditious resolutions;
- **Expertise**: parties have the benefit of choosing arbitrators with expertise in construction law, ensuring a more informed decision;
- **Cost-effective**: it can be more cost effective as it typically involves fewer formalities and less extensive legal procedures; and
- **Flexibility**: arbitration allows for a more flexible process, including procedural rules and timing.

The purpose is to streamline the resolution process to maintain a more private and flexible environment for dispute resolution. Unlike commercial litigation, arbitrations allow parties to maintain a level of cooperation and collaboration, which is essential for successful projects. It is beneficial for parties to formulate a dispute resolution process that meets their commercial needs through the flexible process and procedure arbitration allows.

In addition, arbitrations are particularly suitable for construction disputes as parties can seek decision makers who have prior experience and specialized knowledge related to the construction industry and construction disputes, especially when disputes involve complex delay analyses. Construction-specific decision makers are often best equipped to address the unique complexities in construction disputes.

British Columbia Continues to Be a Popular Venue for Class Actions

There are two common explanations for the recent popularity of British Columbia as a venue for national class action litigation:

- British Columbia's class action costs regimes, where unsuccessful plaintiffs face costs consequences only in unusual circumstances; and
- Legal counsel who formerly acted as personal injury counsel pivoting to class action litigation following the shift to a no-fault automobile insurance regime in British Columbia.

Regardless of the source of British Columbia's recent popularity, our Class Actions Team sees no evidence that the volume of class actions being filed in British Columbia will slow down soon, absent unanticipated legislative changes. At both the certification and trial stages in the lower courts, and at the appellate court level, British Columbia's courts are facing a previously unknown volume of hard-fought class action litigation involving technology companies, cybersecurity, product liability, banking and financial fraud, and securities. Areas likely to invite more class actions in the coming years include recent and proposed changes to Canada's *Competition Act*, employment claims, and environmental, social, and governance ("**ESG**") issues.

ESG Legal Claims Continue to Grow

The landscape of legal disputes for ESG issues has evolved significantly in recent years. Among the various disputes, negative greenwashing—where corporations mislead the public about their environmental practices— has gained prominence. Regulators are drawing their attention to companies making false claims, creating the potential for substantial financial penalties. With a surge of disputes in recent years, it is anticipated that ESG-related disputes will become even more prevalent throughout this year.

To safeguard against the growing wave of ESG litigation, companies must adopt prudent practices. Remaining updated on prevailing guidelines, particularly those pertaining to ESG disclosure practices, is of utmost importance. Additionally, businesses should refrain from making unsupportable predictions or statements, set realistic targets and avoid unfair comparisons. As part of a comprehensive risk management strategy, aligning public-facing statements with concrete actions and maintaining transparency in sustainability claims can be instrumental in minimizing legal exposure.

For companies dealing with ESG requirements and potential legal challenges, receiving professional guidance is critical with the evolving landscape.

Employers in British Columbia Confronting Claims in Multiple Venues

When it comes to employment law claims, employees are in the driver's seat in selecting the forum to pursue remedies against their employers. Potential venues for non-unionized employees in British Columbia include the Supreme Court of British Columbia, the Provincial Court of British Columbia (for claims between $5,001 and $35,000), the Civil Resolution Tribunal (for claims less than $5,000), the Employment Standards Branch, the Human Rights Tribunal, and the Workers' Compensation Board (WorkSafeBC). For employees of federally regulated companies, they may also seek redress under the *Canada Labour Code* and from the Canadian Human Rights Commission.

Increasingly, we are seeing employees simultaneously file, or assert in settlement negotiations, related claims in multiple venues. For example, an employee in British Columbia may file a wrongful dismissal claim with the Supreme Court of British Columbia, while also filing a discrimination complaint with the Human Rights Tribunal, making an overtime complaint under the *Employment Standards Act*, and seeking compensation through WorkSafeBC for retaliation for an earlier bullying and harassment complaint.

Driving this trend of stacking complaints may be delays in the adjudication of cases by overburdened courts and administrative tribunals, as well as steadily rising damages awards from British Columbia's Human Rights Tribunal. Employees may also be incentivized by tax laws to advance claims that are treated as non-taxable general damages, rather than claiming only compensation for loss of employment which is treated as taxable

income. With evolving employment laws in British Columbia, including new pay transparency legislation, employers can mitigate the risk of multiple claims by seeking employment law advice both before hiring and before terminating.

Anticipated Increase in Critical Minerals Disputes

In a time of increased global demand and investment opportunities for companies involved in critical mineral exploration and extraction, McMillan's Vancouver Litigation & Dispute Resolution Group anticipates an increase in the volume and complexity of regulatory and commercial disputes involving critical mineral projects and enterprises.

The Canadian government released its 2023-2030 Critical Minerals Strategy with a goal of increasing production of critical minerals in Canada and identified critical minerals as strategically important for Canada. A key component of this strategy is keeping the production of critical minerals under domestic control. As such, the government of Canada has increasingly been utilizing its powers under the *Investment Canada Act* to block acquisitions of control of Canadian companies involved in critical minerals by foreign entities on national security grounds.

While there will undoubtedly be significant growth in the critical minerals industry in Canada, increased scrutiny and use of the Government of Canada's powers to block acquisitions of critical mineral entities is likely to result in increased regulatory proceedings for Canadian critical mineral businesses with international partners. We can also expect a trickle-down effect from regulatory disputes into the commercial realm as joint ventures and acquisitions involving control of Canadian critical mineral production become no longer viable under the evolving regulatory landscape and companies resort to litigation to protect their existing investments in the critical minerals sphere.

Increase in Asset Freezing Orders

A Mareva injunction, often referred to as an asset freezing order, is a powerful legal tool used to prevent a defendant from disposing of or diminishing the value of their assets before a court awards judgment, including real estate and bank accounts. These orders do not prevent the defendant from spending a fixed or reasonable amount on ordinary living or business expenses and legal representation. The scope of the order may be worldwide.

We are seeing an increasing number of applications for Mareva injunctions in our practice. As these injunctions are often brought in cases involving alleged fraudulent activities, this suggests that there may be a general increase in fraudulent activity, which may be the result of the economic climate. Given the extraordinary nature of these orders, they are not granted lightly by the courts, but when granted, are a powerful legal tool in

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litigation.

Conclusion

McMillan's Vancouver Litigation & Dispute Resolution Group is recognized as one of British Columbia's leading domestic and cross-border corporate commercial litigation firms with specialized bench strength in class actions, construction, fraud, securities litigation, and public and administrative law. Our Group is equipped to strategically address the evolving nature of litigation disputes in British Columbia.

by Melanie Harmer, Carina Chiu, Cole Bailey, Kristen Shaw, Gray Morfopoulous, Katherine Akladios, Articled Students (Ada Ang, Sterling Hillman, and Victoria Kolt)

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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