

In This Issue

Page 1 → President's Message
Page 2 → ACC Annual Meeting in Las Vegas – Focus on Technology and ESG
Page 3 → What Private Equity Can Learn From Shareholder Activism - And Vice Versa?

Page 4 → Key Considerations for Commercial Arrangements involving Personal Information Processing
Page 5, 6 → Event Photos
Page 7 → ACC Ontario Info

IN-HOUSE REPORTER

ACC Ontario Newsletter

President's Message

Brenda MacDonald

As we begin 2023, I want to thank our Members for making 2022 such an exciting year, as we reconnected at in-person events, and to our sponsors for your continued support.

Throughout the year, the Chapter continued to offer robust programming providing practical advice and insight into the key issues affecting our day-to-day practice as well as more tailored programming, including our 9th Annual day-long Securities Symposium and Technology Round table series. The Chapter also provided programming directed at leading and managing a law department, including Optimizing Law Department Performance through Your Legal Operations Function and The Evolving Role of General Counsel in



ESG. EDI and professionalism programs remained a priority with a particular focus on our Members' wellbeing, including Staying Mentally Fit Through the Ongoing Pandemic and The Mindfulness Charter. For additional well being resources, please visit the Chapter's website.

This year, we continued to connect our Members through a number of social events and most recently at Louix Louis and our Annual General

Meeting and holiday get together at The Boulevard Club. Of course, one of the greatest highlights was celebrating the ACC's fortieth anniversary at the Annual Meeting in Las Vegas, Nevada.

As a Chapter, we created amazing momentum in 2022 and we as a Board look forward to leveraging this momentum as we begin 2023. We look forward also to your ongoing support and participation in the Chapter and welcome your input. For those interested in speaking at one of the Chapter's programs in 2023, please note your interest on our In-house Counsel Speakers' Roster.

On behalf of the Board, we wish you and your family all the best in 2023!

ACC Annual Meeting in Las Vegas – Focus on Technology and ESG

Sanjeev Dhawan

The ACC held its Annual Meeting in Las Vegas last October as in-house lawyers from across the globe gathered. The Annual Meeting is the largest gathering of in-house counsel in the world. There were two themes that stood out for me at this conference. The first is technology and the opportunities it presents in reshaping the practice of law, particularly in-house. The second is ESG considerations and how it is reshaping priorities for the organizations that in-house counsel work for.

We had in-house counsel from the global technology leader Google providing their insights how they are leading in times of rapid change, both technologically and with societal values in mind. We learned of Google’s strategies in providing a supportive culture to their in-house counsel, how they advance DEI initiatives, how they support clients across the world, how they work with policy makers globally, and how they support product innovation and contracting at scale.

The ACC Annual Meeting also held its inaugural “Global Day”, which featured a discussion on “In-House

Counsel Re-Imagined” with the leaders of The Future of Law Lab initiative at the University of Toronto’s Faculty of Law. This was a discussion about the future of in-house work and looked at the influence of new technologies and processes such as artificial intelligence. With the emergence of the “T-Shaped lawyer, we looked at questions such as how do we train the next generation of in-house counsel?

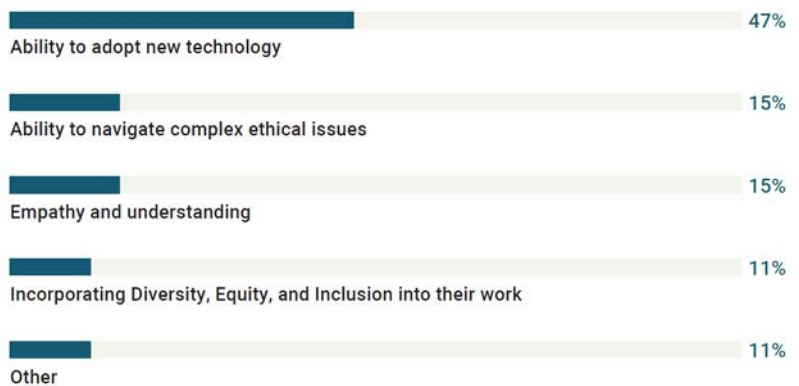
The findings of the Future of Law Lab aligned closely with a survey conducted by the ACC in the summer of

2022.* In the ACC survey, adapting to legal technology was the single most important skill for in-house counsel beyond legal skills.

With a changing global climate and changing attitudes towards societal norms, in-house counsel at the Annual Meeting were also focused on ESG matters. In-house counsel discussed how sustainability, equality, and diversity create value and how their organizations are prioritizing their goals. In fact, the theme of one of the sessions “Are You and Energy Lawyer? How Energy Touches Every Business” was that virtually every in-house lawyer is now an energy lawyer, whether you know it or not.

The conversation at the Annual Meeting was that both technology and societal expectations on ESG considerations are bringing about change to organizational goals and priorities. It was also evident at the conference that in-house lawyers were up to the challenge of elevating their expertise and building their skills to embrace this trend.

Beyond legal skills, what skill is the most critical for the next generation of in-house legal professionals?



(Credit: The State of Corporate Litigation – A survey by the ACC in partnership with Everlaw.)

Skills lawyers require

I-model vs. T-Shaped lawyer – traditional legal skills is the I, and the horizontal T is the additional skills

<div style="background-color: #2c4e60; padding: 5px; margin-bottom: 5px;"> \$ Data management </div> <div style="background-color: #2c4e60; padding: 5px; margin-bottom: 5px;"> + Financial literacy </div> <div style="background-color: #2c4e60; padding: 5px;"> \$ Professional conduct </div>	<div style="background-color: #2c4e60; padding: 5px; margin-bottom: 5px;"> 🏠 Emotional intelligence </div> <div style="background-color: #2c4e60; padding: 5px; margin-bottom: 5px;"> 🌐 Network building </div> <div style="background-color: #2c4e60; padding: 5px;"> 🏠 Strategic thinking </div>	<div style="background-color: #2c4e60; padding: 5px; margin-bottom: 5px;"> 🌱 Entrepreneurial spirit </div> <div style="background-color: #2c4e60; padding: 5px; margin-bottom: 5px;"> \$ Process improvement </div> <div style="background-color: #2c4e60; padding: 5px;"> 🌱 Technological proficiency </div>
--	---	--

New skills

(Credit: The Future of Law Lab, Faculty of Law, University of Toronto)

*The State of Corporate Litigation – A survey by the ACC in partnership with Everlaw

What Private Equity Can Learn From Shareholder Activism - And Vice Versa?

Caitlin Rose, Grant McGlaughlin, Brad Freelan, Neil Kravitz and Paul Blyschak
Fasken LLP

Introduction: Blurring Lines

Among the most fascinating developments in U.S. corporate practice over the past decade has been the incremental and reciprocal convergence of private equity (PE) and shareholder activism.

What exactly has been occurring? Amid ever-tightening competition for value generation opportunities, as well as ample amounts of available capital, each has begun learning from and adopting the tactics of the other.

PE in its most classic form is the leveraged buyout. The fund acquires its target outright to add industry expertise and implement a new business plan. The traditional activist, by contrast, acquires a minority holding as a means to influence change, typically via a proxy contest and the replacement of board members.

Both PE and activists seek to create or unlock value in the target. But the former typically prefers private discussions leading to a friendly transaction. The latter is accustomed to a highly public and hostile campaign to advance its agenda.

These lines are blurring, with numerous notable legal implications. The U.S. is at the forefront of this evolution. However, as with certain other market trends, it may only be a matter of time before Canada follows.

Convergence and Collaboration in the U.S.

U.S. PE has become increasingly inclined to acquire minority stakes in companies.¹ Similar to an activist, this investment can be made to force dialogue regarding operational or management change. Also similar to activism, this investment can be leverage to compel an eventual sale of the company, perhaps to the PE fund itself. Finally, while less common, but much in the vein of an activist, the PE fund can position for an entirely hostile and public relationship.

On the other hand, U.S. activists have become increasingly comfortable acquiring larger stakes in their targets. Similar to PE, the goal may be more comprehensive control of the target than is obtained by a handful of board seats. Along the same lines, activists are increasingly agreeable to the longer term investment horizons needed to realize more fundamental progress. Indeed, activists increasingly use their initial toeholds to pursue an outright target acquisition.

So too has collaboration among U.S. PE and activists become more common. But one example is activists and PE approaching the target in tandem: the activist signals the offensive at hand but offers a sale to the PE fund

¹ For related insights, see FASKEN's Annual Canadian PIPE Deal Point Study (June 2022).

as the board's opportunity to both avoid proxy warfare and retain their roles, including within PE's appealing incentive-based compensation model. Whether cooperative tactics such as these migrate to Canada will be particularly interesting to watch.

Lessons for Clients and Counsel in Canada

What are some takeaways from this reciprocal convergence for clients and counsel in Canada?

Most important is to appreciate that this evolution is occurring, and could become more common in Canada going forward. Change presents both opportunity and risk. Foresight, planning and prudence will be required to take advantage of the former and mitigate the latter.

The activist establishing a PE arm for the first time must be careful to avoid the structural impediments to dissident-type tactics typically included in classic PE limited partnership agreements. The PE fund new to activist strategies must appreciate the full spectrum of applicable securities law concerns, including regarding stake-building, trading on material non-public information and "joint actor" status.² Lessons for target companies are also manifest. The most immediate takeaway is being aware of these hybrid actors and the more complex dynamics their interest may bring, and to organize accordingly. On the other hand, the cross-over of PE and activism could well present opportunity for a company, such as a larger pool of potential "white squires" available to an embattled board. And these are merely a few examples. In all, added complexity will require ever-more sophisticated legal advice and industry awareness.

² For further insights regarding shareholder activism, see FASKEN's "Directors' Handbook: Shareholder Activism" and FASKEN's "Shareholder Activism in Canada: The Legal Framework" (forthcoming).

Key Considerations for Commercial Arrangements Involving Personal Information Processing

Ellie Marshall, *Associate* and Ronak Shah, *Counsel*,
Blake, Cassels & Graydon LLP

As organizations of all sizes in Ontario continue to digitize their operations, they are routinely entering into third-party arrangements involving the processing of personal information. To comply with ever-changing privacy laws, and to reduce the risk of costly data security incidents, it's crucial that businesses understand the implications and risks of the data processing underpinning many of these commercial arrangements.

Outlined below are some practical considerations and tips involving third-party data processing arrangements.

Due Diligence

If your business plans to engage a third party and the arrangement involves sharing personal information with that third party, prior to papering the agreement, it is important to: (a) internally understand the nature and scope of the third party's personal information processing; and (b) conduct diligence on the third party's privacy and cybersecurity practices. A privacy impact assessment (PIA) provides a useful framework to undertake this internal and external diligence while enabling the business to assess, document and address privacy risk in accordance with applicable privacy laws, such as Canada's Personal Information Protection and Electronic Documents Act (PIPEDA).

Whether through the PIA or your organization's vendor procurement process, we recommend considering the following questions before drafting data processing terms with a third party:

- What is the purpose for which the information will be communicated with the third party?
- Is the third party a service provider (i.e., are they processing information

solely on your behalf) or can they process personal information for their own purposes (i.e., are they independently accountable for this information)?

- What is the nature and volume of personal information that needs to be processed, and for how long? Can we limit the scope of the personal information that is processed externally?
- What cybersecurity and privacy policies, procedures, and controls does the third party have in place? Does any technical diligence need to be undertaken? Do they have any certifications (e.g., ISO 27701, SOC-1/2/3)?
- Do the third party's security safeguards meet any specific or prescribed requirements for our industry?
- Where are they located? Does the personal information processing involve cross-border data transfers, if so, are there any business or legal constraints that need to be considered?
- Does the third party have subcontractors that may have access to this information? Where are they located?
- What laws apply to this data processing arrangement?
- What is the third party's reputation, experience, and financial strength? Are there any complaints, compliance issues or litigation against the third party?

Contractual Provisions

PIPEDA and other provincial private sector privacy laws require organizations that transfer or share personal information for processing to implement contractual requirements that provide an equivalent level of protection while the information is being processed. Therefore, depending on whether the third party is a service provider or an

independent contractor, and if your business can negotiate the terms of a data processing agreement, you should consider addressing the following:

- Ensure contractual safeguards adequately address the risks identified in the diligence stage.
- Impose an obligation to implement safeguards to protect against, and to report data breaches.
- Ensure the agreement provides your organization with sufficient control to meet obligations under applicable laws, including any industry specific obligations, such as to investigate allegations of non-compliance or to respond to data subject requests.
- Outline permitted and prohibited uses of personal, de-identified and anonymized information, including whether the third party may use the information for their own purposes, use subcontractors, and transfer or store information outside of Canada.
- Include confidentiality obligations that survive termination or expiration of the agreement.
- Negotiate appropriate indemnity and liability coverage commensurate with the risks identified in the due diligence and the nature and sensitivity of the personal information processing.
- Include appropriate audit rights that permit your organization (or an independent auditor) to evaluate compliance with the privacy and information security obligations.
- Provide a termination provision that permits the business to terminate the engagement for cause if there is a breach of the privacy terms.
- Outline whether the third party must return or destroy the personal information (and any derivative data) on termination or expiration of the agreement.

During the Agreement

To demonstrate that the business continues to hold the third party accountable, businesses should regularly monitor the third party to ensure the appropriate delivery of the services and compliance with the contract's privacy and cybersecurity terms.

Event Photos

9th Annual Securities Symposium

October 17th, 2022



DO YOU WANT TO BE PART OF FUTURE EVENTS LIKE THIS?

DO YOU WORK IN THE FINANCIAL SECTOR?

If you would like to be on the Securities Law Committee to help organize events please [click here](#).



Event Photos



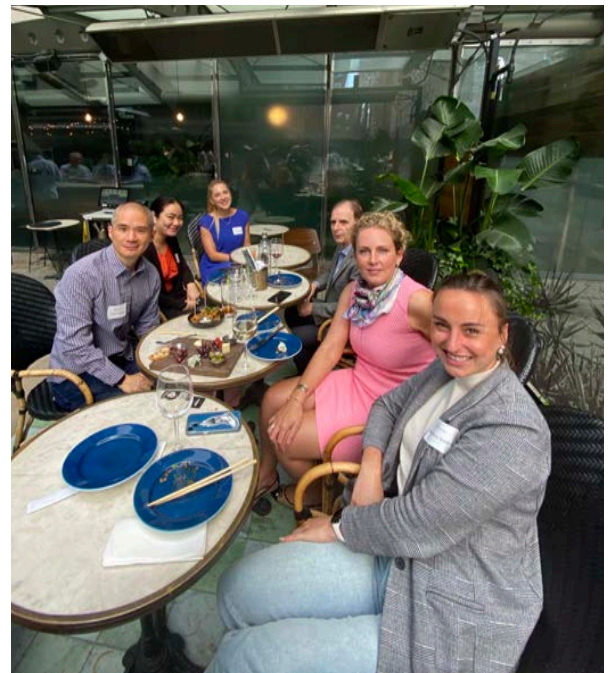
Annual Meeting Visit to Resorts World Las Vegas Facility - Cogeneration Gas Plant Generating Electricity, Heating, and Cooling at Same Time (October 23-26, 2022)



Fall Social at Louix Louis (November 30, 2022)



Holiday Social at the Boulevard Club (December 13, 2022)



Late Summer Social at Walrus Pub (August 31, 2022)

STAY TUNED FOR FUTURE EVENTS AND PROGRAMS
BY FOLLOWING US ON LINKEDIN

Board Members & Contacts

President and Program Chair

Brenda MacDonald

SVP New Growth and Commercial Management
Ontario Power Generation Inc.

Secretary

Wendy Lawrence

Chief Risk, Legal & Privacy Officer
St. Joseph's Healthcare Hamilton

Treasurer

Paul Krpan

*VP, Assistant General Counsel and Chief
Privacy Officer*
Northbridge Financial Corporation

Immediate Past President

Alan Ritchie

General Counsel
Canadian Cancer Society

Membership Chair

Nicole Broley

Assistant General Counsel
EY Canada

Membership Chair

Shawn Graham

Senior Vice President and Head of Regulatory Compliance
HSBC Bank Canada

Program Chair

Hanna Suh

Lead Counsel, Canada
Takeda Pharmaceuticals U.S.A. Inc.

Advocacy and Legal Operations Liaison

Sanjeev Dhawan

Senior Legal Counsel
Hydro One Networks Inc.

Chapter Administrator

Aviva Davis

ACC Ontario Chapter

Email: accontario@accglobal.com

List of Resources

→ *Economic Sanctions ACC & Sponsor Resources:*

<https://www.acc.com/chapters-networks/chapters/canada/ontario-chapter/economic-sanctions-acc-sponsor-resources>

→ *In Your Corner: Mental Health and Wellbeing:*

<https://www.acc.com/chapters-networks/chapters/canada/ontario-chapter/your-corner-mental-health-and-wellbeing>

Interested in sharing your legal expertise?

Sign up for our Speakers Roster to be considered to present at future ACC Ontario programs by clicking [here](#).

ACC365 App Now Available to Download

Your work goes beyond your desktop and now so does the ACC member experience. The brand-new ACC365 app is now available to download. Stay connected and get the ACC experience in the palm of your hand. With one tap, you are plugged into the people, resources, and knowledge that accelerate your career.

