



Putting the “Cure” back in ERP Procurement: A Re-Enactment of an ERP Procurement Gone Wrong

November 18, 2021

Symposium

November 18, 2021 - Toronto

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We are pleased to host this virtual complimentary half-day event to provide you with educational webinars for continuing professional development. By attending, you can achieve up to three hours of education that can be applied towards CPD requirements of the Law Society of Ontario.

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As the Managing Partner of Fasken's Ontario Region, I thank you for joining us today. I trust our event will not only meet, but exceed, your expectations.

A handwritten signature in blue ink, appearing to read 'Martin K. Denyes', is positioned above the printed name.

Martin K. Denyes

Managing Partner, Ontario
Fasken

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Fasken Toronto Mini-Symposium – November 18, 2021

Agenda

Time	Session & Speakers
8:50 am – 9:00 am	Registration
9:00 am – 10:00 am	SESSION 1 1a. Hot Topics in Cybersecurity Risk Fasken Speakers: Alex Cameron and Daanish Samadmoten Guest Speakers: Alireza Arasteh, MBA, MSc, BEng, CISSP, Managing Director, Mandiant Services and Gregory Eskins, Managing Director, Cyber Product Leader, US & CAN, Marsh <i>or</i> 1b. Putting the “Cure” back in ERP Procurement: A Re-Enactment of an ERP Procurement Gone Wrong Fasken Speaker: John P. Beardwood
10:00 am – 10:10 am	Break
10:10 am – 11:10 am	SESSION 2 2a. The Future of Work Fasken Speakers: Alix Herber, Christopher Steeves and Douglas Tsoi Guest Speaker: Deenah Patel, Senior Director, Solution Enablement & Marketing, Future of Work & Culture, RBC <i>or</i> 2b. Cases You Need to Know from the Past Year Fasken Speakers: Zohar Levy, Zohaib Maladwala, Nicholas Carmichael and Rachel Laurion
11:10 am – 11:20 am	Break
11:20 am – 12:20 pm	SESSION 3 PLENARY 3a. Journey Towards Truth and Reconciliation: Considerations For In-House Legal Counsel Fasken Speakers: Amy Carruthers and Sandeep Tatla Guest Speakers: Bindu Cudjoe, SVP, General Counsel & Corporate Secretary, Canadian Western Bank and Chastity Davis-Alphonse, Chastity Davis Consulting

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John P. Beardwood, Partner, Fasken

Toronto Mini-Symposium
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- **Handout:** the materials can be downloaded via the “Handout” tab, also underneath the video window.
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▼ A. Introduction

▼ A. Introduction

- Where large system implementation/outsourcing arrangements fail, sometimes root cause goes back to very beginning: when the provider(s) were first selected.
- E.g.: *National Grid v. Wipro*: significant flaws in how the customer National Grid USA Service Company, Inc. conducted their competitive RFP process to select Wipro Limited as the implementer for an SAP solution.
- However, in *Barrett Business Services, Inc. vs. Oracle America, Inc., Cognizant Worldwide, Cognizant Technology and Kbase Technologies, Inc.* (“**Barrett**”), the customer went one better and *sole sourced* both the solution and the implementer, to their great detriment.

▼ A. Introduction

1. The Players

- **Customer:** Barrett Business Services, Inc. (“**BBSI**”)
- **Solution Provider:** Oracle America, Inc. (“**Oracle**”)
- **Implementer:** Cognizant Technology Solutions Corporation (“**Cognizant US**”)

2. The Accusation

- Failed to deliver viable system at promised price point & time frame. Specifically:
- **Price:** mushroomed from \$5.4 million to over \$33 million
- **Timing:** completion of Phase I delayed by two years

▼ A. Introduction

3. The BSSI Story

- BSSI bought into Oracle ERP “package deal”: i.e. Oracle solution implemented by the Oracle-recommended implementer... with Oracle solution completely financed by Oracle credit.
- Oracle (& Oracle Credit) & Cognizant US “combined their resources, skill and knowledge to carry out single undertaking - the sale as single bundle of products/services to BSSI... Oracle & ... Cognizant [US] had shared financial interest in “closing the deal” & extracting revenue from BSSI.”
- = BSSI was “tricked” into making various missteps during procurement process.

4. But is this true?

- Or was it really BSSI's procurement which was at fault?

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▼ B. Facts & Legal Proceeding

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▼ B. Facts & Legal Proceeding

- BBSI was a professional employer organization (“**PEO**”)
- Service was to establish a co-employment relationship with each client company, & assume responsibility for payroll & other administrative functions their workforce.
- BBSI would assume credit risk associated with its clients’ employee payroll obligations, for fees based on a % of client payroll.

▼ B. Facts & Legal Proceeding

- **The Procurement**
- 2017: BBSI seeks to upgrade BBSI's computer systems into a new integrated enterprise software system.
- Interviews ~ 30 potential providers, but states that because BBSI had thousands of customers & different tax identification numbers, 27 candidates said that they could not meet BBSI's highly customized needs.
- Not clear what happened to other 3 companies, or even if Oracle was one of the remaining 3.
- It is also appears that BBSI did not engage in any form of formal competitive procurement in connection with these interviews.

▼ B. Facts & Legal Proceeding

- **The Procurement**

- During June, July and August 2017, BBSI attends calls, & live demonstration of Oracle Cloud Human Capital Management product (“**Cloud HCM**”), with Oracle. Cloud HCM included payroll management system.
- **The Package Deal:** From beginning, Oracle jointly presents both Cloud HCM and Implementer - Kbace Technologies, Inc. (“KBACE”) (becoming **Cognizant US** in 2017), and continues to emphasize the fit of both Cloud HCM and Cognizant US for the project

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▼ B. Facts & Legal Proceeding

- **The Powerpoint Slide**

- December 5, 2017: Oracle & Cognizant US – again jointly - present following in the form of a PowerPoint “project overview” slide from Cognizant US
 1. **Price:** highest estimated \$5.4M to \$5.9M
 2. **Timing:** “go live” dates of:
 - July 29, 2018 for Accounts Payable/General Ledger
 - January 7, 2019 for “pilot population” & Accounts Receivable/Platform as a Service= “go-live” dates of btw 8 and 13 months from date of presentation.

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▼ B. Facts & Legal Proceeding

- **The Consultant**

- January 2018 BBSI engages third party consultant
- Advises on optimal contract terms & reports that Cloud HCM was not suitable because it:
 - lacked the applicable functionality to meet the BBSI needs;
 - included a poor user interface;
 - only possessed minimal API's; and
 - required significant customization
- BBSI indicated would push hard for exit clause at year 1. Not clear was successful.

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▼ B. Facts & Legal Proceeding

- **The Agreements**

- February 2018 BBSI nevertheless enters into 3 categories of agreements;
 1. **Solution Subscription Agreement:** with Oracle, for Cloud HCM licenses.
 2. **Implementation SOW:** with Cognizant US, under an existing Master Services Agreement with Cognizant Worldwide Limited ("**Cognizant Worldwide**")
 3. **Financing agreement:** with Oracle Credit Corporation, a subsidiary of Oracle ("**Oracle Credit**") .

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▼ B. Facts & Legal Proceeding

- **The Deal Tanks**

- April 2018: BBSI discovers Oracle HCM (a) does not manage local tax configurations, and (b) because it did not include Oracle's Time and Labor application, could not use another payroll software.
- June 2018:
 - Oracle (or possibly Cognizant US) advises that BBSI never should have bought Cloud HCM as was not the right system to meet their business needs
 - Cognizant US admits that, notwithstanding Oracle reps as to Cognizant US's expertise, their only experience with PEO implementation was 11 years prior
 - Oracle advises that unless *BBSI changes the way it processes payroll*, the system will never perform to the level of BBSI's current system

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▼ B. Facts & Legal Proceeding

- **The Deal Tanks**

- June 2018: just 2 months prior to originally scheduled first go-live date, Cognizant presents BBSI with new plan which now includes missing Time & Labor application, but which also includes:
- **New Price:** of approximately **\$33M**, (not ~ \$5m as proposed just the prior year) = 600% price jump
- **New Timing:** "go live" dates of between 16 and 31 months from presentation date (not 8 to 13 months as proposed just the prior year) = a **two-year delay**.

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▼ B. Facts & Legal Proceeding

- **The Deal Tanks**

- November 2018: BBSI expresses concerns to Oracle re perceived “bait and switch” on cost/time estimates, and advises will not pay further invoices.
- Jan 2019: BBSI brings lawsuit against Oracle, Cognizant Worldwide, Cognizant US & KBACE.
= jumped to lawsuit option very quickly: was that the best call?

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▼ B. Facts & Legal Proceeding

- **The Lawsuit**

- **Claims:** various forms of economic harm, including:
 1. various associated expenditures, including \$270K and \$1M paid to Cognizant US and Oracle respectively for “useless” services,
 2. “**enormous waste of time**”: if BBSI employees had instead been working on revenue-generating ventures, employees would have generated roughly \$100M in revenue, and \$3.2M in profits, and
 3. lost time/opportunities, with lost time in getting necessary system rolled out expected to cost BBSI over \$1M.
- **Pleadings:** negligent misrepresentation; breach of contract (CSA), breach of contract (Cognizant US SOW), rescission (CSA) and rescission (Cognizant US SOW).

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▼ C. The Issues

▼ 1. Why not a formal RFP process(es)?

- BBSI did not (a) issue RFP with detailed specifications, (b) evaluate Oracle against other providers or (c) separately procure solution & implementer.
- **How might an RFP have helped?**
 1. Might have provided insight on **how Oracle was positioned in the market**
 - Oracle significantly lagged behind AWS, Microsoft, and Google in 3rd place, in cloud platform market,
 - However, in this case the Oracle cloud product the cloud application HCM Cloud, not a cloud platform solution
 2. **Specifications created for the RFP** could have:
 - a. provided detailed contractual baseline against which Oracle and Cognizant could be tested for material breach, rather than having to rely on much weaker 'fitness for purpose' argument (see below), and
 - b. through procurement process, emerged functional shortcomings of Oracle HCM Cloud

▼ 2. High Pressure Tactics & Order of Agmts

- **Gartner Magic Quadrant report:** *"Oracle sometimes uses high-pressure sales tactics to sell its cloud IaaS offerings, including software audits or threatening to dramatically raise cost of database licenses if customer chooses another cloud provider."*
- **BBSI:**
 - *...Oracle, plagued by sluggish cloud software sales and late to the cloud computing scene, was aggressively pushing its cloud products. After a cold call [in June 2017] to BBSI established that the company was looking for an enterprise solution, Oracle pounced on the opportunity.*
 - Since Oracle incentivizes its sales department to only position cloud applications, Oracle's representatives never proffered on-premises software as an option, despite it being the better solution for BBSI.

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▼ 2. High Pressure Tactics & Order of Agmts

- **BSSI:**
 - Oracle, with Cognizant's assistance, insisted that BBSI execute Cloud HCM CSA, committing to \$15M in cloud licences, **before** entering into the Cognizant US SOW a month later for the actual implementation of those licenses.

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▼ 2. High Pressure Tactics & Order of Agmts

Commentary #1: High Pressure Tactics

- Very common in this space, not just Oracle – i.e. “buy before end of 4Q or else lose the discount”
- Oracle sales team used sales tactics: this is a surprise?
- Finally, regarding the point that Oracle was pushing for cloud because it was seeking market share, Oracle could fairly respond that offering a soon-to-be outdated on-premise solution would not be a good future-proof solution for BBSI

▼ 2. High Pressure Tactics & Order of Agmts

Commentary #2: Order of Agreements

- Cognizant likely delighted with resulting lack of BBSI bargaining power in negotiating SOW. Not huge stretch of imagination to suspect that the fact that BBSI was already committed to \$15M in Oracle licenses, may have contributed to post-Cognizant US SOW increase in the estimate by almost 600%.
- **But** it is not uncommon for subscription licences to be purchased with fee payments being required even before software “goes live” – i.e. before it is being used for its intended purpose - based on the rationale that the software implementation (e.g. by a third party implementer for the client) requires the use of the software. In that case, the licences during this implementation period should be at a discount.
- **But** while it is not usual to so purchase software licences prior to implementation, we would argue that it is less common to purchase the licences before at least coming to a term sheet understanding with the implementer as to price and scope.

▼ 3. Business Case: Hide or Be Transparent?

- BBSI relied on the implementation figure of ~ \$5.5M on ...yes ... a PowerPoint slide
- BBSI proceeded with all 3 vendors based on specific business case of \$20M (i.e. \$5M implementation + \$15M in s/w licences).
- BUT, in triad of Oracle Credit financing, the Oracle licenses and the Cognizant US implementation, the implementation cost was the variable most likely to change.

▼ 3. Business Case: Hide or Be Transparent?

Commentary

- Always a customer dilemma:
 - Option #1: **Hide** customer actual budget, based on concern that the provider will then “size up” the project fees to take the whole budget.
 - Option #2: **Be transparent** as to actual budget, in order to ensure that that all parties are on the same page – e.g. size the fees to be less than budget but build in room for contingency budget to be accessed subject to certain pre-conditions
- BBSI could have considered including specific “business case” precondition in 3-party agreement between Oracle Credit, Oracle and Cognizant US, or alternatively in each of their agreements, that stated that engagement of all parties on the project was conditional on this business case being met – such that, for example, the business case would fail if the final implementation cost estimate/quote was more than x% above the project overview estimate.

▼ 4. Importance of Phase 0

- BBSI: Cognizant US SOW was “an in-depth diagnostic undertaking to ascertain whether the Cloud HCM was in fact suitable for BBSI”.
- i.e. the SOW was a “Phase 0” SOW, which we frequently advocate as useful tool to lessen inevitable gap btw customer’s & service provider’s knowledge of customer business requirements.
- However, key requirement for true Phase 0 agreement is that it allows customer to exit after Phase 0 if the final scope/pricing are unacceptable.

▼ 4. Importance of Phase 0

- **BBSI:** The huge new pricing and timing numbers which emerged post-completion of the Cognizant Phase 0 SOW simply represented Cognizant, as the implementer, pulling an Oracle-sanctioned “bait & switch”, tricking BBSI into making a \$15M licence commitment to Oracle based on fee/time estimates which were deliberately lowballed, and then jacking up the prices/implementation times.
- **Cognizant:**
 - Could respond that whole purpose of Phase 0 SOW is to gather info about client’s requirements, existing systems, etc., to get ‘crisper’ on fees/timelines
 - Thus, from Cognizant’s perspective, Phase 0 achieved its purpose. The fact that BBSI did not like their final numbers is irrelevant: BBSI should simply go hire another implementer.

Commentary: Customer should ensure that terms of the Phase 0 SOW allow customer to take the final “scoping” work product and give it to an alternative provider.

▼ 5. Fitness for purpose disclaimers – time to revisit?

- *Barrett* raises question as to whether a fitness for purpose disclaimer makes sense for a software implementation.
- It is true that Oracle may not have been able to make the claim that the Cloud HCM product was fit for BBSI's purposes, although BBSI in their pleadings makes extensive claims that Oracle did consistently do so.
- Nevertheless, that is exactly what Cognizant US expressly claimed would occur post-implementation of Cloud HCM - specifically, that Cognizant US could (1) deliver a cloud-based system that *would satisfy the special needs* of a PEO; (2) *customize the system to fit BBSI's requirements* with respect to user interface, taxes, payroll, time entry and billing; ... (3) *make the Oracle product work for an entity with over a thousand tax identification numbers*

▼ 5. Fitness for purposes disclaimers – time to revisit?

- In short, if true, then Cognizant US expressly claimed that, post-implementation, the Cloud HCM product *would* be fit for the purposes of BBSI.
- Fairly, is it not the role of the system implementer to do exactly that – that is, to take a base product, but implement it in such a way as to fit the purposes of the customer?
- It would of course be much more prudent for a customer to generate specific specifications/requirements which solution/implementation must meet...
- ... but to suggest that a system implementer is not effectively committing that the solution will in fact be fit for the customer's purposes post-implementation seems far off the mark

▼ 6. Package Deal: Problem or Solution?

- Most striking feature was that Oracle & Cognizant US were presented as package deal - difficult to determine where Oracle ended and Cognizant US began.
- 1. **Only Recommendation.** Oracle repeatedly represented that Cognizant US was “best” payroll implementer, & during weekly calls, Oracle VP of Sales represented repeatedly that Cognizant US was “best, & only” implementation partner.
- 2. **Who's Who?** Adding to perception that this was being presented as a “package deal”, BBSI makes very effective point that individuals on Oracle & Cognizant US sales teams seemed to be employed in some role by *both* providers. E.g.
 - a. business cards for both Senior Manager of Sales for Cognizant US, & Associate Director of Cloud Strategy for Cognizant US, also carried Oracle logos.
 - b. Another Oracle employee, who self-identified himself as part of “Oracle Cloud for Banking, Financial Services & Insurance,” had a Cognizant e-mail address.

▼ 6. Package Deal: Problem or Solution?

- 2. **Who's Who?** Thus BBSI argued that Oracle employees were acting as both Oracle and KBACE/Cognizant representatives & KBACE/Cognizant employees were acting as both Oracle and KBACE/Cognizant representatives.

▼ 6. Package Deal: Problem or Solution?

3. **BBSI: Relying on Oracle/Cognizant Representation.** BBSI alleged that it was *relying on Oracle and ...Cognizant [US]* to identify and recommend both the best solution for BBSI and the best implementer
- **i. BBSI relied on providers to recommend best solution?**
 - a. **Cognizant:** Clearly not their role as by time they were engaged, BBSI had already executed CSA for \$15M in Oracle licenses, + as Oracle “Platinum Partner” vendor, why would it suggest alternatives?
 - b. **Oracle:** Was BBSI seriously suggesting that it was expecting Oracle to recommend a non-Oracle solution?
- **ii. BBSI relied on providers to recommend best implementer?**
 - a. **Cognizant:** Was BBSI seriously suggesting that it was expecting Cognizant to recommend an implementer other than themselves?
 - b. **Oracle:** Oracle made a biased recommendation only. BBSI should have done its own diligence.

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▼ 7. Perils of Assignable Credit Agmts

- Fascinating window into what happens to financing arrangement with solution provider’s credit arm, when arrangement with solution provider collapses. This case provides some useful insight.
- Again, ~ February 2018, when Barret executed the CSA for \$15M in Oracle Cloud HCM licences, BBSI also executed a five year Financing Agreement with Oracle Credit to finance BBSI’s subscriptions the CSA.
- By November 2018 BBSI announced that the deal was over.
- However, in interim, in April 2018, Oracle Credit assigned the agreement to Key Equipment Finance (“**KEF**”). BBSI alleged that this assignment was designed to “sever BBSI’s monetary obligations from Oracle’s performance” under the CSA.
- Thus when BBSI provided notice that BBSI would be terminating the contracts, BBSI also provided KEF with such notice of termination.

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▼ 7. Perils of Assignable Credit Agmts

- However, KEF continued to insist that the financing arrangement continue, and that KEF be paid accordingly. In short, KEF argued that the dispute between BBSI and Oracle had nothing to do with them.
- **Lesson learned:** Critically important when a solution is being financed by a non-arm's length financing provider, that the agreements:
 1. Contain cross-termination provisions in order to dispel the fiction that the financing arrangement is somehow independent from the deal it is financing.
 2. Prohibit the assignment of the credit agreement to an arms-length third party

▼ 8. Why sue?

Recall:

- November 2018: BBSI expresses concerns to Oracle re perceived “bait and switch” on cost/time estimates, and advises will not pay further invoices.
- Only two months later (Jan 2019), BBSI brings lawsuit.
= Very quick to jump to the lawsuit option. Why not instead simply engage a different system implementer other than Cognizant?

▼ Summary

- Clearly BBSI should have (1) competitively procured implementer, or (2) at least asked for multiple recommendations & then evaluated
- Implementer arguably had the most critical role to play in the implementation, but BBSI simply defaulted to Oracle recommendation.
- Note that even **at implementation original price tag of approximately \$6M, that represented approximately 30% of business case.**
- Further, given consistent problem of cost overruns for system implementations (often caused by the information deficit between implementer and customer), industry expert should have advised BBSI that the implementation cost was the cost which was most likely to increase - which of course it did in this case, by 600% - and therefore was the variable to which BBSI should be paying the most attention.

▼ Conclusion

- BBSI experience serves as an excellent cautionary note, irrespective of finger-pointing
- Imagine the procurement lead at BBSI telling their executives in March 2018 that the total budget for the Oracle implementation will be just over \$20M total (i.e. \$15M in licences plus \$5.6M in implementation costs), and then having to tell them *only three months later*, in June 2018, that the actual budget will instead be almost \$50M (i.e. \$15M in licences plus \$33M in implementation costs).
- Oops.

Biography



John Beardwood

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John is a senior partner who Chairs the firm's Technology practice group, and was Co-Founder of the Outsourcing practice group. His practice is focused on technology, outsourcing and procurement and privacy law matters. John is regularly listed in Who's Who Legal- The International Who's Who of Business Lawyers as one of the ten "most highly regarded individuals" globally; and is also listed as one of only five "Thought Leaders" in TMT- North America. He is listed in Chambers Global - The World's Leading Lawyers for Business, for Information Technology, as "very effective, efficient and remarkably accessible" and "a great lawyer", and in Chambers (Canada) as "very polished and has tremendous amount of experience." John receives rave reviews as 'a go-to expert in Canada for privacy and IT law' from The Legal 500.

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Biographies



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Education

1996, LLB, University of Toronto

1993, MA, Political Science, McMaster University

1992, BA (Honours), History and Political Science,
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Jurisdiction

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John is a senior partner who is Past Chair of the firm's Technology practice group, and was Co-Founder of both the Outsourcing practice group and the Privacy and Access to Information practice group. His practice is focused on technology, outsourcing and procurement, and privacy law matters.

John works closely with clients in advising on and negotiating various technology-related transactions, including outsourcing/procurement, licensing, development, implementation, distribution, technology transfer, strategic alliance and e-commerce related transactions, including in the health care, financial/insurance institution and public sector contexts. John often advises clients on privacy law and access to information matters, and has been developing and implementing privacy compliance programs for more than twenty years.

The Who's Who Legal - Data - Information Technology 2021 ranks John as one of only four "Global Elite Thought Leaders" in North America, and states that "John Beardwood focuses his top-drawer practice on technology, outsourcing and procurement and privacy law matters, areas in which he is highly sought after by clients". *The Who's Who Legal - Data - Privacy & Protection 2021* also lists John as one of only four "Global Elite Thought Leaders" in North America, and notes that he "is endorsed for his first rate practice, which encompasses access to information, privacy law and implementation of compliance programs". *The Who's Who Legal Canada 2020 - Data* identifies John as a "National Leader", and one of the Top Six "Most Highly Regarded" leading figures in the Canadian market for his work in assisting clients in complex data protection, privacy, cybersecurity and IT

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matters, noting that “John Beardwood is celebrated for his 20-plus years of experience providing top-notch private compliance advice to a broad range of clients.” *Chambers Global* has identified John as “very effective, efficient and remarkably accessible” and “a great lawyer”, while *Chambers (Canada)* has noted that John “very polished and has tremendous amount of experience.” John has also received rave reviews as 'a go-to expert in Canada for privacy and IT law' from *The Legal 500*. John is consistently recognized in *Best Lawyers in Canada*.

Co-editor and contributing author of the only loose-leaf outsourcing publication *Outsourcing Transactions: A Practical Guide* [Rel.14], co-author of the Canada Chapter in *PLC Outsourcing Handbook*, co-author of the Canada Chapter in *Proskauer on Privacy*. Has prolifically spoken and published for more than 20 years on various outsourcing, technology and privacy/access topics. John has been interviewed by leading business-media outlets including The Globe and Mail, CBC Marketplace and Canadian Business Magazine.



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