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Cases You Need to Know from the Past Year

November 18, 2021

Symposium

November 18, 2021 - Toronto

Dear Guests:

Welcome to the Fasken Toronto Mini-Symposium.

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.

Our speakers will present the latest developments in various areas of law which will permit you to select those most relevant to your practice and your continuing professional development. We recognize that your continued professional development enables you to provide counsel and assist in the ongoing operation of your business.

We would appreciate your completion and submission of the online surveys that can be found on each of the webinar landing pages. Your feedback will ensure that we continue to provide high-quality events and learning opportunities that are relevant to you.

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.

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 *or* **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 *or* **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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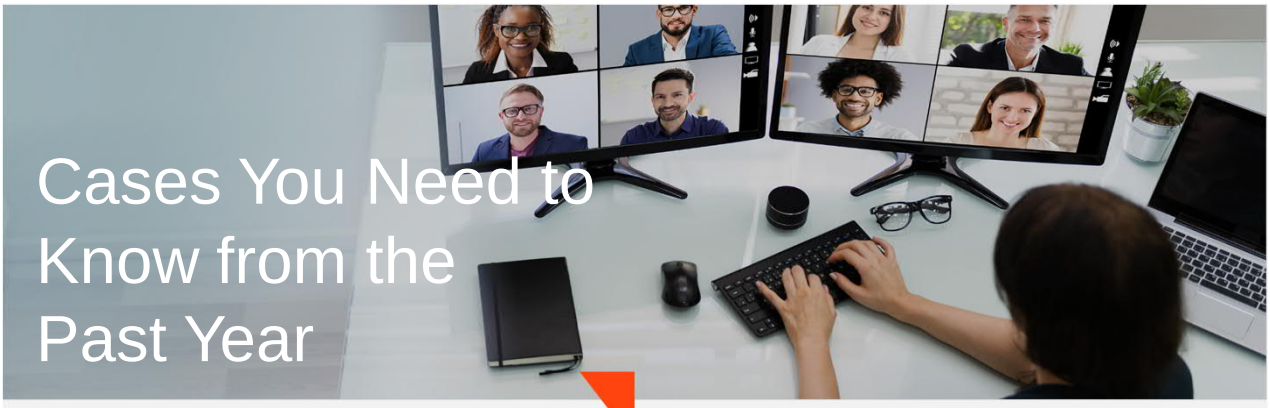

Cases You Need to Know from the Past Year

Zohar Levy, Partner, Fasken
Zohaib Maladwala, Partner, Fasken
Nicholas Carmichael, Associate, Fasken
Rachel Laurion, Associate, Fasken

Toronto Mini-Symposium
November 18, 2021

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Please note the following

- **Survey:** please click on the “Survey” tab underneath the video window to complete our survey.
- **Handout:** the materials can be downloaded via the “Handout” tab, also underneath the video window.
- **Questions:** please put any questions for the speakers into the “Questions” chat box.
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Maginnis v. FCA Canada – Facts

- Proposed Class Action alleging that certain model FCA diesel vehicles contained defeat devices.
- Plaintiff sought to represent a class consisting of all current/past owners/lessees of the subject vehicles.
- FCA denied the allegations but, pursuant to a regulatory/class action settlement in the United States, FCA recalled all subject vehicles (at no cost) and installed an approved emissions modification (AEM). No dispute that AEM was regulatory compliant.

Mackinnon v. Volkswagen – Facts

- Arising from VW defeat device scandal.
- Primary class action on behalf of owners and lessees of subject VW vehicles was settled in 2017 for $2.1 billion.
- This proposed class action sought to represent a class of former owners/lessees who returned their subject VW vehicles pre-scandal.

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Maginnis/Mackinnon– Issues

A single threshold issue was at the heart of both cases – Damages

- Was there any evidence of a compensable loss?
- Was there a plausible methodology to measure loss on a class-wide basis?

Maginnis v. FCA Canada - Decision

- No evidence of compensable loss.
  - No evidence of a premium price but, in any event, any alleged issue was corrected.
  - No evidence that performance/fuel economy was impacted.
- Motion dismissed on basis that class action was not the preferable procedure.
- Dismissal upheld by Divisional Court.

Mackinnon v. Volkswagen - Decision

- The motion for class certification was dismissed.
- There was no evidence of compensable loss or a plausible method to measure that loss.
  - No evidence to isolate the value of the clean diesel feature
  - Post-disclosure drop in value cannot be used to calculate “overpayment”.

Maginnis/Mackinnon - Takeaways

- No evidence of loss = no certification
- Greater judicial scrutiny of alleged damages/methodologies at certification stage
- Implementing a successful recall/repair program may limit class action exposure in certain circumstances

Uber v. Heller - OVERVIEW

- Case about validity of “arbitration clause”
- Uber’s standard-form contract forces drivers to bring ***all disputes*** to arbitration in Amsterdam
- Supreme Court of Canada strikes out “unconscionable” clause

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Uber v. Heller - FACTS

- Uber drivers click “accept” on electronic standard-form contract – includes mandatory arbitration clause to resolve ***all disputes in Amsterdam under Dutch law***
- Arbitration filing fee is USD $14,500 – not mentioned anywhere in the contract
- Heller brings class action on behalf of Uber drivers – value of each claim is only a few hundred dollars

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Uber v. Heller – COURT DECISIONS

- Motion judge – "stays" class action because the court **lacks jurisdiction** to hear the dispute
- Ontario Court of Appeal – overturns the motion judge because the arbitration clause is **invalid**
- Supreme Court of Canada (majority) – upholds Court of Appeal – and permits class action to proceed

Uber v. Heller – MAIN ISSUE

- Was the arbitration clause invalid? **YES.**
- Why? Clause is "**unconscionable**"

PROCEDURE:

- **Unequal power dynamic – Uber held all the cards**
- **No opportunity for drivers to negotiate**

SUBSTANCE:

- **Improvident Bargain – USD $14,500 filing fee is exorbitant**
- **Extinguishes drivers' right to ever realistically bring a claim**

Uber v. Heller - TAKEAWAYS

- SCC expands doctrine of unconscionability – no need to have ***knowledge*** of other party's vulnerability or ***intention*** to exploit them
- Decision puts *all* standard-form contracts under the microscope – courts will take a hardline on all dispute clauses (e.g., choice of law, choice of forum, arbitration)
- Companies should re-examine their contracts to make sure dispute clauses are fair, realistic and clear

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Braebury Development Corporation v. Gap (Canada) Inc.– Facts

- Gap operated a retail store in a leased premises in downtown Kingston.
- Due to the COVID-19 pandemic, Gap (as a non-essential business) was required to shut down from March 2020 to May 2020. Gap did not pay rent for April or May. It paid partial rent from June-September. It ultimately vacated the leased premises in September.
- The landlord sought to recover $208,211.85 in arrears of rent.
- The lease contained a *force majeure* clause, which excused the parties from performance of certain obligations under the lease if that party was prevented from performing their obligations by reason of, among other things, "restrictive governmental laws or regulations".
- The *force majeure* clause expressly stated that in the event of a force majeure, the tenant was not excused from the prompt and timely payment of rent.

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Braebury Development Corporation v. Gap (Canada) Inc.– Issues

- Was the force majeure clause engaged, and if so, was the defendant required to pay rent?
- If the force majeure clause was not triggered, did the doctrine of frustration of contract relieve the defendant of its obligation to pay rent?

Braebury Development Corporation v. Gap (Canada) Inc.– Decision

- The court held that the *force majeure* clause was triggered because the governmental laws and regulations that were implemented in response to the pandemic constituted "restrictive government laws or regulations".
- The doctrine of frustration did not apply because:
  - Gap was not required to operate as a retail store under the lease;
  - Gap was only ordered to be shut down from March 24, 2020 to May 26, 2020 and, thus, the disruption was temporary; and
  - the existence of the force majeure clause demonstrated that the parties turned their mind to situations in which, due to circumstances beyond their control, performance of obligations under the lease would be delayed, hindered, or prevented.

Braebury Development Corporation v. Gap (Canada) Inc.– Takeaways

- Justice Mew expressly commented that cases like this ask the courts to decide how the burdens of the pandemic should be distributed between commercial parties.
- Thus, despite being sympathetic to the effects of the pandemic, he courts will nevertheless hold parties (especially commercial parties) to their bargain.
- Where the *force majeure* provision is triggered (which means that the contract has accounted for the supervening event), the remedy of frustration of contract is not available.

Supreme Court decisions: good faith in contractual dealings

- 2 recent cases:
  - *C.M. Callow Inc. v Zollinger*, 2020 SCC 45
  - *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7
- Have they changed the law?

Rooplal v. Fodor, 2021 ONCA 357 (CanLII) – Facts

- Ms. Rooplal was injured while riding on a TTC bus, Leslie Fodor was the bus driver at the time of the incident, and an unidentified motorist was the cause of the incident.
- The TTC claimed the limitation period began to run when Ms. Rooplal knew or ought to have known the motorist caused the incident.
- Ms. Rooplal claimed the period does not begin to run until the insurer denied her claim for indemnification under her insurance contract, or alternatively, when the TTC driver was examined for discovery (thereby learning how the accident happened).

Nasr Hospitality Services v. Intact Insurance 2018 ONCA 725 – Facts

- Nasr Hospitality acquired a property with the intention of using it as a restaurant.
- Water damage was found, and reported to the insurer.
- The insurer first paid some of Nasr's expenses, then took the position that Nasr had violated its policy and the insurer would no longer provide payment.
- Nasr brought a claim more than 2 years after the discovery of the water damage, but less than 2 years after the denial of further payment.

When does the limitation period run?

- In *Rooplal*, the Court of Appeal held that the limitation period for a demand for indemnification begins to run only after a demand for indemnification has been denied and allowed the claim against the insurer.
- In *Nasr*, the Court of Appeal held that the limitation period begins to run when a party knows that it has a claim for indemnification, regardless of when that claim is denied, and dismissed the claim against the insurer.

Blake v. UHN - Facts

- On August 17, 2021, CMOH issued Directive 6 under section 77.7 of the *Health Protection and Promotion Act* (the Vaccine Directive)
- UHN and other hospitals implemented mandatory vaccine policies. Failure to comply or provide proof of exemption resulted in termination.
- Unionized and non-unionized workers challenged the mandate and sought an interlocutory injunction to prevent termination of non-compliant employees.

Lavergne-Poitras v. Canada - Facts

- On October 6, 2021, Federal Govt. implemented mandatory vaccination policy for public servants and suppliers effective November 15, 2021.
- Applicant was an employee of a supplier – challenged the supplier policy.
- Applicant sought an interlocutory injunction to prevent implementation of the mandate for "supplier personnel" until the matter was heard on the merits. Argued that the mandate breached his Charter rights.

Blake/Lavergne-Poitras – Issues

- Not a merits decision – Only injunction
- Did the applicants/moving parties meet the three part *RJR-MacDonald* test for an interlocutory injunction?
  - Is there a serious issue to be tried?
  - Is there potential for irreparable harm if the injunction is not granted?
  - Does the balance of convenience favour granting the relief?

Lavergne-Poitras v. Canada - Decision

- No serious issue regarding the Government's authority to issue and implement the policy.
- No serious issue to be tried regarding the policy being in breach of Section 7 of the *Charter.*
- No irreparable harm – harm is monetary.
- Balance of convenience favours Canada.
- No Injunction.

Blake v. UHN - Decision

- No standing for unionized employees – essential character of dispute "lies squarely within the ambit of the collective agreements"
- No irreparable harm for non-unionized employees – "Money, by definition is not only an adequate remedy it is the *only* remedy."
- No Injunction.

Blake/Lavergne-Poitras - Takeaways

- Neither decision addresses the merits/legality of mandatory vaccine policies.
- Unionized employees' remedies are pursuant to the collective agreement.
- Interlocutory injunctions to prevent implementation/termination may be challenging for applicants.

Fairstone Financial Holdings Inc. v. Duo Bank of Canada – OVERVIEW

- "Busted Deal" case
- M&A involving purchase of bank goes "belly-up" in the midst of COVID-19 pandemic
- Canadian court meaningfully looks at Material Adverse Event ("MAE") clause for the first time

Fairstone v. Duo – FACTS

- **February 2020** – Duo agrees to purchase Fairstone
- **June 1, 2020** – scheduled closing date
- **August 14, 2020** – outside closing date
- **May 27, 2020** – Duo notifies Fairstone it will not close due to COVID-19 – and invokes the Material Adverse Event ("**MAE**") clause and the "ordinary course" covenant
- **September 2020** – case goes to trial and Fairstone is awarded specific performance – Duo must close the deal

Fairstone v. Duo – MAIN ISSUE

MAE CLAUSE

- Was there a MAE? **YES.**

Definition of MAE (adopted from U.S. case law):

- **(i) unknown event**
- **(ii) substantially threatens overall earnings of target**
- **(iii) durationally significant period**

Fairstone v. Duo – MAIN ISSUE

MAE CLAUSE

- Did any of the carve-outs apply – *preventing* Duo from relying on the MAE clause? **YES – all of them:**
- **(i) worldwide, national or local "emergencies";**
- **(ii) change in industry or market Fairstone operates in; and (iii) failure to meet financial projections**

- Regardless, was Fairstone disproportionately affected? **NO**

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Fairstone v. Duo - TAKEAWAYS

- For now, the leading authority on treatment of MAE clauses in Canada – there was no appeal as the parties closed the deal in January 2021
- Other trial-level decisions will be released in Ontario – but could go in different directions
- Adopts the U.S. definition of "MAE" (Delaware cases)
- Broad interpretation of customary carve-out term for systemic events – will include "pandemic" even if not specifically listed

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1704604 Ontario Ltd. v. Pointes Protection Association and Bent v Platnick – Facts

- *Pointes Protection*:
  - The plaintiff was a property development company that sought approval of a proposed subdivision. The defendant opposed the development.
  - Ultimately, the parties entered into a settlement that, among other things, prevented the defendant from advancing the position that the development was contrary to *the Conservation Authorities Act*.
  - At an OMB hearing, the president of Points Protection testified that the development would result in a loss of wetland area and in environmental damage to the region.
  - The plaintiff sued the defendant for breach of contract (i.e. of the parties' settlement agreement) and the defendant brought a motion under the anti-SLAPP provisions of the *CJA* to have the action dismissed.

1704604 Ontario Ltd. v. Pointes Protection Association and Bent v Platnick – Facts

- *Platnick*:
  - Bent (a lawyer who regularly acted for victims of MVAs) sent an email to 670 members of the Ontario Trial Lawyers Association, which alleged that Platnick (who was often retained as an expert by insurance companies) had altered doctors' reports and changed a doctor's decision.
  - Bent's email was leaked and later published in a magazine.
  - Platnick commenced a defamation action against Bent and her law firm. Platnick brought a motion under the anti-SLAPP provisions of the *CJA* to have the action dismissed.

1704604 Ontario Ltd. v. Pointes Protection Association and Bent v Platnick – Issues

- Moving Party's Onus:
  - Does the lawsuit arise from an expression the defendant has made?
  - Was the expression related to a matter of public interest?
- Responding Party's Onus:
  - Are there grounds to believe the lawsuit has substantial merit?
  - Does the defendant have no valid defence to the lawsuit?

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1704604 Ontario Ltd. v. Pointes Protection Association and Bent v Platnick – Decision

- *Pointes Protection*
  - Points Protection met its onus under s. 137.1(3) of the CJA because:
    - the testimony was captured by the statutory definition of expression (in that it was a verbal communication made publicly);
    - the expression constituted a matter of public interest; and
    - there was a clear nexus between the testimony (i.e. the expression) and the underlying proceeding.
  - 1704604 Ontario Ltd. did not meet its onus under s. 137.1(4) of the *CJA* because:
    - its claim was not legally tenable; and
    - the harm allegedly suffered by the plaintiff arising from the expression did not outweigh the public interest in protecting Pointes Protection's expression.

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1704604 Ontario Ltd. v. Pointes Protection Association and Bent v Platnick – Decision

- *Platnick*
  - Bent met the threshold burden under s. 137.1(3) of the *CJA* because:
    - Bent's email constituted an expression that related to a matter of public interest; and
    - Platnick's action arose from that expression.
  - Platnick met its onus under s. 137.1(4) of the *CJA* because:
    - the three criterion for a defamation claim were met:
      - the words complained of were: published, referred to Dr. Platnick, and defamatory (i.e. would tend to lower Dr. Platnick's reputation in the eyes of a reasonable person);
    - the harm likely to be or have been suffered by Dr. Platnick was sufficiently serious to establish a public interest in permitting the proceeding to continue.

1704604 Ontario Ltd. v. Pointes Protection Association and Bent v Platnick –Takeaways

- Anti-SLAPP motions are not limited to defamation actions and, as a result, there will likely be more cases (such as breach of contract cases) where a party brings an anti-SLAPP motion.
- Unlike a motion for summary judgment, you do not need to put your "best foot forward", but the responding party should nevertheless tender enough evidence to demonstrate causation and harm.
- Lawyers are duty-bound to undertake a reasonable investigation into the correctness of a defamatory statement and, actions which may be characterized as careless behaviour in a lay person could be held to be reckless behaviour by a lawyer.

Tanase v. College of Dental Hygienists of Ontario – Facts

- A dental hygienist treated his friend twice in 2013, stopped treating her in 2014 when their relationship became romantic, and they married in 2016.
- He was told, in error, by a colleague that the rule permitting the treatment of spouses had changed.
- At no point did the hygienist seek to confirm the advice he was given.

Tanase v. College of Dental Hygienists of Ontario – Facts

- He resumed treating his wife in 2016, at which point another hygienist filed a complaint with the College.
- At his Discipline Committee hearing, the hygienist's registration was revoked by operation of the *Regulated Health Professions Act*, that requires mandatory revocation upon a finding of sexual abuse of a patient.

Tanase v. College of Dental Hygienists of Ontario – Decision

- The hygienist challenged the constitutionality of the mandatory revocation provision, arguing:
  - The provision was unconstitutional.
  - The *RHPA* amended the definition of "sexual abuse" to not include spouses, though the amendment had not been enacted at the time of these events.
- The court rejected both arguments.

Tanase v. College of Dental Hygienists of Ontario – Takeaways

- This was a unanimous decision from a five-judge panel.
- Regulatory authorities will likely take a strict approach when faced with questions surrounding sexual abuse provisions.
- Health care providers should consider this both clarifying and cautionary.

Today's Cases

- *Maginnis v. FCA Canada Inc.*, 2021 ONSC 3897 (CanLII)
- *Mackinnon v. Volkswagen,* 2021 ONSC 5941 (CanLII)
- *Blake v. University Health Network*, 2021 ONSC 7139 (CanLII)
- *Lavergne-Poitras v. Canada*, 2021 FC 1232(CanLII)

Today's Cases

- *Tanase v. College of Dental Hygienists of Ontario,* 2021 ONCA 482
- *Rooplal v. Fodor*, 2021 ONCA 357 (CanLII)
- *Nasr Hospitality Services v. Intact Insurance,* 2018 ONCA 725

Today's Cases

- *Uber Technologies Inc. v. Heller, 2020 SCC 16 (CanLII)*
- *Fairstone Financial Holdings Inc. v. Duo Bank of Canada, 2020 ONSC 7397 (CanLII)*

Today's Cases

- *1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22*
- *Bent v. Platnick, 2020 SCC 23*
- *Braebury Development Corporation v. Gap (Canada) Inc., 2021 ONSC 6210*

Questions?

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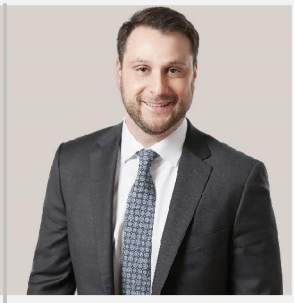
Zohar Levy

- Partner
- +1 416 868 7877
- zlevy@fasken.com

Zohaib Maladwala

- Partner
- +1 416 868 3453
- zmaladwala@fasken.com



Nicholas Carmichael

- Associate
- +1 416 865 5131
- ncarmichael@fasken.com

Rachel Laurion

- Associate
- +1 416 868 3460
- rlaurion@fasken.com

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Institute

Biographies

FASKEN

Zohar Levy

PARTNER

Toronto

+1 416 868 7877

zlevy@fasken.com

www.fasken.com/en/zohar-levy

Area of Expertise

Litigation and Dispute Resolution

Education

2008, BA, Political Science, McMaster University

2008, JD/LLB, Osgoode Hall Law School at York University

Jurisdictions

Ontario, 2011 | New York, 2009

Language

English

Zohar Levy is an experienced commercial and civil litigator. She regularly assists clients in contractual and shareholder disputes, defends product liability claims, and enjoys advocacy at all levels of court.

Zohar has appeared before the Supreme Court of Canada, Ontario Court of Appeal, Federal Court of Appeal, Divisional Court, Superior Court and the Ontario Court of Justice. She has represented diverse clients including financial institutions, large corporations and regulated professional colleges. She always takes a measured, strategic approach to secure the best possible outcome in each situation.

Zohar is active in her community, both through pro bono work and volunteer work, representing such advocacy organizations as the Canadian Civil Liberties Association and the Legal Education and Action Fund and is a regular volunteer at Law Help Ontario.

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Zohaib I. Maladwala

PARTNER

Toronto

+1 416 868 3453

zmaladwala@fasken.com

www.fasken.com/en/zohaib-maladwala

Areas of Expertise

Product Liability | Commercial Litigation | Litigation and Dispute Resolution | Class Actions | Life Sciences | Insurance | Automotive

Education

2009, JD, University of Western Ontario

2005, BA Hons (with distinction), University of Toronto

Jurisdiction

Ontario, 2010

Languages

English | Urdu

Zohaib Maladwala is a commercial litigator with expertise in class actions, product liability and estates litigation. Zohaib provides practical, business focused advice to multinational clients across a variety of industries including life sciences, industrial and consumer products, automotive, banking and professional/financial services.

Zohaib has significant class actions experience, particularly in the defence of product liability and competition/antitrust actions. A selection of his experience includes representing a multinational pharmaceutical company in class actions alleging negligent design and manufacture, defending a global auto maker in a diesel fuel emissions class action and representing a major consumer electronics manufacturer in a series of class actions alleging price-fixing in the electronics industry.

Zohaib's product liability expertise extends to defending manufacturing clients, including consumer and industrial product manufacturers, pharmaceuticals, and automotive companies, in individual actions involving allegations of defective design/manufacture and failure to warn.

The *Canadian Legal Lexpert Directory* recognizes Zohaib as a Leading Lawyer to Watch in Class Actions. He is also ranked as a Future Star in Litigation by *Benchmark Litigation* and has been recognized on the *Benchmark Litigation 40 & Under Hot List*. He was one of three lawyers nominated by *LMG Life Sciences* for its 2019 Canadian Rising Star Award, and is listed in the *Rising Stars Expert Guide* for his work in Product Liability/Life Sciences.

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Nicholas Carmichael

ASSOCIATE

Toronto

+1 416 865 5131

ncarmichael@fasken.com

www.fasken.com/en/nicholas-carmichael

Areas of Expertise

Litigation and Dispute Resolution | Automotive | Product Liability | Contract Disputes | Mining | Arbitration | Class Actions | Insurance Matters

Education

2014, JD, Dalhousie University

2009, BA, Histrory, Concordia University

Jurisdiction

Ontario, 2015

Language

English

Nicholas Carmichael maintains a broad litigation and dispute resolution practice, and has experience working on matters involving negligent misrepresentation, fraud, insurance coverage issues, product liability, negligence and trespass.

Nicholas has extensive experience representing clients at the Superior Court of Justice, such as contested motions, summary judgment motions, applications, pre-trial conferences and trials. He has negotiated resolutions on behalf of his clients at numerous mediations. He has also appeared before the Small Claims Court and the License Appeal Tribunal. As an articling student, he assisted on a trial involving a breach of contract dispute that was heard on the Commercial List.

When not practising law, Nicholas enjoys cooking, playing tennis and following politics and international events.

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Rachel Laurion

ASSOCIATE

Toronto

+1 416 868 3460

rlaurion@fasken.com

www.fasken.com/en/rachel-laurion

Areas of Expertise

Product Liability | Litigation and Dispute Resolution | Defamation & Media

Education

2014, JD, University of Western Ontario

2011, MSc, Social Work, Columbia University

2009, BA, New York University

Jurisdiction

Ontario, 2015

Language

English

Rachel Laurion is a litigator, whose dispute resolution practice includes all aspects of civil, commercial, public, and administrative litigation. Rachel maintains a broad practice, with an emphasis towards defamation, product liability, breach of contract, and professional negligence matters.

Rachel has appeared before all levels of court in Ontario and she has been co-counsel to participants at the Long-Term Care Homes Public Inquiry and the Red Hill Valley Parkway Inquiry. Rachel has also served as independent legal counsel to the Discipline Committee of the College of Physicians and Surgeons.

Rachel also has experience advocating for and representing at-risk members of society, both in Ontario and New York City. Regularly volunteering as Duty Counsel at the Toronto Small Claims Court, Rachel provides assistance to unrepresented litigants as part of the Pro Bono Law Ontario Duty Counsel Project.

Rachel completed her Bachelor of Arts at New York University, her Masters of Science in Social Work at Columbia University, and her Juris Doctor at Western University.

Ten offices
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› fasken.com

Canada

Vancouver, BC
550 Burrard Street, Suite 2900
T +1 604 631 3131
vancouver@fasken.com

Calgary, AB
350 7th Avenue SW, Suite 3400
T +1 403 261 5350
calgary@fasken.com

Ottawa, ON
55 Metcalfe Street, Suite 1300
T +1 613 236 3882
ottawa@fasken.com

Québec, QC
140 Grande Allée E., Suite 800
T +1 418 640 2000
quebec@fasken.com

Surrey, BC
13401 - 108th Avenue, Suite 1800
T +1 604 631 3131
surrey@fasken.com

Toronto, ON
333 Bay Street, Suite 2400
T +1 416 366 8381
toronto@fasken.com

Montréal, QC
800 Victoria Square, Suite 3500
T +1 514 397 7400
montreal@fasken.com

Global

London, United Kingdom
15th Floor, 125 Old Broad Street
T +44 20 7917 8500
london@fasken.com

Johannesburg, South Africa
Inanda Greens, 54 Wierda Road
West Sandton 2196
T +27 11 586 6000
johannesburg@fasken.com

Beijing, China
Level 24, China World Office 2
No. 1 Jianguomenwai Avenue
T +8610 5929 7620

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