



chapter with dispute resolution provisions, although that chapter is not yet in force because it requires ratification by all EU member states.

In April 2019, the EU Court of Justice opined that the mechanism for investor-state dispute resolution set out in CETA is compatible with EU law, paving the way for ratification. CETA contemplates a unique “investment court” mechanism rather than submission of disputes to *ad hoc* tribunals, which would change the investor-state arbitration model.

Finally, the new *Canada-United States-Mexico Agreement* (CUSMA, or NAFTA 2.0) was signed on November 30, 2018, but has not yet been ratified by the three member states. Once in force, the investment chapter in CUSMA will do away with investor-state arbitration altogether in the case of investors from, or in Canada, subject to a three-year phase-out period for “legacy” investments under current NAFTA Chapter 11. Mexican and U.S. investors will continue to have recourse to some investor-state arbitration under CUSMA, and Mexican and Canadian investors will have recourse to CPTPP. The Canadian ratification process for CUSMA began in June 2019, and on June 20, 2019, Bill C-100, *An Act to implement the Agreement between Canada, the United States of America and the United Mexican States* received second reading in the House of Commons and was referred to the Standing Committee on International Trade.

On a procedural level, the International Centre for Settlement of Investment Disputes (ICSID) arbitration rules are undergoing a comprehensive review, with an amendment process underway intended to modernize the rules, make ICSID arbitration more time- and cost-effective, and make the process less paper-intensive with greater use of technology for transmission of documents, which will be a welcome development for claimant investors and respondent states alike.

## 2

### **New Remediation Agreements for Corporate Crime**

By [Mark Morrison](#), [Michael Dixon](#), [Sean Boyle](#), [Iris Fischer](#) and [John Fast](#)



Remediation agreements, known as deferred prosecution agreements in the United States and United Kingdom, are a new tool for enforcing and resolving corporate crime in Canada. Remediation agreements are made between the Crown and an organization charged with a criminal offence, whereby the Crown agrees to suspend prosecution if the organization complies with certain terms and conditions, including providing a statement of facts and admission of responsibility related to the underlying misconduct; forfeiting property,

benefits or advantages obtained from the underlying conduct; and agreeing to pay fines or reparations, among other things.

Prosecutors may invite an accused organization to negotiate a remediation agreement only if they are satisfied that it is in the public interest and appropriate in the circumstances. The *Criminal Code* sets out several factors that prosecutors may consider to determine this, including the circumstances in which the underlying misconduct was brought to the authorities.

Negotiated remediation agreements are subject to court approval. Courts will approve a remediation agreement if they are satisfied it is in the public interest and its terms are fair, reasonable and proportionate to the underlying misconduct.

Upon receiving court approval, prosecution against the accused organization is stayed, subject to satisfaction of the terms of the remediation agreement. Approved remediation agreements, including the

statement of facts and admission of responsibility, are publicly available, subject to a court sealing the record, and may be admissible as evidence in other matters related to underlying misconduct.

### **A Helpful Update to Canadian Enforcement**

Remediation agreements are a welcome addition to Canada's enforcement landscape. Prosecuting corporate crime often involves complex legal issues and substantial amounts of financial and business records that may require specialized review. As a result, prosecutions can be prohibitively expensive and slow. This concern has been exacerbated since the Supreme Court of Canada (SCC) set out ceilings for what constitutes a reasonable amount of time to bring an accused to trial in *R. v. Jordan* in 2016, which has resulted in charges being permanently stayed in several prosecutions against individuals for corporate criminal offences.

Remediation agreements also allow organizations to cooperate with enforcement authorities to gather evidence related to individuals most responsible for the underlying misconduct, leading to more efficient and effective prosecutions.

Additionally, by including how misconduct was discovered as a consideration about whether to negotiate a remediation agreement, the *Criminal Code* encourages organizations to self-report misconduct. In other jurisdictions, such as the U.S. and U.K., an uptick in self-reporting has been associated with increased detection and remediation. While there is still no formal credit system for self-reporting non-competition offences in Canada, remediation agreements provide more incentive for self-reporting than previously existed in Canada and are a step toward more modern enforcement.

### **Business with Government**

Remediation agreements are especially important for organizations that do business with government. Pursuant to a suite of policies known as the Integrity Regime, any organization convicted of a corruption-related offence is debarred from contracting with the federal government for 10 years, or five years if an Administrative Agreement is entered into, and simply being charged with a corruption-related offence may result in an 18-month debarment.

Additionally, other jurisdictions and certain financial institutions, such as the World Bank, have similar debarment regimes that may be triggered by a conviction of a corruption-related offence under Canadian law. Because remediation agreements do not result in a conviction, organizations may resolve criminal charges without debarment consequences.

# 3

## **Rise in Civil Claims Related to Financial Products**

By [Andrea Laing](#) and [Ryan Morris](#)



Civil claims related to financial products have been on the rise in Canada in recent years and plaintiffs' counsel are showing surprising creativity in crafting new claims involving financial product design, product operation and product sales and compensation.

The proliferation of financial product claims appears to have been prompted by the expanded range of investment products available to retail investors. Many such products were previously only available to sophisticated and institutional investors. Additionally, retail investors are increasingly making investments in self-directed online accounts without the assistance of an adviser. This creates the potential for a knowledge gap between buyers and sellers of financial products.

### **Product Design**

Imprudent product design has been alleged or implied against, among others, a manager of a labour-sponsored venture capital corporation fund and a provider of tax minimization strategies. When courts ultimately have occasion to confront such allegations directly, it is anticipated that plaintiffs will face difficulty extending product liability principles to financial products and fitting financial products into recognized categories of recovery for pure economic loss.

Patent and confidential information claims in respect of financial products in both Canada and the U.S. have included allegations that methods, strategies and techniques for calculation and information aggregation used in the design of financial products were misappropriated. The outcome of these actions will determine the level of protection that innovators of financial products can expect under intellectual property law.

### **Product Operation**

The Ontario Court of Appeal has certified a class action for negligent misrepresentation against an insurance company on behalf of policyholders who had selected an investment feature. In this case, it is alleged that misrepresentations were made in written materials provided to investors. Courts have been reluctant to certify negligent misrepresentation claims because they often raise individual issues ill-suited to class proceedings, but this decision signals that courts are prepared to certify this type of claim where there is a single common misrepresentation.

Class actions have also commenced against multiple financial institutions for allegedly conspiring to fix foreign exchange rates, gold and silver prices, and bond rates through benchmark manipulation. Certain defendants have settled, but the actions continue against the remaining defendants. The benchmarks at issue in these cases serve as the foundation for a range of financial products.

Offerors of financial products are also susceptible to claims for share price performance related to financial products. In an older case, an insurance company's losses related to segregated funds were alleged to have depressed the company's share price, even though investors in the segregated funds did not sustain losses.

### **Product Sales and Compensation**

The expected range of suitability claims against investment advisers continues, but new claims against the vendors of financial products have recently risen.

Class actions have been brought against mutual fund administrators and trustees in respect of commission fees paid to online brokerages. It is alleged that these payments, though disclosed, were improper because the investors received no advice in exchange for the commissions paid. Class actions have also been brought against mutual fund administrators alleging "closet indexing"; in other words, that certain funds charged fees commensurate with active management, but provided only passive management.

Several class actions are outstanding in respect of syndicated mortgages, alleging that investors were misled as to the security of syndicated mortgages for real estate projects in Ontario and Alberta. As access channels for financial products become increasingly automated, it is anticipated that claims will proliferate further in respect of sales channels.

# 4

## Important Developments in Construction Law

By [David Tupper](#), [Seumas Woods](#), [Claude Marseille](#) and [Emily Hazlett](#)



### Late Payments

In recent years, stakeholders in the Canadian construction industry have been looking to resolve the ongoing problem of late payments. Changes are underway across the country, with Ontario taking the lead. In August 2018, the Quebec government announced a pilot project introducing the same reforms as in Ontario: a mandatory payment schedule and a rapid dispute resolution process. For now, these reforms will affect only certain public contracts, but the pilot is expected to be extended in the future.

Quebec's pilot project imposes a swift payment schedule. The public body involved has 30 days to pay the general contractor, who has five days to pay its subcontractors, who have five days to pay their own subcontractors. The legislation imposes specific dates each month by which general contractors and subcontractors must make their payment requests. If a party does not respect the schedule, the party wishing to preserve its rights cannot immediately publish a notice of legal hypothec (construction lien) against the property; instead, it must initiate the dispute resolution process.

A mandatory arbitration process is required for contracts subject to the pilot project and applies to a range of disputes, including disputes relating to requests for payment, the value of a change order, holdbacks and releases, and the cost of the work.

From the date of the notice of dispute, the parties have five days to agree to an adjudicator, who may proceed as he or she deems appropriate — whether by way of written submissions, telephone conference or an oral hearing. Although lawyers may advise the parties, they are prohibited from making submissions. The arbitration does not interrupt the execution of the work.

The process is swift. The adjudicator has 30 days to render an award, which is enforceable as soon as it is received. If the adjudicator determines that an amount is due, payment must be made within 10 days of notification, failing which the offending party commits an offence punishable by a fine ranging from C\$10,000 to C\$40,000.

At present, a three-year period is planned for Quebec's pilot project. If successful, broader reforms could be introduced sooner than expected.

### Payment Bonds

The SCC recently addressed the timely issue of whether owners and contractors are required to notify beneficiaries of existing payment bonds. Payment bonds ensure that parties to a project will be financially compensated for losses resulting from a contractor's default.

In *Valard Construction Ltd. v. Bird Construction Co. (Valard)*, the SCC held that owners and contractors must disclose the existence of a bond if its beneficiaries would otherwise suffer an unreasonable disadvantage. To determine unreasonable disadvantage, the SCC considered several factors, including bond terms, industry practice, and the nature of the entitlement of beneficiaries pursuant to the bond.

The SCC holds trustees to a standard of honesty, reasonable skill and prudence, and noted that posting a notice on-site at a frequent meeting place is enough to meet the requirement.

However, the decision does not define which other circumstances may trigger a duty to disclose. For example, can a trustee contract out of the duty and decision in *Valard* or is there always an implied duty to disclose?

To avoid liability, owners and contractors who are trustees for a payment bond must reasonably ensure that the bond's beneficiaries are aware of its existence.

### **Contract Interpretation and Limitation Periods**

Another noteworthy case is the Court of Queen's Bench of Alberta's (Court) decision in *Riddell Kurczaba Architecture Engineering Interior Design Ltd. v. Governors of the University of Calgary (Riddell)*, which addressed three legal principles and their applicability to a client-consultation contract.

The plaintiffs in *Riddell* were a team of architects who argued that upon completing the project, their fee should be paid on a percentage rather than fixed-fee basis. They relied on the principle of *contra proferentem*, which states that ambiguity in contracts should be resolved against the drafter.

The Court held that the principle has little application in contracts between sophisticated parties. Instead, post-contractual conduct may be considered to resolve ambiguity, particularly if the conduct is consistent with interpretation of one of the parties. Because the architects conducted themselves in a way that reflected a fixed-fee project, they would have been estopped from claiming damages for breach of the agreement even had the contract supported their position. Parties must, therefore, be aware that their subsequent conduct can affect their rights pursuant to a construction contract.

*Riddell* also explains the applicability of limitation periods to periodic payments. The architects received payments periodically throughout the project. The Court concluded that the two-year limitation period started to run on the date the architects discovered that the payment was made in a manner that was inconsistent with the service agreement. The architects brought their claim over two years after the first such payment was made. The claim accordingly was precluded by the passage of a limitation period.

*Riddell* indicates that the limitation period for building contracts that have part payment obligations may trigger limitation periods before the contract is fully performed. Therefore, parties to a long-term construction contract need to be aware of limitation periods that may begin to run before the project's completion.

### **Inter-Provincial Projects**

In May 2019, the British Columbia Court of Appeal (Court) held that the province of British Columbia does not have jurisdiction to regulate the operation and expansion of the Trans Mountain Pipeline. Although the decision in *Reference re Environmental Management Act (British Columbia)* focuses primarily on the constitutional division of powers between the federal and provincial governments, the holding has important implications for future inter-provincial construction projects.<sup>1</sup>

Federal and provincial laws may co-exist in certain situations. However, the Court was unanimous that the proposed additions to the *Environmental Management Act* by B.C. were in "pith and substance" regulation of a federal undertaking that is managed by the National Energy Board. Therefore, the ability to regulate the pipeline was out of B.C.'s jurisdiction.

For future inter-provincial construction projects, the decision suggests that courts will scrutinize provincial regulations to ensure that they are not interfering with the federal government's legislative authority.

1

Blakes lawyers Bill Kaplan, Q.C., Cathy Beagan Flood, Peter Keohane, Ben Rogers, Joanne Lysyk, Laura Cundari, Rebecca Spigelman (now of Gilbert and Tobin in Sydney, Australia) and Christopher DiMatteo acted for an interested party, the Consortium of Energy Producers, in this matter.



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