M&A Year in Review 2023

Overview

While 2023 was a down year in the volume of M&A deal flow overall, Fasken was able to remain at the forefront of league tables.

We've also been busy sharing our insights on key developments in M&A law and market practice over the last year, including with The M&A Lawyer and the American Bar Association (ABA) M&A Deal Points quarterly newsletter.

2023 saw numerous notable developments, including:

- The increased use of earn-outs raises the need to draft with foresight and precision: the buyer's specific efforts undertaking can have widely different consequences.
- For a private equity (PE) buyer negotiating a non-compete with the seller, how much protection is too much protection? Can the non-compete extend to the PE buyer's related portfolio companies?
- Will "*Great Hill* clauses" catch on in Canadian M&A now that Ontario courts have followed Alberta in signalling their approval, and what guidance remains outstanding?
- Several courts have applied heightened scrutiny to conflicts of interest and nominee directors in the M&A context. Adopting a "corporate opportunity waiver" may be the answer.
- Our review of 70+ recent information circulars reveals that ESG issues have been making incremental inroads into public M&A decision-making. Will this remain a minority trend, or is it evidence of more to come?

To facilitate M&A dealmaking in the year ahead, we've collected our insights into this year in review. Please also see our **Public M&A in Canada** and **Private M&A in Canada**, and **Private M&A in Canada: Transactions & Litigation (LexisNexis, 2024)**.

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Contents

Key M&A Deal Terms

Earn-Outs in Cross-Border M&A: Choose Wisely

Earn-outs are in: as deal lawyers know well, economic uncertainty and valuation gaps over recent years have increased the use of earn-outs in M&A. But as M&A disputes from Delaware caution, earn-outs can also convert "today's disagreement over price into tomorrow's litigation over the outcome." Careful earn-out drafting is therefore key, as is heeding the lessons of the growing body of earn-out caselaw.

Writing in **The M&A Lawyer**, we highlight what dealmakers need to know to avoid their next earn-out clause turning into the next earn-out decision, and we focus specifically on the efforts undertakings typically incorporated into earn-out obligations. What level of commitment must the buyer meet in pursuing earn-out targets post-closing? Its an important question, and its consequences are magnified the longer post-closing the earn-out periods extend.

The high-level practical takeaway: choose wisely and with appreciation for how different efforts undertakings have been applied by Canadian courts, including in M&A disputes.

Non-Competes in M&A: Caution Flags from Canadian and Delaware Courts

Non-Competes in M&A protect against the seller competing with the business the buyer just bought. But how much protection is *too much protection*, i.e., such that a court might declare the clause unenforceable?

Numerous different questions regarding the drafting and enforceability of non-competes can arise in the M&A context. For example:

- Can a private equity (PE) buyer, in addition to preventing the seller from competing with the target, also prohibit the seller from competing with the PE fund's other portfolio companies?
- Can a strategic buyer, in addition to preventing the seller from competing with the target, also prohibit the seller from competing with the strategic buyer's wider operations or upcoming expansion plans?

Recent decisions from Delaware and Canada raise caution flags on these and similar fronts that both buyers and sellers in M&A should understand. We review the decisions and related Canadian caselaw, and provide practical takeaways for PE and strategic buyers in Canada.

While the substance and depth of caselaw varies from province to province, a general caveat is that, even if the seller's subsequent conduct would clearly be in breach of a non-compete limited to the target's business and geographic scope of operations, if the non-compete extends further the entire clause could be struck for overreach.

Ordinary Course Covenants in M&A: When Will Compliance with Law be Implied?

The importance of the decisions of the Delaware Court of Chancery and Supreme Court in *AB Stable VIII LLC v MAPS Hotels* to M&A practice is hard to overstate. Simply put, the decisions are a deeper dive into the interpretation and application of "ordinary course of business" covenants in M&A than had ever before occurred.

That said, *AB Stable* left a significant question unanswered: when might an obligation to comply with law or government regulations be read into an "ordinary course of business" covenant that is otherwise silent on the point?

Writing in **The M&A Lawyer**, we highlight new caselaw tackling this question, both in light of the questions asked (but left unanswered) in *AB Stable* and in comparison with relevant Canadian M&A caselaw. We also provide 5 key practical takeaways for M&A lawyers flowing from these decisions.

Among these is that, even if a compliance with law qualifier clarifies that the ordinary course includes complying with changing law, this does not mean that all potential uncertainty is resolved. One example is the distinction between mandatory directions and government recommendations or guidelines. Another example is the distinction drawn by certain courts between *actions required by law* and commercial decisions *flowing from* changing law.

Does a Different MAE Analysis Apply to a "Financial" Buyer?

"Financial" buyers are amongst the most active participants in M&A. Alleged material adverse effects ("MAEs") are amongst the most complex disputes in M&A.

What happens when the two meet? Numerous Delaware decisions have indicated that a different MAE analysis might apply where the transaction features a "financial" buyer (as opposed to a "strategic" buyer). Moreover, the scant Canadian caselaw that has considered the issue arguably points in the same direction. Given that Canada is consistently the largest foreign destination for US outbound M&A by deal volume, writing in **The M&A Lawyer**, we explored this issue for the benefit of M&A lawyers on both sides of the border.

At a high level, several courts have indicated – although none definitively – that the r*equired duration* of the adverse impact experienced by the target necessary to trigger an MAE clause may be *briefer* where the buyer is a "financial" with a shorter-term investment horizon. Stated differently, these courts have acknowledged the fact that "strategics" and "financials" can have different acquisition motivations and intentions and have indicated that such differences may in part drive their MAE analysis.

Appraisal Rights in Cross-Border Public M&A: Canada Is Not Quite Delaware

How do appraisal rights in public cross-border M&A transactions into Canada compare with appraisal rights under Delaware law?

The 2023 ABA Canadian Public Target M&A Deal Point Points Study, together with an August 2023 Canadian court decision, provide timely and illustrative points of comparison on two key transactional issues. First, while appraisal rights closing conditions are uncommon in U.S. public M&A transactions, they are near omnipresent in Canadian public M&A. This raises several strategic considerations for a U.S. buyer eyeing a Canadian public target. Second, while Delaware and Canadian courts have been trending in the same direction in favouring deal price over other valuation methodologies in deciding fair value in appraisal proceedings, the "one true rule" in Canada remains that the court will account for all relevant factors. This highlights the importance of the sales process conducted in determining the deference the court will give to deal price. It also highlights that target directors in Canada are not subject to exactly the same duties as target directors under Delaware law when overseeing the sale of the company.

Writing in **The M&A Lawyer**, we highlight that, overall, U.S. counsel will find that appraisal rights in cross-border public M&A into Canada are both partly familiar and partly foreign.

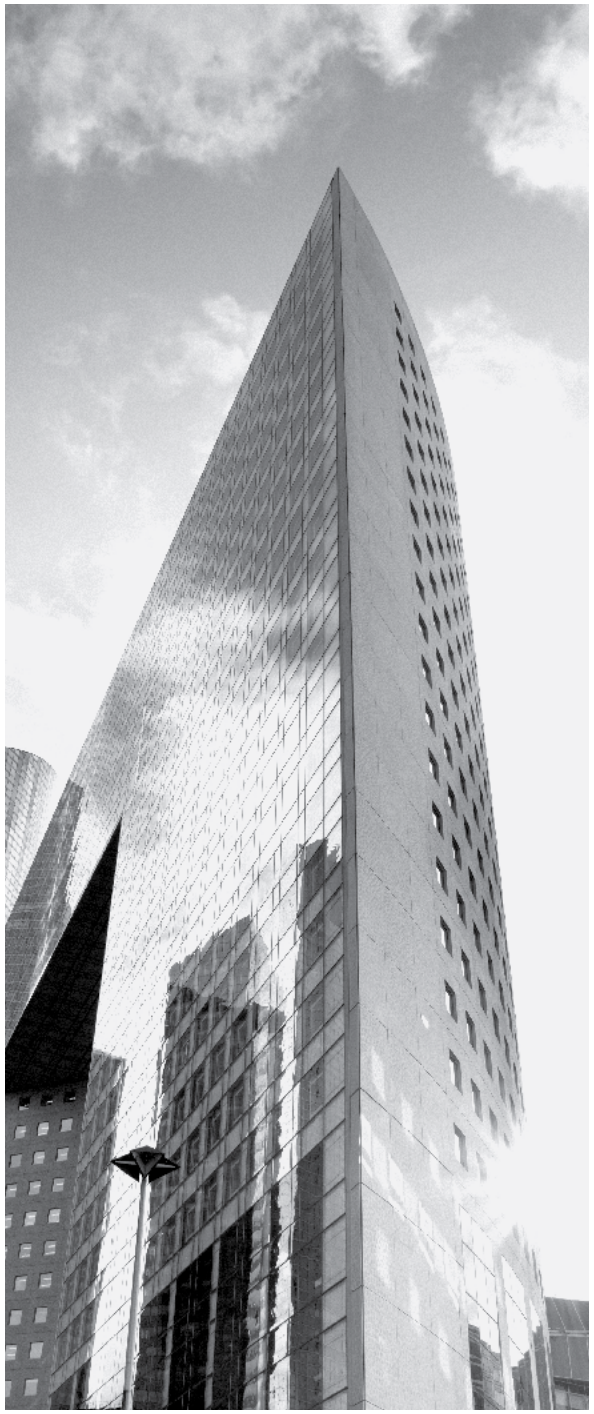
"Great Hill Clauses" in Cross-Border M&A: Canada Follows Delaware (Again), But How Far?

Under Delaware law, the seller in an M&A transaction can include a "*Great Hill* clause", i.e., one designed to preserve the seller's control over the target's privileged pre-closing attorney-client communications. In particular, the goal is to prevent the buyer from having access to such target privileged communications in connection with any potential post-closing claim by the buyer against the seller.

But are "*Great Hill clauses*" – named after a 2013 decision of the Delaware Court of Chancery – effective in M&A governed by Canadian law? Early indications suggest they are, including, most recently, a June 2023 Ontario decision. Indeed, Canada's largest province is now the country's second jurisdiction to endorse "*Great Hill clauses*" after Alberta did so ten years ago.

Writing in the **ABA's M&A Deal Points**, we explore "*Great Hill clauses*", their component subclauses, and their recent judicial treatment (and remaining open questions). While both *NEP Canada* (Alberta) and *Dente* (Ontario) clearly endorse the notion of "*Great Hill clauses*", both do so in a cursory manner. Much therefore remains to be seen regarding how closely Canada will follow Delaware in this area, even in these two provinces.

An initial caveat is that, while *NEP Canada* and *Dente* addressed "*Great Hill clauses*" in share acquisitions, we have not yet seen similar discussion in Canada regarding asset acquisitions. A second caveat is that Delaware courts have wrestled with whether a seller could retain privilege contractually only to then inadvertently waive it by subsequent conduct.



Cineplex's C$1.24 Billion Damages Award: Should Market Practice in Canadian Public M&A Learn from the U.S.?

The C$1.24 billion damages award in *Cineplex* in December 2021 was big news. Rarely do Canadian M&A disputes result in such a colossal damages award. Moreover, the nature of the damages and their calculation were, to put it mildly, curious.

Writing in **The M&A Lawyer**, we revisit *Cineplex* to consider the practical lessons of its damages analysis for Canadian public M&A. We first scrutinize the "lost synergies" analysis applied by the court. We then consider whether M&A parties can draft to avoid the possibility of a "lost synergies" analysis and in favour of another approach, namely lost shareholder premium.

In circumstances where the latter question is answered in the affirmative, we ask whether Canadian market practice regarding drafting for target remedies in public M&A should take a lesson from the US. This issue has several important ramifications, including the quantum at stake. For example, even though *Cineplex's* "lost synergies" analysis led to the very sizeable award of C$1.24 billion, this does not mean that a different analysis would have led to a lower damages award. In fact, the target's claim for lost shareholder premium was calculated by its expert at C$1.32 billion, an amount C$80 million *higher* (and a calculation the court did not take issue with).

Caution: Where Canada Departs from Delaware on MAE Clauses and the Ordinary Course

Recent years have seen much commentary on Canada's two monumental M&A decisions arising from the Covid-19 pandemic, including as relates to cross-border M&A. Unfortunately, much of this analysis of *Fairstone* and *Cineplex* is substantially undermined by an incorrect or incomplete understanding of Delaware law by some Canadian legal commentators.

Writing in the **ABA's M&A Deal Points**, we cut through the noise to highlight the key departures by *Fairstone* and *Cineplex* from Delaware caselaw on material adverse effect (MAE) clauses and "ordinary course of business" covenants. While on the surface *Fairstone* and *Cineplex* may appear to align with Delaware on most key points, a deeper dive reveals several important differences that should be front of mind both in negotiating an M&A agreement and should any potential interim period, closing or post-closing dispute arise.

The key takeaway for Canadian and cross-border M&A? *Fairstone* and *Cineplex* generally signal where they follow Delaware, but are silent where they do not. Regarding MAE clauses, this includes *Fairstone* continuing to require that the risk giving rise to an MAE be of an "unknown" nature while Delaware has decisively reversed course on the point. Regarding "ordinary course of business" covenants, this includes *Fairstone* holding that a "consent not to be unreasonably withheld" qualifier can result in deemed buyer consent even where the seller hasn't consulted the buyer.

Directors' Duties in M&A

Nominee Directors in Canadian M&A: Warning Signs from Delaware

Nominee directors are a central feature of the private equity, venture capital and hedge fund landscapes: where an investor acquires a significant interest in a company, it typically seeks representation on the company's board. And there is nothing inherently wrong with this, as courts in Canada and elsewhere have confirmed.

However, nominee directorships also carry the potential for conflicts of interest, including amid M&A. Specifically, the risk of the loyalty of the nominee director being divided (or appearing to be divided) between, on the one hand, the company on whose board the director serves and, on the other hand, the nominating shareholder.

A recent series of Delaware decisions arising in the M&A context highlights this tension, and provides a reminder of the duties and potential liabilities of nominee directors. They also provide an opportunity for practical guidance regarding how to mitigate risks arising for nominee directors during M&A transactions. Finally, they highlight that Canada is not Delaware and that US investors should appreciate the different playing field regarding fiduciary duties north of the border.

What is the chief takeaway? Courts may be increasingly inclined to apply heightened scrutiny to nominee directors, to their broader relationship with their nominating shareholder, and/or to the business models (and routine tactics) of their nominating shareholders, including in the M&A context.

ESG and Fiduciary Duties in M&A

What role have environmental, social, and corporate governance (ESG) considerations been playing in M&A negotiations and director decision-making?

Recent years have seen much debate regarding the interaction of ESG and directors' fiduciary duties generally. Also well-explored are such ESG issues in M&A as ESG due diligence, ESG in target valuation, and post-closing ESG integration. Comparatively less analysis has occurred regarding the *more specific question* of the interaction of ESG-considerations and directors' fiduciary duties in the M&A context.

This being the case, writing in **The M&A Lawyer** we took a deeper dive into this issue, including by revisiting two large Canada/U.S. cross-border M&A deals from recent years. Our findings include that:

- The rise to prominence of ESG flags a potentially complex issue for corporate fiduciaries going forward: whether, and to what extent, ESG issues should be taken into account in deciding what constitutes a "superior proposal" for the purpose of a target's "fiduciary out."
- The foregoing "fiduciary out" and "superior proposal" analysis might vary depending on the particular law governing the transaction (i.e., Delaware or Canadian law).

There remain no definitive answers to the foregoing questions. However, we raise them because we foresee the general issue becoming increasingly relevant as the rise to prominence of ESG continues. Stated differently, we would not be surprised to see greater regularity in the need for directors and their counsel to consider the interplay between ESG-considerations and fiduciary duties in the M&A context, including for nuances of the applicable governing law and/or the particular political or regulatory context.

Delaware's Corporate Opportunity Waiver Comes to Canada: Risk Mitigation Opportunities for Private Equity Buyers

Its not unusual for Canadian courts to look to Delaware caselaw for guidance, particularly in M&A disputes. Its less common for Canadian legislators to take a page out of Delaware's statutory playbook. But this was recently done by Alberta when it adopted, *near verbatim*, Delaware's corporate opportunity waiver into the province's Business Corporations Act (ABCA).

Writing in **The M&A Lawyer**, we explore the practical implications of this noteworthy corporate governance development for investors in Canada, including private equity (PE). Numerous points warrant highlighting. First, Alberta's adoption of Delaware's corporate opportunity waiver represents an additional and incrementally "private equity friendly" aspect of the ABCA. Second, the risk mitigation opportunities offered by Alberta's corporate opportunity waiver (as well as the other "private equity friendly" aspects of the ABCA) to investors in *Canada* need not necessarily be limited to investment in *Alberta* (i.e., they're also available in connection with portfolio companies operating elsewhere in the country). Third, even though Alberta's corporate opportunity waiver is essentially identical to Delaware's as written, we caution against expecting it to be interpreted and applied in lockstep with its Delaware forebear.

Overall, as relates to corporate governance and risk mitigation opportunities for PE buyers regarding portfolio companies, Canada has taken a significant step closer to Delaware.

Deal Point Studies – What's Market?

ESG in Public M&A: What's Market?

What happens when ESG and Public M&A meet? Or, put differently, how has the recent rise to prominence of ESG in Canada *generally* manifest in the *specific context* of public M&A?

To address this question, we reviewed the Arrangement Agreements and Information Circulars from 70+ Canadian public M&A transactions since May 2021 for ESG-related considerations and deal terms. We found:

- ESG considerations have been making some interesting inroads into public M&A decision-making, as evidenced in target Information Circulars.
- While an interesting and perhaps to be expected development, this remains the case in only a small minority of circulars, at least at present.
- Consistent with our general expectations, we have not seen any meaningful evolution in market practice regarding the drafting of "fiduciary outs" specific to ESG-type issues.
- However, ESG considerations can (and sometimes do) manifest in public M&A agreements in other, deal-specific ways and customized terms.

In **Part 1** of our two-part series we focused on the first two points. In **Part 2** we focused on the latter two points and concluded our commentary. Among other things, it remains an open (and interesting) question whether this minority trend will persist as such, or whether a continued focus on ESG in the boardroom will gradually lead to more frequent deliberations around, and a clearer articulation of, ESG considerations in deciding the merits of an M&A transaction.

The Ongoing Evolution of Canada's PIPE Market

2023 marked the release of Fasken's fourth **Annual PIPE (Private Investment in Public Equity) Deal Point Study**. This being the case, we took a step back to aggregate the insight we've gained.

Each of our annual PIPE studies provides insight into Canadian PIPE activity in that year and allows for comparison with previous years. The benefit of producing a Canadian PIPE deal point study *each year* for *multiple consecutive years* is the ability to *track broader trends and market developments over longer periods of time*. In other words, it gives insight into the *continuing evolution and greater sophistication* of Canada's PIPE market for the benefit of both investors and issuers.

Numerous notable observations emerged, including: (1) confirmation that PIPEs can be of interest to even Canada's *larger* public issuers; (2) which deal points can be more *volatile* over time; (3) which deal points may be more *stable* over time; (4) which deal points are exhibiting *distinct trends*; (5) which deal points are exhibiting *evolution* and increasingly *creative structuring*; (6) detectable shifts in investor *preference* and/or *strategy*; and (7) snapshots of PIPE market practice in *different economic climates*.

What's Market? Latest ABA Canadian Public Target M&A Deal Points Study

The latest edition of the American Bar Association's (ABA) Canadian Public Target M&A Deal Points Study was released in Spring 2023. This was an important and eagerly awaited development, including as the study is a key resource in seeking to answer a dealmaker's most basic question: what's market?

We dove into the study to highlight some of its key findings and to compare certain deal points with US market practice, including regarding: (1) Buyer Characteristics; (2) Representations and Warranties; (3) Closing Conditions; (4) MAE Definition; and (5) Deal Protection.

For example, the are several notable comparisons between Canadian and US practice in terms of Closing Conditions. The Canadian trend appears to moving toward the US style of having a target's representations be accurate at both signing and closing. Regarding Deal Protection, an interesting trend in Canadian public M&A during the study period (2020-2021) is that even though buyers may have been willing to pay substantial premiums, pre-signing exclusivity periods were significantly longer than in the previous (2017) study period.

We also addressed the caution that should be exercised when consulting deal point studies, including appreciation for the characteristics of the deal sample informing the study and the reasonableness of each party's position given the circumstances of the particular transaction.

Key Takeaways from SRS Acquiom's 2023 Private M&A Deal Terms Study

Spring 2023 was a busy period for M&A deal point studies!

Almost contemporaneous with the release of the ABA's Canadian Public M&A Study (**discussed above**) came the release of SRS Acquiom's 2023 Private M&A Study, which analyzed over 2,100 private-target M&A deals closed between 2017 and 2022 (and the vast majority of which involved US buyers).

Regarding financial terms in private M&A, the study's observation included that: (1) transaction values trended lower in 2022, with buyers presumably more interested in lower-middle market targets given uncertain economic conditions and limited financing options; (2) 2022 saw a marked increase in deals with consideration paid structured as a combination of cash and management rollover, presumably to help bridge valuation gaps and/or to avoid having to obtain the additional financing; (3) the regularity of earn-outs trended upward from 2018 onward, once again presumably to help bridge valuation gaps.

Regarding risk allocation in private M&A (i.e., representations, warranties and indemnification), the study reviews all pertinent deal points in detail. What is perhaps most interesting, however, is the impact of the ever-increasing use of RWI policies on these terms. Among other things, we see correlation between the use of RWI and: (1) increased inclusion of "no other representations and warranties" and "no reliance" clauses; (2) decreases in the "survival rate" of representations and warranties; (3) decreased frequency of the inclusion of pro-sandbagging clauses; (4) decreased use of both double and single materiality scrapes; and (5) lower caps on liability as well as indemnity escrow amounts.

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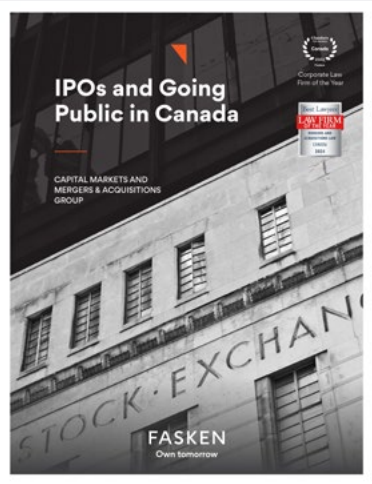
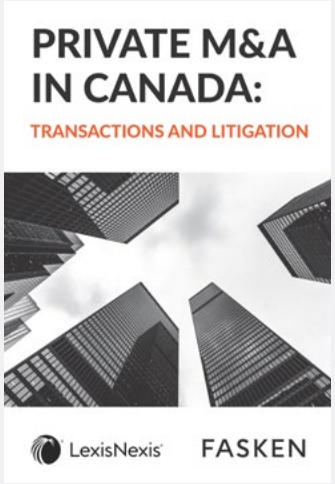
Other Fasken Capital Markets & M&A Guides





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Fasken Awards and Rankings

A clear leader in Canadian M&A

		FASKEN	Stikeman Elliott	Blakes, Cassels & Graydon	Osler, Hoskin & Harcourt	McCarthy Tétreault	Davies Ward Phillips & Vineberg	Torys
Mergermarket	Canadian M&A (by deal count)	**No. 1**	No. 3	No. 5	No. 2	No. 4	No. 6	No. 10
Bloomberg	M&A – Canada Announced (by deal count)	**No. 1**	No. 6	No. 5	No. 2	No. 4	No. 7	No. 12
	M&A – Canada Mid-Market (Up to $250 million, by volume)	**No. 1**	No. 14	No. 6	No. 3	No. 2	No. 4	No. 5
	M&A – Canada Mid-Market (up to US$500 million, by deal count)	**No. 1**	No. 7	No. 5	No. 2	No. 4	No. 6	No. 12
	M&A – Canada Mid-Market (up to US$250 million, by deal count)	**No. 1**	No. 6	No. 5	No. 2	No. 4	No. 6	No. 13
REFINITIV	Canadian Involvement Announced (based on number of deals)	**No. 1**	No.4	No. 6	No. 2	No. 5	No. 7	No. 16
	Canadian Involvement Completed (based on number of deals)	**No. 1**	No. 4	No.6	No. 2	No. 5	No. 7	No. 10
	Canadian Involvement Mid-Market	**No. 1**	No. 5	No. 6	No. 3	No. 4	No. 7	No. 17
	Canadian Involvement Small-Cap	**No. 1**	No. 4	No. 6	No. 2	No. 5	No. 7	No. 20

* Mergermarket (Q3 2023), Bloomberg (Q3 2023), Refinitiv M&A (Q3 2023), Refinitiv Mid-Market/Small-Cap (Q3 2023)

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Client Testimonials

"They are a great team to work with, offer great client service, and are very responsive and efficient. Fasken goes above and beyond. They always impress."

- Client Quote, Chambers Global

"Of the many other firms that I have encountered... I have not seen their equal in Canada."

- Client Quote, Chambers Global

"The Fasken team are very complementary, and their expertise in their respective fields is second to none."

- Client Quote, Chambers Global

"Excellent service, very timely responses, and a wide array of experience in several different types of industries. I am comfortable entrusting matters in their hands. They get the job done and are good at it."

- Client Quote, The Legal 500

"My firm engaged Fasken to assist us in connection with our private equity client's acquisition. Our client and the entire deal team were very impressed with the work of the Fasken team. I frequently work with, and across from, top firms as part of my private equity practice and the Fasken team was more responsive, more technically proficient and much easier to deal with."

- International Law Firm that engaged Fasken for cross-border deals

"Our company was undergoing a cross-border transaction, which was quite complex and required in-depth business considerations, regulatory advice, and Federal Commission interaction. The depth of knowledge and experience the Fasken attorneys brought to the table was astounding."

- International Law Firm that engaged Fasken for cross-border deals

"The entire Fasken team is not only knowledgeable of all the relevant laws, but they are true partners and help management think through critical business matters in a practical way, allowing management to make sound business decisions. Compared to others, I think Fasken went above and beyond, I was very impressed."

- Client Quote, Chambers Global

Corporate Law Firm
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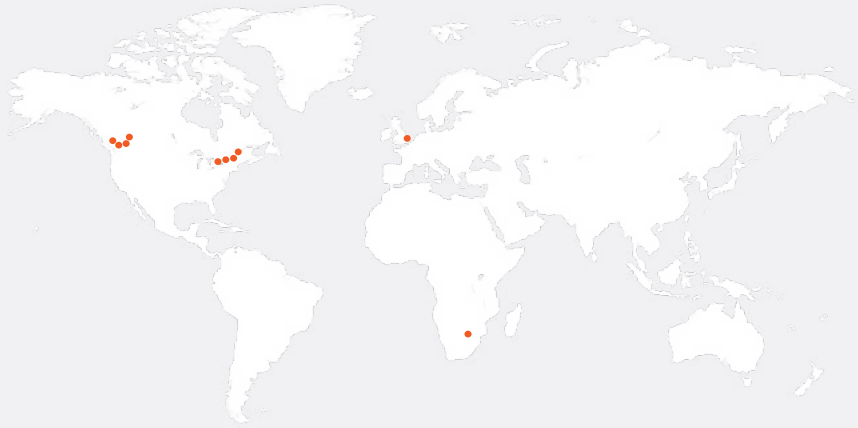
Fasken is a leading international law firm with more than 950 lawyers and 10 offices on three continents. Clients rely on us for practical and innovative legal services.

We provide results-driven strategies to solve the most complex business and litigation challenges.



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