



# Brandon Kain

## Partner

Toronto

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t. +1 416-601-7821

## Bar Admission

Ontario 2004

## Law School

University of Toronto

## Practices

Disputes  
Appellate Litigation  
Class Actions  
Corporate Commercial Litigation  
Products Liability  
Public Law  
Securities Litigation

Brandon Kain is a partner in our Litigation Group in Toronto. His practice focuses on appellate litigation, administrative law, broadcasting and telecommunications, commercial disputes, class actions and product liability. He has acted for a wide variety of clients in major litigation – including individuals, large and small corporations, industry associations and public interest groups – and has appeared before the Supreme Court of Canada and the Federal, Alberta, British Columbia, Manitoba, Ontario and Saskatchewan courts.

## APPELLATE LITIGATION

Brandon is the co-founder of our National Appellate Litigation Group. He has acted in 20 appeals in the Supreme Court of Canada, including as lead counsel for the appellant, along with numerous appeals in the Federal and provincial appellate courts. His appeals have involved a diverse range of issues, encompassing aboriginal, administrative, broadcasting, civil procedure, class actions, constitutional, contract, criminal, environmental, insolvency, labour and employment, private international, product liability, restitution, tax, telecommunications and tort law. Eight of his appeals are included in *Lexpert Magazine's* annual list of the *Top 10 Business Decisions* in Canada, with three ranked #1, and two others have been named a "National Impact Case of the Year" by *Benchmark Litigation Canada*.

## ADMINISTRATIVE LAW

Brandon frequently acts in judicial reviews and administrative appeals. He successfully delivered the oral argument for the appellants, Bell Canada and the National Football League, on the standard of review in the Supreme Court of Canada's 2019 administrative law trilogy, which established that questions of law are reviewed for correctness when subject to statutory appeal rights, and sets out Canada's governing framework for judicial review: *Bell Canada v. Canada (A.G.)*, 2019 SCC 66. Brandon has also acted in several other leading administrative law cases, including *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40; *Green v. Law Society of Manitoba*, 2017 SCC 20; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34; and *Air Canada v. Toronto Port Authority*, 2011 FCA 347. He was recently successful in defeating a judicial review application seeking to cancel several of Syngenta Canada's federal pest control product registrations: *David Suzuki Foundation v. Canada (A.G.)*, 2019 FC 411.

## BROADCASTING AND TELECOMMUNICATIONS

Brandon has significant experience in litigation involving the broadcasting and telecommunications industries, having acted in five appeals from the CRTC to the Federal Court of Appeal, along with the judicial review of a Cabinet decision in the Federal Court. He successfully represented Bell Canada and the National Football League in challenging the CRTC's order prohibiting the simultaneous substitution

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of Canadian and American television commercials for the Super Bowl before the Supreme Court of Canada: *Bell Canada v. Canada (A.G.)*, 2019 SCC 66. Brandon also successfully represented Bell Canada in challenging the validity of the CRTC's Wholesale Code under the *Broadcasting Act* before the Federal Court of Appeal: *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174. As well, he successfully obtained a permanent injunction prohibiting the unauthorized retransmission of conventional television services over the Internet in violation of the *Copyright Act*: *2251723 Ontario Inc. v. Bell Canada*, 2016 ONSC 7273.

## COMMERCIAL DISPUTES

Brandon has acted in several major commercial disputes. He has particular experience with the contractual principle of good faith, having recently acted as lead counsel to the appellant in *C.M. Callow Inc. v. Zollinger* (heard December 6, 2019), the first case in which the Supreme Court of Canada will substantively consider the principle in the commercial setting after introducing it in *Bhasin v. Hrynew*, 2014 SCC 71, where Brandon successfully represented the appellant. As well, he recently acted as counsel to the intervener, the Canadian Association of Counsel to Employers, in *Matthews v. Ocean Nutrition Canada Limited* (heard October 8, 2019), the first post-*Bhasin* case in which the Supreme Court of Canada has been asked to substantively consider the principle of good faith in the employment setting.

Brandon also successfully represented the respondent in the leading Canadian case on the tort of fraud, *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, and represented the appellant in the landmark summary judgment case of *Hryniak v. Mauldin*, 2014 SCC 7. In addition, he represented the intervener, the Insolvency Institute of Canada, in *Chandos Construction Ltd. v. Deloitte Restructuring Inc.* (heard January 20, 2020), where the Supreme Court of Canada will consider the anti-deprivation rule in insolvency proceedings and the rule against contractual penalties.

## CLASS ACTIONS

Brandon regularly represents clients in class actions. He appeared before the Supreme Court of Canada on behalf of the IMAX appellants in the securities class action trilogy (*Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60), and on behalf of the Microsoft respondents in the competition class action trilogy (*Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57). He also acted as lead counsel for the intervener, the Canadian Chamber of Commerce, in *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, where the Supreme Court of Canada upheld the enforceability of arbitration clauses in agreements with business customers in the class action setting. In addition, he recently acted as lead counsel for the intervener, the Canadian Gaming Association, in *Atlantic Lottery Corporation Inc. v. Babstock* (heard December 3, 2019), where the Supreme Court of

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Canada will consider the viability of waiver of tort and other forms of class disgorgement relief. Brandon previously served on the executive committee of the Class Actions Section of the Ontario Bar Association.

His class actions often involve cross-border issues. He successfully acted as lead counsel before the Ontario Court of Appeal in dismissing part of a proposed \$400 million negligence class action alleging pure economic loss from a foreign import ban involving genetically modified corn: *Darmar Farms Inc. v. Syngenta Canada*, 2019 ONCA 789. He also defeated a proposed \$7 billion (USD) secondary market securities class action in the Ontario Court of Appeal based on lack of territorial jurisdiction over the foreign securities issuer: *Yip v. HSBC Holdings plc*, 2018 ONCA 626.

## PRODUCT LIABILITY

Brandon has achieved particular success in product liability cases. He defeated certification in the first prescription pharmaceutical class actions where certification was refused in British Columbia and Ontario: *Charlton v. Abbott Laboratories, Ltd.*, 2015 BCCA 26; *Martin v. AstraZeneca Pharmaceuticals PLC*, 2012 ONSC 2744, aff'd 2013 ONSC 1169 (Div. Ct.). As well, he successfully represented the defendants in the first pharmaceutical class action to be defeated on summary judgment in Canada: *Wise v. Abbott Laboratories, Ltd.*, 2016 ONSC 7275.

## ACADEMIC AND PROFESSIONAL INVOLVEMENT

Brandon is an active member of Canada's legal academic and professional communities. He has taught Advanced Contracts at the University of Western Ontario Faculty of Law since 2012, and Economic Torts at the University of Toronto Faculty of Law since 2015. Brandon has also published 20 articles in the *Advocates' Quarterly*, *Alberta Law Review*, *Annual Review of Civil Litigation*, *Banking and Finance Law Review*, *Canadian Bar Review*, *Canadian Business Law Journal*, *Commercial Litigation*, *Corporation Litigation*, *Collective Redress in Europe – Why and How?* and *Supreme Court Law Review*, many of which have been cited by the Supreme Court of Canada and other Canadian courts. He is a frequent speaker on legal issues, having presented for the *Advocates' Society*, the *Canadian Bar Association*, the *Canadian Centre for Ethics & Corporate Policy*, *Canadian Defence Lawyers*, the *Canadian Energy Law Foundation*, the *Canadian Institute*, the *Commons Institute*, the *Law Society of Upper Canada*, the *Ontario Bar Association*, *Osgoode Professional Development*, the *Prospectors and Developers Association of Canada*, the *Runnymede Society*, the *Toronto Lawyers' Association* and the *University of Toronto Faculty of Law*.

## EDUCATION

Brandon obtained his LL.B. (Honours) from the University of Toronto in

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2003, where he received the Fasken Martineau DuMoulin LLP Award for Academic Excellence in first year, and graduated with Honours Standing. He also obtained his MA in philosophy from the University of Toronto in 1999 and his BA (First Class Honours) in philosophy from Queen's University in 1998.

## REPRESENTATIVE CASES

- [Bank of Montreal v. Li](#), 2020 FCA 22 (CanLII)
- [Bell Canada v. Canada \(A.G.\)](#), 2019 SCC 66 (CanLII); [Bell Canada v. Canada \(A.G.\)](#), 2017 FCA 249 (CanLII); [Bell Canada v. Canada \(A.G.\)](#), 2016 FCA 217 (CanLII)
- [O'Reilly v. IMAX Corporation](#), 2019 ONCA 991 (CanLII)
- [Darmar Farms Inc. v. Syngenta Canada Inc.](#), 2019 ONCA 789 (CanLII); [Darmar Farms Inc. v. Syngenta Canada Inc.](#), 2018 ONSC 7129 (CanLII)
- [Fleming v. Ontario](#), 2019 SCC 45 (CanLII)
- [David Suzuki Foundation v. Canada \(A.G.\)](#), 2019 FC 411 (CanLII); [David Suzuki Foundation v. Canada \(Health\)](#), 2018 FC 380 (CanLII); [David Suzuki Foundation v. Canada \(Health\)](#), 2017 FC 682 (CanLII)
- [TELUS Communications Inc. v. Wellman](#), 2019 SCC 19 (CanLII)
- [Elson v. Canada](#), 2019 FCA 27 (CanLII); [Elson v. Canada \(A.G.\)](#), 2017 FC 459 (CanLII)
- [Tluchak Estate v. Bayer](#), 2018 SKQB 311 (CanLII)
- [Mikisew Cree First Nation v. Canada \(Governor General in Council\)](#), 2018 SCC 40 (CanLII)
- [Bell Canada v. 7265921 Canada Ltd.](#), 2018 FCA 174 (CanLII)
- [Price v. H. Lundbeck A/S](#), 2018 ONSC 4333 (CanLII)
- [Yip v. HSBC Holdings plc](#), 2018 ONCA 626 (CanLII); [Yip v. HSBC Holdings plc](#), 2017 ONSC 5332 (CanLII)
- [Houle v. St. Jude Medical Inc.](#), 2018 ONCA 88 (CanLII)
- [Ktunaxa Nation v. British Columbia \(Forests, Lands and Natural Resource Operations\)](#), 2017 SCC 54 (CanLII)
- [Spicer v. Abbott Laboratories, Ltd.](#), 2017 SKQB 271 (CanLII)
- [Re Lajeunesse](#), 2017 SCC 24 (CanLII)

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- [Green v. Law Society of Manitoba](#), 2017 SCC 20 (CanLII)
- [R. v. Peers](#), 2017 SCC 13 (CanLII); [R. v. Aitkens](#), 2017 SCC 14 (CanLII)
- [Wise v. Abbott Laboratories, Ltd.](#), 2016 ONSC 7275 (CanLII)
- [2251723 Ontario Inc. v. Bell Canada](#), 2016 ONSC 7273 (CanLII)
- [Bell Mobility Inc. v. Klass](#), 2016 FCA 185 (CanLII)
- [Toyota Tsusho Wheatland Inc. v. Encana Corp.](#), 2016 ABQB 209 (CanLII)
- [Canadian Imperial Bank of Commerce v. Green](#), 2015 SCC 60 (CanLII)
- [Airia Brands v Air Canada](#), 2015 ONSC 5332 (CanLII); [Airia Brands v Air Canada](#), 2015 ONSC 5352 (CanLII)
- [Guindon v. Canada](#), 2015 SCC 41 (CanLII)
- [Prince Edward County Field Naturalists v. Ostrander Point GP Inc.](#), 2015 ONCA 269 (CanLII)
- [Saskatchewan Federation of Labour v. Saskatchewan](#), 2015 SCC 4 (CanLII)
- [Charlton v. Abbott Laboratories, Ltd.](#), 2015 BCCA 26 (CanLII); [Charlton v. Abbott Laboratories, Ltd.](#), 2013 BCSC 1712 (CanLII)
- [Bhasin v. Hrynew](#), 2014 SCC 71 (CanLII)
- [Hryniak v. Mauldin](#), 2014 SCC 7 (CanLII); [Bruno Appliance and Furniture, Inc. v. Hryniak](#), 2014 SCC 8 (CanLII)
- [Pro-Sys Consultants Ltd. v. Microsoft Corporation](#), 2013 SCC 57 (CanLII)
- [Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.](#), 2013 SCC 34 (CanLII)
- [BCE Inc. v. TELUS Communications Company](#), 2013 FCA 58 (CanLII)
- [Ontario First Nations \(2008\) Limited Partnership v. Aboriginal Affairs \(Ontario\)](#), 2013 ONSC 7141 (CanLII); [Ontario First Nations \(2008\) Limited Partnership v. Ontario](#), 2013 ONSC 814 (CanLII)
- [Martin v. AstraZeneca Pharmaceuticals PLC](#), 2013 ONSC 1169 (Div. Ct.) (CanLII); [Martin v. AstraZeneca Pharmaceuticals PLC](#), 2012 ONSC 2744 (CanLII);
- [Bell Canada v. Canada \(A.G.\)](#), 2011 FC 1120 (CanLII)
- [Air Canada v. Toronto Port Authority](#), 2011 FCA 347 (CanLII); [Air Canada v. Toronto Port Authority](#)

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, 2010 FC 774 (CanLII)

- [Chrysler Canada Inc. v. Canada](#), 2008 FC 1049 (CanLII)

## PUBLICATIONS

- [“A Wise Development? The Growing Trend Towards Summary Judgment in Class Actions”](#) (2017) 47 Adv. Q. 164 (with Neil Finkelstein and Byron Shaw) (Reproduced by permission of Thomson Reuters Canada Limited)
- [“Developments in Class Actions Law: The 2014-2015 Term – Securities Litigation Comes of Age at the Supreme Court of Canada”](#) (2017) 77 S.C.L.R. (2d) 1 (with Dana M. Peebles and Paul Davis) (Reproduced by permission of LexisNexis Canada Inc.)
- [“Economic Duress After \*Bhasin v. Hrynew\*: Does the Organizing Principle of Good Faith Offer a New Framework?”](#) in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation, 2016* (Toronto: Thomson Carswell, 2016) 43 (with Justin Nasser) (Reproduced by permission of Thomson Reuters Canada Limited)
- [“A Lawyer’s Judge: Justice Marshall Rothstein and the Rule of Law”](#) (2016) 74 S.C.L.R. (2d) 51 (with Neil Finkelstein, Richard J. Lizius and Adam Goldenberg) (Reproduced by permission of LexisNexis Canada Inc.; first published in *Supreme Court Law Review, Second Series*, Vol. 74)
- [“Honour Among Businesspeople: The Duty of Good Faith and Contracts in the Energy Sector”](#) (2015) 53 Alta. L. Rev. 349 (with Neil Finkelstein, Craig Spurn, Séan O’Neill and Justin Nasser) (Reproduced by permission of Alberta Law Review)
- [“Summary Judgment Prior to Certification in Class Actions: How Microsoft and Hryniak Have Changed the Landscape”](#) (2015) 44 Adv. Q. 229 (with Neil Finkelstein, Eric S. Block and Byron Shaw) (Reproduced by permission of Canada Law Book, a division of Thomson Reuters Canada Limited)
- [“Cross-border Actions for Collective Redress – Some Lessons from Canada”](#), in Eva Lein *et al*, eds., *Collective Redress in Europe – Why and How?* (London: British Institute of International and Comparative Law, 2015) 203 (with John P. Brown) (Reproduced by permission of the British Institute of International and Comparative Law)
- [“Developments in Class Actions Law: The 2013-2014 Term – The Supreme Court of Canada and the Still-Curious Requirement of ‘Some Basis in Fact’”](#) (2015) 68 S.C.L.R. (2d) 77 (Reproduced by permission of LexisNexis Canada Inc.)
- [“Developments in Communications Law: The 2012-2013 Term – The Broadcasting Reference, the Supreme Court and the Limits of the CRTC](#)



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" (2014) 64 S.C.L.R. (2d) 63 (Reproduced by permission of LexisNexis Canada Inc.)

- ["Through the Looking Glass: Recent Developments in Piercing the Corporate Veil"](#) (2013) 28 B.F.L.R. 525 (with Thomas G. Heintzman, Q.C.) (Reproduced by permission of Carswell, a division of Thomson Reuters Canada Limited)
- ["Developments in Private International Law: The 2011-2012 Term – The Unfinished Project of the \*Van Breda Trilogy\*"](#) (2012) 59 S.C.L.R. (2d) 277 (with Elder C. Marques and Byron Shaw) (Reproduced by permission of LexisNexis Canada Inc.)
- ["Mapping the Serbonian Bog: The Territorial Limits of Secondary Market Securities Act Claims Under the Canadian Constitution — Part II"](#) (2012) 53 Can. Bus. L.J. 233 (with Byron Shaw) (Reproduced by permission of Canadian Business Law Journal Inc., and Canada Law Book, a division of Thomson Reuters Canada Limited)
- ["Mapping the Serbonian Bog: The Territorial Limits of Secondary Market Securities Act Claims Under the Canadian Constitution— Part I"](#) (2012) 53 Can. Bus. L.J. 63 (with Byron Shaw) (Reproduced by permission of Canadian Business Law Journal Inc., and Canada Law Book, a division of Thomson Reuters Canada Limited)
- ["Solicitor-Client Privilege and the Conflict of Laws"](#) (2012) 90 Can. Bar. Rev. 245 (Reproduced by permission of the Canadian Bar Review)
- ["The Implication of Contractual Terms in the New Millennium"](#) (2011) 51 Can. Bus. L.J. 170 (Reproduced by permission of Canadian Business Law Journal Inc., and Canada Law Book, a division of Thomson Reuters Canada Limited)
- ["The "Unlawful Means" Element of the Economic Torts: Does a Coherent Approach Lie Beyond Reach?"](#), in Hon. Todd L. Archibald and Hon. Randall Scott Echlin, eds., *Annual Review of Civil Litigation*, 2010 (Toronto: Thomson Carswell, 2010) 33 (with Anthony Alexander) (Reproduced by permission of Carswell, a division of Thomson Reuters Canada Limited)
- ["The Doctrine of Public Policy in Canadian Contract Law"](#), in Hon. Todd L. Archibald and Hon. Randall Scott Echlin, eds., *Annual Review of Civil Litigation*, 2007 (Toronto: Thomson Carswell, 2007) 1 (with Douglas T. Yoshida) (Reproduced by permission of Carswell, a division of Thomson Reuters Canada Limited)
- ["Recent Watershed Developments in Oppression Remedies and Shareholder Activism"](#), in Hon. Todd L. Archibald and Hon. Randall Scott Echlin, eds., *Annual Review of Civil Litigation*, 2006 (Toronto: Thomson Carswell, 2006) 33 (with Mendy Chernos and Michael D. Briggs) (Reproduced by permission of Carswell, a division of Thomson Reuters

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Canada Limited)

## SPEAKING ENGAGEMENTS

- Panelist, The Runnymede Society, 2020 Law and Freedom Conference, “Administrative Law: *Vavilov* and the Supreme Court” (February 29, 2020)
- Panelist, The Advocates’ Society, “*Bell and Vavilov*: The SCC’s impact on standard of review, administrative law and arbitration decisions” (February 14, 2020)
- Co-Chair, The Canadian Institute, 19th Annual Conference on Advanced Administrative Law & Practice (October 29-30, 2019)
- Panelist, The Canadian Institute, 19th Annual Conference on Advanced Administrative Law & Practice, “Contractual Disputes and Judicial Review” (October 29-30, 2019)
- Moderator, Toronto Lawyers’ Association, “Contractual Interpretation: Five Years after *Sattva*” (April 9, 2019)
- Panelist, Ontario Bar Association, Essential Update on Procedural Fairness: 20 Years Post-*Baker*, “Where Do We Stand on Procedural Fairness” (February 5, 2019)
- Speaker, Canadian Bar Association, “The Art of Persuasive Writing”, CBA Skilled Lawyers Series 2019 (January 29, 2019)
- Speaker, Canadian Bar Association, “The Art of Persuasive Writing”, CBA Skilled Lawyers Series 2017 (April 6, 2017)
- Speaker, Canadian Defence Lawyers, Defending Products Claims, “Causation” (February 22, 2017)
- Speaker, Canadian Energy Law Foundation, Jasper Research Seminar, “Honour Among Businesspeople: The Duty of Good Faith and Contracts in the Energy Sector” (June 18, 2015)
- Panelist, PDAC International Convention 2015, Legal Challenges Facing the Mining Industry Today, “Review of Important New Decisions Affecting Contracts, Arbitration and Dispute Resolution in the Mining Industry” (March 2, 2015)
- Speaker, The Commons Institute, 240 Minutes on Cross-Border Litigation Strategies, “Cross-Border Insolvency Procedures” (February 19, 2015)
- Panelist, Canadian Centre for Ethics & Corporate Policy, “*Bhasin v. Hrynew*: SCC Establishes General Duty of Good Faith in Commercial Contracts” (February 3, 2015)
- Panelist, Osgoode Professional Development, “*Bhasin v. Hrynew*: The



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New Duty to Act Honestly” (January 19, 2015)

- Panelist, Law Society of Upper Canada, 17<sup>th</sup> Biennial National Conference, New Developments in Communications Law and Policy, “The Value for Signal Case and its Implications” (May 1, 2014)
- Chair, Canadian Defence Lawyers, “Torts: Unlawful Interference with Economic Claims” (April 23, 2014)
- Speaker, The Commons Institute, Supreme Court & Constitutional Litigation, “Obtaining Leave to Appeal to the Supreme Court of Canada in Commercial Cases” (June 27, 2013)
- Panelist, The Canadian Institute, Western Forum on Employment Law, “What You Need to Know to Effectively Use Drug and Alcohol Testing Lawfully” (May 7, 2013)
- Panelist, Osgoode Professional Development, National Forum on Administrative Law and Practice, “Judicial Review of Commercial Decisions” (October 24, 2012)
- Panelist, University of Toronto, Faculty of Law, 41<sup>st</sup> Annual Workshop on Commercial and Consumer Law, “When Should Courts Fill Gaps in Commercial Contracts? Reactions to Lord Hoffmann’s Judgment in *Belize Telecom Ltd.*” (October 14, 2011)

## Awards & Rankings

### Benchmark Litigation Canada - 2019

Future Star

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## Recent Experience

- **NFL and Bell Canada successful in the Supreme Court of Canada in overturning the CRTC decision regarding substitution of U.S. ads during the SuperBowl**  
December 19, 2019
- **A consortium agrees to acquire up to a 100 per cent interest in Alberta PowerLine for up to C\$1.7B**  
December 18, 2019
- **Contract awarded to Mobilinx for Hurontario LRT to be completed in 2024**  
October 21, 2019
- **Syngenta Canada successfully opposes judicial review application**  
April 05, 2019

## Recent Insights

- **Podcast: Law in the Time of COVID-19**  
March 31, 2020
- **The Debate Over Vavilov's Applicability to Commercial Arbitration Appeals Continues in Alberta**  
February 18, 2020
- **Unintended Consequences? The Vavilov Standard of Review is Applied to Commercial Arbitrations**  
February 13, 2020
- **The Supreme Court of Canada simplifies the standard of review analysis in historic Super Bowl trilogy**  
December 20, 2019

## Events

- **The Supreme Court of Canada's Administrative Law Trilogy: A New Era for Regulated Businesses, Projects and Professionals**  
March 05, 2020