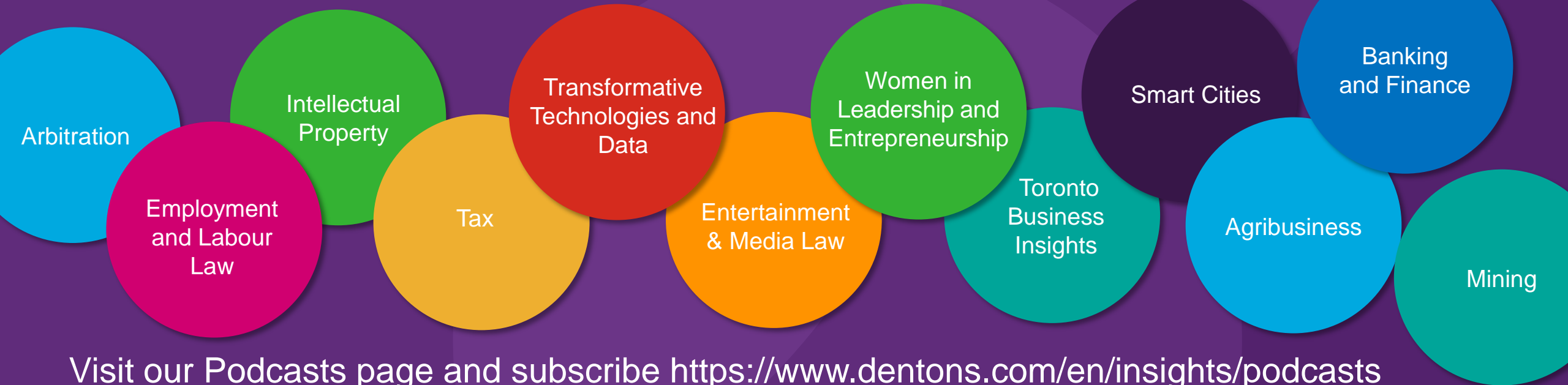


Day 3 – Ontario Employment and Labour Spring Webinar series

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Wrongful Dismissal Case Law update

The latest on Notice Periods and Mitigation during the pandemic

Andy Pushalik, Partner, Toronto

Kyle Isherwood, Associate, Toronto

The COVID-19 bump – timing is everything

- Reasonable notice is assessed at the time the termination decision is made

The COVID-19 bump – what the courts have said

“It seems clear terminations which occurred before the COVID pandemic and its effect on employment opportunities should not attract the same consideration as termination after the beginning of the COVID pandemic and its negative effect on finding comparable employment.”

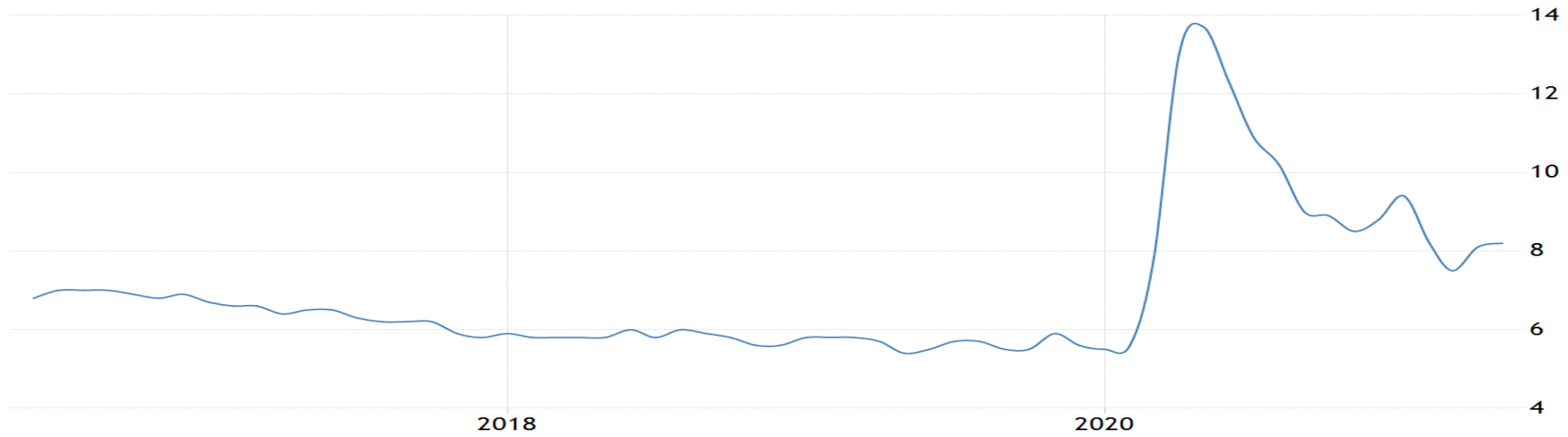
Yee v Hudson’s Bay Company, 2021 ONSC 387 (December 2020)

The COVID-19 bump – what the courts have said

“Reasonable Notice I was asked to make findings about the job market and the possible impact of Covid-19 on Mr. Iriotakis. I have little doubt that the pandemic has had some influence upon Mr. Iriotakis’ job search and would have been reasonably expected to do so at the time his employment was terminated in late March 2020. However, it must also be borne in mind that the impact of the pandemic on the economy in general and on the job market, in particular, was highly speculative and uncertain both as to degree and to duration at the time Mr. Iriotakis’ employment was terminated. The principle of reasonable notice is not a guaranteed bridge to alternative employment in all cases however long it may take even if an assessment of the time reasonably anticipated to be necessary to secure alternative employment is a significant factor in its determination. I must be alert to the dangers of applying hindsight to the measuring of reasonable notice at the time when the decision was made to part ways with the plaintiff.”

Iriotakis v. Peninsula Employment Services Limited, 2021 ONSC 998 (January 2021)

The COVID-19 Bump – What lies ahead?



SOURCE: [TRADINGECONOMICS.COM](https://tradingeconomics.com) | STATISTICS CANADA

Mitigation during COVID-19: CERB may be deductible from damages

- Recent B.C. Decision:
 - CERB benefits deducted from damages
 - Judge noted that if the CERB benefits were not deducted, the employee would be in a better economic condition than he would otherwise be
 - CERB benefits are different than EI benefits:
 - Neither the employer nor the employee contributed to them
 - No evidence that the plaintiff will have to repay the CERB.

Mitigation during COVID-19: COVID does not eliminate employee's duty to mitigate

- *Moore v Instow Enterprises Ltd.*, 2021 BCSC 930
- 53 year old sales person; 26.5 years of service
- Dismissed July 2020
- Employer identified a list of job postings that it argued would have provided reasonably similar employment to employee's previous sales job
 - Employee did not actively pursue any of these jobs
- Judge awarded notice period of 20 months BUT reduced notice period by 3 months due to employee's failure to mitigate his losses

Mitigation during COVID-19: COVID does not eliminate employee's duty to mitigate

“A job search in COVID times must necessarily look different. Physically knocking on doors or invitations to lunch are not reasonable job search expectations during COVID-time. Mr. Moore nonetheless has an obligation to take active steps to search for reasonably similar employment. This could include phone calls, cover letters, emails, use of a headhunting employment search service, or otherwise reaching out and connecting with potential employers. I find that reasonableness in the circumstances required Mr. Moore to cast a net further than the very limited pool of commercial tire sales, and take steps beyond his limited efforts.

A job search is an active prospect, and it can be a difficult and onerous one. It requires more than creating a resume and conducting computer searches. Looking at job postings, absent further action, is not sufficient to fulfill the requirement that a person undertake a reasonable job search. A reasonable job search may include activities such as reaching out to contacts within the industry, writing cover letters setting out why you qualify for a position, following up with telephone calls, or email correspondence.”

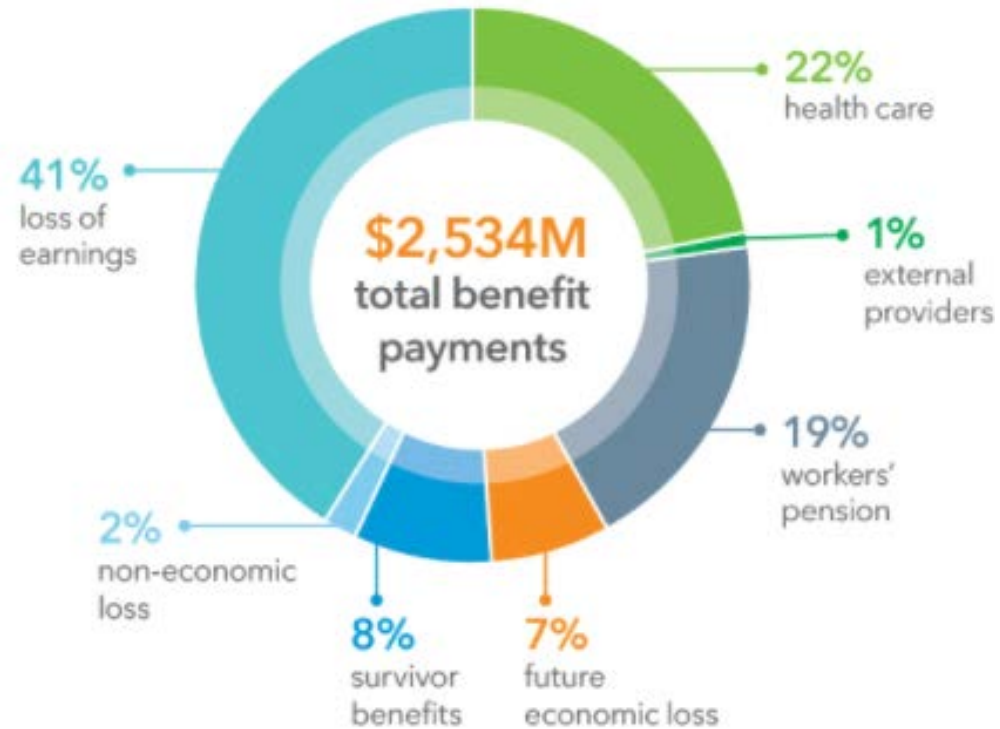
Moore v Instow Enterprises Ltd., 2021 BCSC 930.

Steps to appealing a WSIB decision

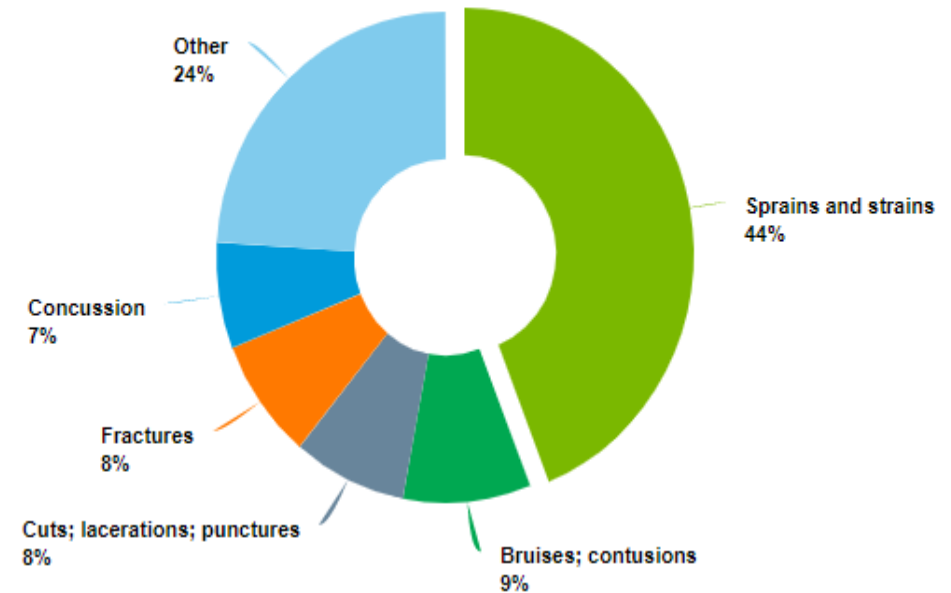
Stefanie Chimienti, Associate, Toronto

WSIB illness and injury Trends – 2019 highlights

Benefit payments



2019 leading nature of injury Schedule 1



Why appeal a WSIB decision?

- Concerns about legitimacy of the worker's claim
- The worker's injury is unrelated to the workplace
- Impact to the employer's projected premium rating

About the WSIB appeals process

Appealing a WSIB decision

- The Appeal Services Division – internal to the WSIB
- The Workplace Safety and Insurance Appeals Tribunal – external to the WSIB

Time limits to object

- A workplace party has 30 days to object to WSIB decisions about:
 - Return to work,
 - Re-employment, and
 - Return-to-work plans made on or after January 1, 1998.
- A workplace party has 6 months to object to any other WSIB decision

Persons involved in an employer's WSIB appeal

- Appeals Resolution Officer (“ARO”)
- Appeals Registrar
- Appeals Coordinator
- The worker
- Witnesses

If you disagree with a WSIB claim decision:

- Step 1: Complete and submit an Intent to Object Form
- Step 2: Await Receipt of the Claim File and Appeal Readiness Form
- Step 3: Once ready to proceed with the appeal, complete and return the Appeal Readiness Form to the WSIB

Types of hearings at the WSIB

- Hearings in writing
- Oral hearings

Appeal decisions

Appeal decisions

- Decisions will generally be written in an anonymized style
- A copy of the decision will be placed in the claim file and mailed to both parties
- Parties will be advised of the relevant time limit for appeals to the Workplace Safety and Appeals Tribunal (the “WSIAT”)

Request for clarification

- If an Appeals Resolution Officer's decision is unclear or incomplete, a party can send a letter requesting that the Appeals Resolution Officer clarify the decision
- A request for clarification must be made in writing directly to the Appeals Resolution Officer

Request for reconsideration

- The WSIB may reconsider any decision made by it and confirm, amend, or revoke the decision
- Time limit to request a reconsideration: two years from the date of the decision
- Reconsiderations in the Appeal Services Division (only available in certain circumstances), completed by:
 - The Appeals Resolution Officer,
 - An Appeals Manager, or
 - The Vice-President

De Novo Decisions

- Where there has been a significant procedural flaw that results in the appeals process being fundamentally unfair, the WSIB will consider the Appeals Resolution Officer's decision voidable
- If an Appeals Resolution Officer's decision is considered voidable, the WSIB will:
 - Remove the original ARO decision from the claim file temporarily and replace it only after a second ARO decision has been made
 - Conduct a “de novo” hearing by a second ARO
 - Take no steps to interfere with the implementation of the original ARO decision, pending the outcome of the de novo process, subject to exceptional circumstances

Inclusion and Diversity

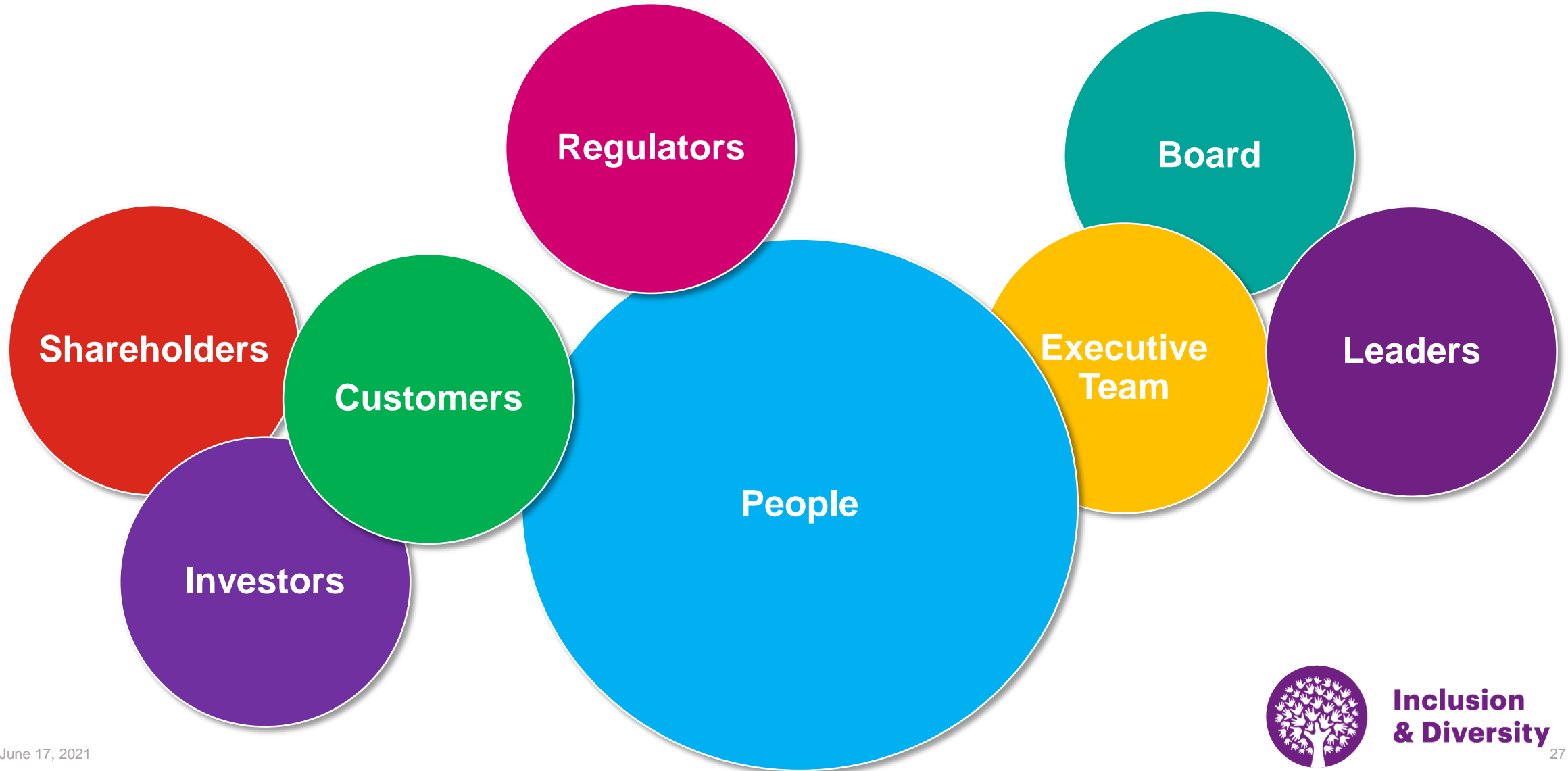
Positioning your organization for success

Kate Broer, Partner, Global Client Development and Women's Clients & Markets, Toronto



**Inclusion
& Diversity**

Key stakeholder groups



Definitions

Representation = How many

Diversity = Combination of characteristics that make each of us unique

Inclusion = “Making diversity count”

Equity v equality = Equity recognizes the different circumstances of each person and then allocates resources and opportunities to yield an equal outcome

Under-represented/equity-seeking group

Allyship



Building an effective strategy

Treat inclusion and diversity like any other business imperative



You need to know where you are to know where you're headed



Thank you



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