



**Law Society**  
of Ontario

**Barreau**  
de l'Ontario

# 13<sup>th</sup> Business Law Summit

## CO-CHAIRS

**Nicole Kapos**

*DLA Piper (Canada) LLP*

**Max Spearn**

*Miller Thomson LLP*

November 9, 2023



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**13<sup>th</sup> Business Law Summit**

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# 13<sup>th</sup> Business Law Summit



CO-CHAIRS: **Nicole Kapos, *DLA Piper (Canada) LLP***

**Max Spearn, *Miller Thomson LLP***

**November 9, 2023**

**9:00 a.m. to 4:00 p.m.**

**Total CPD Hours = 5 h 10 m Substantive + 20 m Professionalism <sup>P</sup>  
+ 30 m EDI Professionalism <sup>E</sup>**

**Law Society of Ontario  
Donald Lamont Learning Centre  
130 Queen St. W.  
Toronto, ON**

**SKU CLE23-01104**

## Agenda

**9:00 a.m. – 9:05 a.m.**

**Welcome**

*Nicole Kapos, DLA Piper (Canada) LLP*

*Max Spearn, Miller Thomson LLP*

- 9:05 a.m. – 9:35 a.m.**      **Transparency Register (ON and QC)**  
Craig McFarlane, *Low Murchinson Radnoff LLP*
- 9:35 a.m. – 10:05 a.m.**      **Employment Law Update**  
Tatha Swann, *Swann Law*
- 10:05 a.m. – 10:35 a.m.**      **Generative AI (ChatGPT) and Related Legal Issues**  
Alan Macek, *DLA Piper (Canada) LLP*
- 10:35 a.m. – 10:45 a.m.**      **Question and Answer Session**
- 10:45 a.m. – 11:05 a.m.**      **Break**
- 11:05 a.m. – 11:35 a.m.**      **Commercial Relations Involving First Nations: What First Nations and Non- First Nations Need to Know (30 m 🕒)**  
Garnet Brooks, *Burchell Wickwire Bryson LLP*
- 11:35 a.m. – 12:00 p.m.**      **Professional Corporations and the Tax Benefits**  
Shayan Rashid, CPA, *SRJ Chartered Professional Accountants*
- 12:00 p.m. – 12:15 p.m.**      **Question and Answer Session**
- 12:15 p.m. – 1:15 p.m.**      **Lunch**
- 1:15 p.m. – 1:45 p.m.**      **Changes to Pension Rules in Insolvency Context**  
Hugh Wright, *Miller Thomson LLP*

**1:45 p.m. – 2:10 p.m.**

**Real Estate Law Update**

Joel Kadish, Barrister & Solicitor

**2:10 p.m. – 2:20 p.m.**

**Question and Answer Session**

**2:20 p.m. – 2:40 p.m.**

**Break**

**2:40 p.m. – 3:05 p.m.**

**Contract Drafting (10 m )**

Angela Swan, *Aird & Berlis LLP*

**3:05 p.m. – 3:50 p.m.**

**Privacy and Cyber Security Issues (10 m )**

Imran Ahmad, *Norton Rose Fulbright Canada LLP*

Jelena Cvetkovic, Director of Business Development, Canada  
Cyber Insurance Channel, *Arete Advisors*

**3:50 p.m. – 4:00 p.m.**

**Question and Answer Session**

**4:00 p.m.**

**Program Ends**



## This program qualifies for the 2025 LAWPRO Risk Management Credit

### What is the LAWPRO Risk Management credit program?

The LAWPRO Risk Management Credit program pays you to participate in certain CPD programs. For every LAWPRO-approved program you take between September 16, 2023 and September 15, 2024, you will be entitled to a \$50 premium reduction on your **2025 insurance premium** (to a maximum of \$100 per lawyer). Completing any Homewood Health Member Assistance Plan e-learning course available at [homeweb.ca/map](http://homeweb.ca/map) also qualifies you for a \$50 credit.

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STEP 1:	STEP 2:
<ul style="list-style-type: none"><li>Attend an approved program in person or online; and/or</li><li>View a past approved program</li><li>Completing a Homewood Health e-course*</li></ul>	Complete the online declaration form in the Risk Management Credit section of <a href="http://my.lawpro.ca">my.lawpro.ca</a> by September 15, 2024. The credit will automatically appear on your 2025 invoice.

You are eligible for the Risk Management Credit if you chair or speak at a qualifying program provided you attend the entire program.

### Where can I access a list of qualifying programs?

See a list of current approved programs at [lawpro.ca/RMcreditlist](http://lawpro.ca/RMcreditlist). Past approved programs are usually indicated as such in the program materials or download page. Free CPD programs offered by LAWPRO can be found at [www.practicepro.ca/cpd](http://www.practicepro.ca/cpd)

### Whom do I contact for more information?

Contact practicePRO by e-mail: [practicepro@lawpro.ca](mailto:practicepro@lawpro.ca) or call 416-598-5899 or 1-800-410-1013.

\*One Homewood Health e-learning course is eligible for the credit on a yearly basis.



# 13<sup>th</sup> Business Law Summit

November 9, 2023

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**TAB 1**

# 13<sup>th</sup> Business Law Summit

Transparency Registers (ON and QC)

**Craig McFarlane**

*Low Murchinson Radnoff LLP*

November 9, 2023



# Transparency Registers (ON and QC)

**Craig McFarlane**  
**Low Murchison Radnoff LLP**

In 2017, Canadian ministers of finance agreed to develop a framework to combat tax evasion, money laundering and terrorist financing. Part of this framework includes transparency registers of Individuals With Significant Control (ISC) of non-public corporations. Since then, all provinces, with the exception of Alberta and the territories, have introduced mandatory transparency registries. Most provinces, including Ontario, have followed a model similar to that introduced by the federal government's amendments to the *Canada Business Corporations Act* (CBCA). Quebec has developed its own framework. The *Ontario Business Corporations Act* (OBCA) transparency register requirements came into force on January 1, 2023. Quebec's *Act mainly to improve the transparency of enterprises* came into force on March 31, 2023. There are significant penalties for non-compliance, including personal liability for directors and officers. The following presents a detailed review of OBCA requirements, a high level overview of Quebec's requirements, and a brief look at Bill C-42, which introduces significant changes to the CBCA transparency regime.

## The OBCA ISC Register

### Non-public OBCA corporations must maintain an ISC register

Non-public OBCA corporations are required to maintain a register of ISCs (OBCA, s. 140(1)). Offering corporations, corporations listed on a designated Canadian or foreign stock exchange, wholly owned subsidiaries of corporations listed on a designated Canadian or foreign stock exchange, and as of yet undefined prescribed classes are exempt from maintaining an ISC register (OBCA, s. 140.2(8)). The OBCA ISC register does not extend to partnerships or trusts.

### Individuals with Significant Control

An ISC (1) has interests or rights in a significant number of shares of the corporation where the individual is the registered holder or beneficial owner of those shares or where the individual has direct or indirect control over those shares, (2) has direct or indirect influence that, if exercised, would result in control in fact of the corporation, or (3) is an individual to whom prescribed circumstances apply (no such circumstances have yet been defined) (OBCA, s. 1.1(2)). As "individual" is defined as a "natural person," it may be necessary to work through trust and other agreements to identify individuals with significant control.

A significant number of shares means any number of shares that carry at least 25% of the voting rights attached to all of the corporation's voting shares or represent at least 25% of the fair market value of the corporation (OBCA, s. 1.1(1)).

“Significant influence” is not defined in the OBCA. Significant influence will most likely be determined in the circumstances to determine if there is control in fact and include factors such as whether the individual has a legally enforceable right or ability to effect change in the board of directors of the corporation, its powers, or to exercise influence over the shareholder or shareholders who have that right or ability (OBCA, s. 1.1(5)). There are exemptions to determining significant influence, such as arm’s length dealing or the influence derives from an agreement, such as a franchise or license (OBCA, s. 1.1(6)). An individual with significant influence need not be a shareholder of the corporation.

Significant control may also exist in situations of joint ownership or control (OBCA, s. 1.1(4)). Two or more individuals may jointly have significant control where (1) an interest or right, or a combination of interests and rights, is jointly held by those individuals, (2) a right, or combination of rights, is subject to an agreement or arrangement under which the right or rights are to be exercised jointly by those individuals, (3) where an interest or right, or combination of interests or rights, is held by individuals each of whom is a “related person,” or (4) any other means of combining interests or rights that may be prescribed (no such combinations have been prescribed). Consequently, trust agreements and shareholder agreements may result in trustees, trust protectors, beneficiaries, and other individuals having direct or indirect control over the corporation.

A “related person” includes (1) a spouse, son or daughter of that person, (2) any relative of that person living in the same home as the person, (3) any body corporate to which the person or any of the aforementioned individuals or the partner or employer of the person, or any combination of these, beneficially own, directly or indirectly, voting securities of the corporation resulting in more than 50% of the voting rights attached to all voting securities of that corporation outstanding at that time (OBCA, s. 1(1)).

### **What the transparency register must contain**

A corporation must prepare and maintain a register containing the following information for each ISC:

- name, date of birth, and last known address;
- the jurisdiction of residence for tax purposes;
- the date an individual became or ceased to be an ISC;
- a description of the significant control over the corporation including, as applicable, a description of the rights and interests in respect of shares in the corporation;
- a description of each step taken to ensure the information in the register is accurate, complete, and up to date;
- any other prescribed information (none has been prescribed as of yet) (OBCA, s. 140.2(1)).

The corporation must take reasonable steps each year to update the register (OBCA, s. 140.2(3)). There is no date set in law for when this must occur, but it must occur each calendar year. When new information reveals that changes to the register are required, the register must be updated within fifteen days (OBCA, s. 140.2(4)).

Shareholders are required to respond to requests for information promptly and to the best of their knowledge (OBCA, s. 140.2(5)). Should a shareholder decline to provide information, the corporation must take “reasonable steps” to identify the individual in accordance with regulations that have yet to be promulgated ((OBCA, s. 140.2(7)). The requirement to respond to requests for information is limited to shareholders. Individuals with direct or indirect control who are not shareholders have no statutory requirement to respond to a request for information.

As the register collects “personal information,” PIPEDA is engaged and corporations must obtain consent from ISCs to collect this information about them. Such consent must be meaningful and the ISC must be informed of the type of personal information being used, that the personal information will be included in the register, and that the information may be disclosed to authorized recipients.

The register must be kept at the corporation’s registered office or at any other place designated by the directors, so long as that place is in Ontario (OBCA, s. 140(1)). At present, the register is not required to be submitted to any government authority.

Information about an ISC in the register must be disposed of within a year after the sixth anniversary of that individual ceasing to have significant control over the corporation. This retention period may be subject to other acts of parliament or court orders (OBCA, s. 140.2(6)).

### **Access to the registry**

The ISC register is not publicly available, submitted to any government agency, and shareholders and creditors do not have a statutory right to access it.<sup>1</sup> However, upon request, a corporation may be required to disclose its ISC register for law enforcement purposes, tax purposes, or regulatory requirements (OBCA, s. 140.3). A corporation must share the register with the Minister upon request (OBCA, s. 140.4). If a corporation is required to share the register with the Canada Revenue Agency, then it is possible that the CRA may share that register with foreign tax authorities in accordance with international tax information exchange agreements. Similarly, law enforcement agencies may share the content of the register with other law enforcement agencies outside Ontario or Canada in accordance with any applicable laws or treaties. Law enforcement agencies are not required to obtain a warrant or court order to access the register.

### **Penalties for non-compliance**

There are severe penalties for non-compliance:

- a corporation, that without reasonable cause, fails to maintain a register is liable to a fine of not more than \$5,000 (OBCA, s. 258.1(1));
- a corporation, that without reasonable cause, fails to disclose the register in response to an authorized request is liable to a fine of not more than \$5,000 (OBCA, s. 258.1(2));

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<sup>1</sup> This is a significant difference from the CBCA, which extends access to the register to shareholders and creditors. Bill C-42, has received royal assent and a coming into force date is pending, will introduce a publicly accessible database of transparency information. See below for more.

- a person who, without reasonable cause, fails to respond to a request by the Minister is liable to a fine of not more than \$5,000 (OBCA, s. 258.1(3));
- every director or officer who knowingly authorizes, permits or acquiesces to the contravention of maintenance of an ISC register, fails to disclose the contents of the register to an authorized person or entity, or fails to disclose the contents of the register to the Minister upon request is liable to a fine of no more than \$200,000, six months imprisonment, or both (OBCA, s. 258.1(4));
- every director or officer who knowingly records or authorizes, permits or acquiesces to the recording of false or misleading information in the register is liable to a fine not more than \$200,000, six months imprisonment, or both (OBCA, s. 258.1(5));
- every director or officer who knowingly provides or authorizes, permits, or acquiesces to provide false or misleading information to any person or entity in relation to the register is liable to a fine of not more than \$200,000, six months imprisonment, or both (OBCA, s. 258.1(6)); and
- every shareholder who knowingly declines to provide ISC information to the corporation is liable to a fine of not more than \$200,000, six months imprisonment, or both (OBCA, s. 258.1(7)).

## **The Quebec ISC Register**

Quebec's *Act respecting the legal publicity of enterprises* came into force on March 31, 2023 and requires many of the same reporting requirements as the OBCA. By March 31, 2024 it is expected that the Quebec ISC database will be searchable by individual name.

Unlike the OBCA ISC register, the Quebec register requires the general partner of the partnership to register. Business trusts and other trusts may be required to register. Private non-profit and reporting issuers are exempt from the register, but there is no exemption for corporations listed on a foreign stock exchange who are not reporting issuers in Canada.

Unlike other provincial registers, the Quebec register applies to any corporation conducting business in Quebec even if that corporation is not organized in Quebec or has a business address in Quebec. This means that, for instance, an Ontario corporation conducting business in Quebec will be required to maintain two separate transparency registers and in some cases it is possible that the same corporation will be required to identify different individuals for different registers because the “individual with significant control” and “ultimate beneficiary” are defined differently with the Quebec legislation making use of the word “hold” rather than “control.”

The “ultimate beneficiary” to is required to register. The “ultimate beneficiary” means: (1) the holder, directly or indirectly, or beneficiary of shares having at least 25% of the voting rights in the entity; (2) the holder, directly or indirectly, or beneficiary of shares having at least 25% of the fair market value of the entity; (3) exercises control in fact; or (4) is the general partner of a limited partnership. These provisions also apply when the shares are held jointly or there is an agreement to exercise the voting rights jointly.

Corporations are required to record:

- name, address (personal or professional), and date of birth;
- the type of control exercised and percentage of shares owned; and
- the date on which the ultimate beneficiary became and ceased to be an ultimate beneficiary;

Corporations must take the “necessary measures to locate them [ultimate beneficiaries] and to ascertain their identities.” This is a higher standard than the “reasonable measures” contemplated by the OBCA. However, shareholders are not required to respond to the requests of the corporation.

Penalties for non-compliance include fines up to \$25,000 in the case of a first infraction and up to \$50,000 in the case of subsequent infractions.

## **Bill C-42**

Bill C-42 has received royal assent and is expected to come into force shortly. Corporations Canada has already begun preparations for proposed changes to the CBCA transparency registry. Assuming a rapid coming into force date, it is expected that by January 22, 2024 CBCA corporations will be required to file ISC information with Corporations Canada. A copy of this filing is also required to be kept in the corporate minute book.

The Bill creates a public registry for all CBCA corporations. The public registry would include the full legal name, dates when the individual became and ceased to be an ISC, a description of the nature of the ISC’s control over the corporation, residential address if there is no address for service, and an address for service. Non-public information includes date of birth, countries of citizenship, country of residence for tax purposes, and residential address (if an address for service is provided). Law enforcement organizations and FINTRAC will access to public and non-public data.



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**TAB 2**

# 13<sup>th</sup> Business Law Summit

Employment Law Update (PowerPoint)

**Tatha Swann**  
*Swann Law*

November 9, 2023



# Employment Law Update

Tatha Swann, SWANN LAW

# Competition Act Criminalizes Wage-Fixing and No-Poach Agreements

# Background Context

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- During the Covid-19 pandemic, 3 of Canada's largest grocery store chains colluding to wage fix
- Loblaws, Metro, and Sobeys announced they would give employees a special "hero pay" raise of \$2 per hour, and then in June 2020 announcing their hero pay program would end – all within 1 day of each other
- This led to media and parliamentary scrutiny that there were anti-competitive agreements between the grocery chains

# S. 45 of the *Competition Act*

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❖ As of June 23, 2023, Section 45(1.1) of the *Competition Act*, criminalizes 2 types of agreements between employers:

(a) Wage-Fixing Agreements

(a) No-Poach Agreements

# 1. No Wage-Fixing Agreements

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- ❖ Prohibited agreements are between unaffiliated businesses to fix, maintain, decrease or control salaries, wages or terms, as well as conditions of employment
  - They are aimed at influencing employees' decision on where to work
    - reducing movement between companies (anti-competitive)
  - E.g., An agreement that all entry level employees at various companies are paid the same wage, same bonus pay of \$2/hour, same benefits plan

# 2. No More No-Poach Agreements

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- ❖ Prohibited agreements are between unaffiliated businesses to not solicit or hire each others' employees
  - They are aimed at influencing employees' decision on where to work, as with wage-fixing agreements (anti-competitive)
  - E.g., Agreement that Company A and B will not solicit each other's employees, or hire them, even if an employee applies without any solicitation
  - Sample provision:

“Company A and Company B agree not to directly or indirectly employ, offer to employ, or otherwise engage any employee, contractor, or agent of the other party during the term of this Agreement and for a period of 18 months thereafter without the prior written consent of the other party.”

# No Poach Agreements - Exceptions

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## ❖ Permitted in **One-Way Agreements**

- Employer A can agree not to hire or solicit Employer B's employees, as long as Employer B can still hire Employer A's employees

## ❖ Permitted in **Subcontracting Agreements**

- Prohibition applies only to Stand-Alone No-Poaching Agreements where there is no other commercial explanation, other than anti-competitive reasons
- E.g., A manufacturing company may subcontract distribution of its products to another company and have a mutual non-solicitation agreement as part of the subcontracting agreement.

# No Poach Agreements - Exceptions

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## ❖ Permitted in **Employee Secondment Agreements**

- Company A is a law firm who lends its lawyers to its clients' businesses for a period of time. As part of the contract, Company B agrees not to hire the seconded lawyer for a period of 1 year following the completion of the secondment.
- This is a one-way agreement and has a commercial context that applies to a single employee.

# No Poach Agreements - Exceptions

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## ❖ Permitted in **Employment Contracts**

- Employers often include non-solicitation provisions in their employment contracts
- These prohibit employees from soliciting/poaching customers, other employees, or vendors after they are terminated or resign
- This is an agreement between a company and employee, not between 2 companies

## ❖ Permitted in **Termination Agreements**

- Employers often include non-solicitation provisions in their termination agreements when they offer a severance package
- A generous severance package may come with strings not to solicit customers, employees, vendors for a specified period of time
- This is an agreement between a company and employee, not between 2 companies

# No Poach Agreements **for Employees**

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## ❖ **No Poach/Non-Solicitation agreements**

- Will be enforced the same way as previously - if reasonable and clearly limited in terms of business activities, scope, and length of time.
- Sample provision:

“You agree that for a period of 12 months following the termination of your employment, regardless of the reason for termination, you will not, directly or indirectly solicit, cause, or induce, or attempt to solicit, cause, or induce, any employee to leave their employment with the Company.”

# No Poach vs. **Non-Competition Agreements**

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## ❖ **Non-competition Agreements**

- Restrict an employee from competing directly with the business, during and after their departure. This includes working for a competitor or starting their own business
- Sample provision:

“You agree that for a period of 12 months following the termination of your employment, regardless of the reason for termination, you will not, directly or indirectly solicit, cause, or induce, or attempt to solicit, cause, or induce, any employee to leave their employment with the Company.”
- Not prohibited under the *Competition Act*.

# No Poach vs. **Non-Competition Agreements**

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- However, amendments to the Ontario *Employment Standards Act, 2000* on October 25, 2021 made them largely illegal.
- They are now only permitted in limited circumstances

# Non-Competition Agreements – Exception 1

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## ❖ **ESA permits non-compete if ALL of the following are true:**

1. There is a **sale or lease of a business or a part of a business** that is operated as a sole proprietorship or a partnership;
2. Immediately following the sale, **the seller becomes an employee of the purchaser;** and
3. As part of the sale, the purchaser and seller enter into an agreement that prohibits the seller from engaging in any business, work, occupation, profession, project or other activity that is in competition with the purchaser's business after the sale.

Explanation: The employee subject to the non-compete just sold their business for a purchase price. If they were to go and compete, they would be unfairly undermining the business they just sold.

# Non-Competition Agreements – Exception 2

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❖ ESA permits non-compete for executives holding the following titles:

- President
- CEO - Chief Executive Officer
- CAO - Chief Administrative Officer
- COO - Chief Operating Officer
- CFO - Chief Financial Officer
- CIO - Chief Information Officer
- CLO - Chief Legal Officer
- CHRO - Chief Human Resources Officer
- CCDO - Chief Corporate Development Officer
- Any other Chief Executive position

# Lingering Work From Home Issues

# Employee Monitoring

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- You are permitted to monitor employees, if they are told and if restricted to what is reasonable and necessary
- Used to mean employers had to justify any monitoring – for example suspected misconduct
- What is reasonable and necessary has expanded – traditional walk-by supervision is not possible when the employee is working remotely
- Regular electronic monitoring and reporting on employee activities can now be justified – not just upon suspicion of misconduct

# Employee Monitoring

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- As of January 1, 2023, employers with 25 or more employees who monitor their employees must circulate their electronic monitoring policy (ESA)
- “Electronic monitoring” includes all forms of monitoring done electronically, regardless of whether on employee/er equipment or while employees are at work or outside the office
- Policy Requirements:
  - Whether the employer monitors employees
  - A description of how and in what circumstances the monitoring is done
  - The purpose for which the information obtained may be used
  - The date the policy was prepared/updated
  - 30 days notice of implementation

# Human Rights Accommodations

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- ❖ Employers must accommodate employees to the point of undue hardship
- ❖ Increasingly difficult for employers to deny accommodation requests to work from home because:
  - Technological improvements make it harder to argue that employee won't be productive
  - It is harder to argue in person work is a *bone fide* occupational requirement if the employee already works from home part time

# Human Rights Accommodations

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- Employers may request medical documentation to support employee's accommodation request
- Factors to consider:
  - How far is the employee's commute and what is the impact on impact on disability & functional restrictions?
  - Does the position require a dedicated workspace free from distraction?
  - How long is the duration of the request to work from home – for a week, a month, several months?
- Employers must more carefully consider bone fide occupational requirements of being the office, and should put these in workplace policies and employment contracts

# Employment Law Update

Tatha Swann, SWANN LAW



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**TAB 3**

# 13<sup>th</sup> Business Law Summit

Generative AI Some Legal Issues (PowerPoint)

**Alan Macek**

*DLA Piper (Canada) LLP*

November 9, 2023



# Generative AI – Some Legal Issues

13<sup>th</sup> Business Law Summit  
November 9, 2023

Alan Macek – DLA Piper (Canada) LLP

# Generative AI – What is It?

- system that generates text, images, video, etc. based on prompts
- guesses the next best word
- does not understand what is being generated – “hallucinations”
- based on a large set of training data
- text to image – generating images based on a description without requiring any photos or drawings as source material
- descriptions – summarizing lengthy documents; creating documents from a prompt/idea; summarizing research into the key ideas
- interactive features – chat bots, customer service/intake

AM ALAN

Provide a favourable review of the speed of the Don Valley Parkway in the style of a tourism office

CHATGPT

Welcome to the Don Valley Parkway, Toronto's dynamic expressway that seamlessly connects the heart of the city to its picturesque northern suburbs! Discover the thrill of swift and convenient travel on this well-maintained roadway, making your journey an absolute delight.



Dall-E 3

# Generative AI – Some legal issues

- Application of existing laws:
  - Copyright
  - Trade secrets
  - Consumer protection
  - Human rights codes
  - Defamation and privacy torts
- New regulations/laws:
  - Artificially Intelligence and Data Act (pending in Canada)
  - Safe Innovation Framework for AI policy/hearings in the United States
  - Voluntary codes of conduct
    - United States: Blueprint for AI Bill of Rights
    - Canadian Guardrails for Generative AI – Code of Practice
- Guidance/rules for specific uses – e.g. courts, schools

# Generative AI – Copyright and Trade Secret

- Training data
  - AI systems are trained on large sets of data and developers may not have license to use the data
  - data may be “scrapped” from online sources
  - copyright owners may have claims for copyright infringement against such AI systems if their works are used to train the AI systems
  - sensitive information in the training data may appear in the output of the system
- generated outputs
  - generative outputs may infringe copyright if it is substantially similar to one or more works in the training data
  - is there copyright in the output of AI systems – who is the author?
  - can sensitive information entered as a prompt re-appear in the someone else’s output
- fair dealing and other exceptions

# Generative AI – Consumer Protection and Human Rights

- Existing legislation protecting individuals will likely apply to applications of generative AI
- Bias
  - systems may propagate biases that arise in the training data
  - bias may arise even if explicit variables are excluded from the training if there are correlated variables
  - primarily arise for decision-making AI systems but can also arise in generative AI
  - “biased output means ... adversely differentiates, directly or indirectly and without justification, in relation to an individual on one or more of the prohibited grounds of discrimination set out in section 3 of the Canadian Human Rights Act”
- Monitoring, audits, mitigation and verification
  - steps to reduce the risk of bias in AI systems
  - measures included in the pending Artificial Intelligence and Data Act
- Deepfakes – defamation, privacy torts

# Generative AI – Artificial Intelligence and Data Act

- part of Bill C-27, “Digital Charter Implementation Act, 2022”
- “to regulate ... trade and commerce in artificial intelligence systems...”
- significant consultation is planned with coming-into-force not expected until after 2025
- AI systems broadly defined:
  - artificial intelligence system means
    - a technological system that,
    - autonomously or partly autonomously, processes data related to human activities through the use of a genetic algorithm, a neural network, machine learning or another technique
    - in order to generate content or make decisions, recommendations or predictions.
- AIDA would require that appropriate measures be put in place to identify, assess, and mitigate risks of harm or biased output prior to a high-impact system being made available for use
- Definition of “high impact” is still being developed through consultation and amendment

# Generative AI – Consultations and Codes of Conduct

- “Canadian Guardrails for Generative AI – Code of Practice” – August 16, 2023
  - identification of potential malicious or harmful inappropriate use
  - assess and curate datasets/training data to remove bias and access/mitigate biased output
  - transparency for identifying AI generated output and avoid misleading users
  - human oversight of testing and operation, to identify adverse impacts and for accountability
- “Government of Canada launches consultation on the implications of generative artificial intelligence for copyright” – October 12, 2023
  - the use of copyright-protected works in the training of AI systems;
  - authorship and ownership rights related to AI-generated content; and
  - liability, especially when AI-generated content could infringe existing copyright-protected works.

# Generative AI – practice notes

- Schools/universities
  - University of Toronto: “If an instructor specified that no outside assistance was permitted on an assignment, the University would typically consider use of ChatGPT and other such tools to be use of an “unauthorized aid” under the Code of Behaviour on Academic Matters, or as “any other form of cheating”. Such a categorization is in keeping with how the University has classified use of other generative and unauthorized technology tools, such as Chegg, in the past.”
- Courts
  - lawyers sanctioned in New York over use of ChatGPT
  - Court of King’s Bench of Manitoba: “To address these concerns, when artificial intelligence has been used in the preparation of materials filed with the court, the materials must indicate how artificial intelligence was used.”
  - Casetext’s CoCounsel: “CoCounsel does document review, legal research memos, deposition preparation, and contract analysis in minutes—with results you can trust.”

# Generative AI – what's next

- more amendments to the law to account for AI generated works
- transparency around AI generated works to distinguish them from human generated
- sophisticated mitigation measures against bias, audits and class actions
- more applications and uses all around us – online world and the real world
- developments every day

# Thank you

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**TAB 4**

# 13<sup>th</sup> Business Law Summit

Commercial Relations Involving First Nations  
(PowerPoint)

**Garnet Brooks**

*Burchell Wickwire Bryson LLP*

November 9, 2023



# COMMERCIAL RELATIONS INVOLVING FIRST NATIONS

**BURCHELL WICKWIRE BRYSON** <sup>LLP</sup>  
lawyers | avocats

# COMMERCIAL RELATIONS INVOLVING FIRST NATIONS

BY: GARNET BROOKS

BURCHELL WICKWIRE BRYSON <sup>LLP</sup>  
lawyers | avocats

# LAND ACKNOWLEDGMENT

## **Mi'kma'ki**

The Traditional and unceded territory of the Mi'kmaq People.

The ancestral territories of the Anishinaabe, Haudenosaunee, Wendat, and the Mississaugas of the Credit First Nation

# INTRODUCTION

## **Commercial Relations Involving First Nations**

- Growing significance
- Culturally different
- Legal advisors' role to help get it over the finish line

# HISTORICAL CONTEXT

- Trust, Equity and Commercial Relationships
- Historical Strain & Tensions
- Movement Toward Reconciliation

# WHERE WE ARE TODAY

- Improvement
- Development of Aboriginal Law
- Improved relations

# RECONCILIATION

- Effort & Willingness
- Timing is right
- Healing
- Reconciliation is all around us

# FIRST NATIONS DECISION-MAKING

- Anticipate different processes & timing
- Cultural approach / cultural values
- 7 Generations Principle

# TWO-EYED SEEING

- Mi'kmaw Elder, Albert Marshall
- Incorporate both Worldviews – understanding
- Grant equal weight & respect at decision-making table
- Achieve an inclusive, robust and long-term sustainable outcome

# WRAP-UP

- First Nations Commercial Transactions are unique
- Our role as advisors is to recognize and guide clients toward a mutually beneficial outcome
- Incorporate knowledge – become better at Two-Eyed Seeing

**Wela'lioq - Thank You**



---

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**TAB 5**

# **13<sup>th</sup> Business Law Summit**

**Professional Corporations: Tax Benefits (PowerPoint)**

**Shayan Rashid, CPA**

*SRJ Chartered Professional Accountants*

November 9, 2023



# PROFESSIONAL CORPORATIONS: TAX BENEFITS

## 13TH BUSINESS LAW SUMMIT

**SRJ** Chartered Professional  
Accountants

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# ABOUT THE FIRM

As the co-founder and driving force behind SRJ CPAs, I've dedicated my career to revolutionizing finance for entrepreneurs. Catering to businesses and professionals with revenues ranging from \$300k to \$60M, and funded startups.

**Streamlined Accounting Departments:** We understand that businesses require all these things, but on a budget. Many CEOs and founders come to us feeling overwhelmed, pulled into the day to day accounting tasks, and lacking the insights they need to drive their business forward.

**Time Reclaimed:** We liberate CEOs from accounting burdens, allowing you to focus on business growth instead.

**Innovation and Technology:** We're committed to staying ahead of the curve. We harness the power of AI and cloud based bookkeeping to streamline processes and enhance efficiency.

**Entrepreneurial Ecosystem:** We understand the unique challenges entrepreneurs face, from securing funding to scaling operations. With a deep network of strategic partners and a finger on the pulse of the startup ecosystem, we're here to guide you every step of the way.

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## WHAT IS A PROFESSIONAL CORPORATION

### Legal Entity

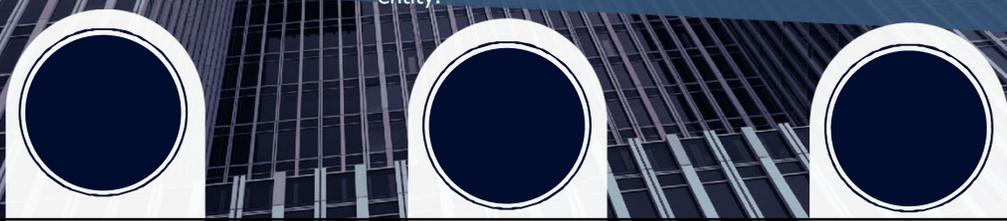
Separate Legal Entity and Different from a normal corporation. Can enter into contracts and own property in its own name, separately and distinctly from its owner. Because it is a separate legal entity, it is required to file its own tax return.

### Compliance

Obligated to follow a rigid set of rules as defined by medical colleges or associations across Canada. Each college or association will provide specific restrictions on what activities can be performed through the entity.

### Liability

It does not provide shareholder(s) and director(s) protection from liability arising as a result of malpractice, although it can provide some protection from business creditors.



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# WHY INCORPORATE?

## BENEFIT 1

Access to Capital Gains Deduction (if qualifying) and small business tax rates

## BENEFIT 2

Income Splitting and Tax Deferral

## BENEFIT 3

Continued Existence after professional activities cease

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# WHY INCORPORATE?

## ISSUES 1

Losses can be trapped inside a corporation

## ISSUES 2

Increased administrative complexity and significant set up and maintenance costs

## ISSUES 3

Capital Gains deduction not available to all corporations and must follow stricter rules

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# TAX DEFFERAL

## PRACTICAL EXAMPLE

Annual Professional Income of \$500,000 with \$150,000 required for personal living expenses:

### Unincorporated Professional

- Tax ~\$232,000
- Remaining Capital Available for Investment ~\$118,000

### Incorporated Professional

- Personal Salary ~\$250,000
- Corporate Tax ~\$30,000
- Remaining Capital Available for Investment ~\$220,000

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# DOUBLE TAXATION

## EXAMPLE CONTINUED

Annual Professional Income of \$500,000 with \$150,000 required for personal living expenses:

### Unincorporated Professional

- Tax ~\$232,000

### Incorporated Professional

- Dividends to Shareholder ~\$439,000
- Personal Tax ~\$171,000
- Corporate Tax ~\$61,000
- Remaining Capital Available for Investment ~\$232,000

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# TAX SAVINGS

## GENERAL RULES FOR TAX DEDUCTIONS

### Allowable Deductions:

- Any expense incurred with the intent of helping me do my job or earning more profits unless it is specifically prohibited by the Income Tax Act, is an allowable deduction.
- Example of Prohibited expenses by Income Tax Act Include:
  - Golf fees and memberships
  - Clothing
  - Personal use items & personal groceries

### Personal Withdrawal Options:

- Salary
- Dividends
- Reimbursement of expenses paid personally
- Capital gains strip (Only until Dec 31, 2023)

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# TAX SAVINGS

## COMMON TAX DEDUCTIONS

### Common expenses for professionals include:

- Membership dues to professional associations
- Salaries/wages and subcontractor costs
- Travel costs
- Office expenses
- Office supplies
- Automobile expenses (lease/finance, gas, insurance, maintenance, parking)
- Home office expenses (rent, mortgage interest, property tax, utilities, insurance)
- Telephone expenses
- Meals & Entertainment (50% allowed as deduction)
- Advertising & Promotion
- Legal, accounting and other professional fees
- Rent, overhead and costs related to use of physical space

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# TAX SAVINGS

## WITHDRAWING FUNDS FROM CORPORATION

### Salary

- Fully tax deductible in the corporation
- Pay source deductions to the CRA consisting of CPP and income tax
- Ability to avail more tax deductions and the income counts towards RRSP deduction limit

### Advanced tax Planning Concepts

- Shareholder Loans
- Holding Companies
- Inter-company Loans
- Capital Gains Strip

### Dividends

- Taxed at a lower amount personally due to dividend tax credit
- Jurisdiction may not allow to have non-professional shareholders and thus no dividends can be paid to family members if not involved in the business
- Eligible dividends are grossed up and taxed at a lower rate than non-eligible divide

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# INVESTING THROUGH PROFESSIONAL CORPORATIONS

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# INVESTING THROUGH PROFESSIONAL CORPORATIONS

## MAXIMIZE BENEFIT ON TAX DEFERRAL

### Holding Companies and Intercompany Loans

- Corporations can lend money from one corporation to another corporation using intercompany loans
- For incorporated professionals, holding companies can provide a great opportunity to purchase investment properties using pre-tax corporate funds.
- Some examples of investments include:
  - Invest in shares (public and private companies)
  - Invest in RPP (Registered Pension Plan) or IPP (Individual Pension Plan)
  - Purchase a rental property
  - Pay off debt with after-tax corporate dollars and save money

### Borrowing Money

- Interest on money borrowed to invest with the business is tax deductible

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# INVESTING THROUGH PROFESSIONAL CORPORATIONS

### Investment Companies:

- Do not have active income (earned), rather passive (investment) income
- Money can be moved from the professional corporation (operating company) to the investment company)
- Can purchase rental properties to generate rental income
- Separate assets and creditor protections
- Dividends, interest income, rents, capital gains
- Taxed at a higher rate than active income
- Reduces small business deduction after \$50K in investment income

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## PROFESSIONAL CORPORATION UPON DEATH

- All assets are deemed to be sold at fair market value
- Tax deferral on deemed disposition if left to a spouse on select assets
- Professional corporation becomes a regular corporation, but the corporation continues to exist

## DONATE PERSONALLY OR THROUGH A PC?

- Dependent on the income level of individual shareholder
- Personal donations must be to registered charities to qualify as a deduction
- Corporations can donate to non registered charities for promotional purposes
- Donating shares instead of cash and avoid taxable capital gain and adds as a credit to the capital dividend account
- Money donated personally through professional corporation must come out as salary or dividends

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# RRSP, TFSA, RETAIN CASH IN PROFESSIONAL CORPORATION

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## IPP

- Designed for small groups or even a single person
- Actuary calculates the annual amount that can be contributed then an investment advisor contributes the funds
- Must take salary to be eligible, similar to RRSP
- Income received is fully taxable but tax sheltered while invested
- Any investment losses can be reinvested
- Setup and maintenance costs can be high
- Trust return must be filed annually
- Value of fund is protected from creditors

RRSP

IPP

## RRSP

- Can generate RRSP room based on earned income of 18% annually
- Dividend income does not qualify towards 18%
- Required by law to start withdrawing at 72 years old
- Income received is fully taxable but tax sheltered while invested
- Can income split with spousal RRSP

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## Saving in Professional Corporation

- Can invest in publicly traded stock to generate eligible dividends from the corporation and increase GRIP balance
- No requirement to remove money and money left in professional corporations can be invested forever
- Money removed can be taken as dividends and reduce income taxes
- Passive income in professional corporations greater than \$50K can start to reduce the small business deduction

TFSA (PERSONAL SAVINGS)

CORP SAVINGS

## TFSA

- Money is invested on a tax-free basis
- Can remove money from corporation as salaries or dividends
- Limit on how much can be invested

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# THANK YOU!

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**TAB 6**

## **13<sup>th</sup> Business Law Summit**

Insolvency Developments:  
Prioritizing DB Pension Plan Deficits

Will Lenders Now Fund DB Pension Plans  
(PowerPoint)

**Hugh Wright**  
*Miller Thomson LLP*

November 9, 2023



LAW SOCIETY OF ONTARIO

13<sup>TH</sup> BUSINESS LAW SUMMIT  
NOVEMBER 9, 2023

# **INSOLVENCY DEVELOPMENTS: PRIORITIZING DB PENSION PLAN DEFICITS**

## **WILL LENDERS NOW FUND DB PENSION PLANS?**



# Outline

- Primer on types of pension plans
- The prior pension charge
- Pension Protection Act changes
- Implications for lending and pension plans



# Types of Pension Plans

- Defined Benefit – contributions and unfunded deficits
- Defined Contributions – contributions, but no deficits
- Target Benefit Plan – usually set contributions, no deficit funding
- MEPP – usually set contributions, no deficit funding
- RRSP/DPSP/TFSA – not a registered pension plan



# The Prior Pension Charge

- Priority over all other claims, security
  - excepting certain limited exclusions
- Covers:
  - Contributions deducted from employee pay, but not yet remitted;
  - Employer current service contributions (excluding past service liabilities)
- Transparent – paid 30 days after end of month



# The Prior Pension Charge

- Applicable to most registered pension plans
  - DB Plans
  - DC Plans
  - MEPP
  - Target Benefit Plans
- Not GRSP/DPSP etc as not registered pension plans



# Effect of Prior Pension Charge

- CCAA plan or BIA proposal can only be approved if:
  - Prior Pension Charge paid, or
  - Beneficiaries agree and regulator agrees
- Prior Pension Charge usually not material and paid



# Pension Protection Act

- Prior Pension Charge
- Plus Expanded Pension Charge
- Effective April 27, 2023
- 4 year transition for existing arrangements



# Expanded Pension Charge

- Prior Pension Charge **plus:**
  - Special Payments
    - Past service schedule of payments
    - Collapses and accelerates schedule of payments
  - **Any amount** needed to fund a deficit determined as of the insolvency filing date



# The Prior Pension Charge

- **Not** applicable to most registered pension plans
  - DB Plans – fully applicable
  - DC Plans – no special payments or deficits to fund
  - MEPP – “usually” no special payments/deficits
  - Target Benefit Plans - “usually” no special payments/deficits
- GRSP/DPSP/TFSA not registered pension plans
  - Therefore not relevant/applicable



# Key Points of Distinction - Prior Charge v Expanded Charge

- Ability to quantify
- Relation to ordinary course of business
- Not verifiable exposure
- Absence of Prior Legal Constraints
- Source of delay/litigation



# Implications For Borrowers and Lenders

- Lenders won't be willingly funding pension deficits
- Asset base/pool of funds for potential recovery always focus for lenders
  - potential asset pool reduced, highly uncertain
  - increased time and expense to assess risk
  - For asset based lending, likely reduce amounts from borrowing base



# Lender precautions?

- Current provisions common in credit agreements:
  - Representation that borrower does not contribute to any pension plan with a defined benefit provision
  - Negative Covenant that will not contribute to any DB Plan, including any acquired company, without consent of lender
  - Breach of contribution requirements (prior pension charge)
    - Notice requirement
    - Breach of credit agreement



# Potential Lender precautions?

- Require new funding levels beyond applicable law?
- Obtain regular reporting, right to updated valuation?
- Event of default – moving outside agreed funding range?
- Potential to reduce volatility in funded status through investment policy restrictions?
- Ability to re-open credit agreements?



# Transition

- As of April 27, 2023, applies to all lending arrangements, unless employer has existing DB Plan
- If existing DB Plan as of April 27, 2023, provisions cif in 4 years
- But, credit agreements often longer than 4 years
- Restructuring resulting in new employer?



# Conclusion

- Assumption is where employer is unable to fund DB plan, secured lenders will do so through reduced recoveries in an insolvency
- Likely tighter credit conditions, monitoring for borrowers with DB Plans
- Viability of business remains key lender concern
- Efficacy of this approach remains to be seen



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**TAB 7**

# 13<sup>th</sup> Business Law Summit

**LATEST CONDOMINIUM ISSUES:  
New Taxes & Restrictions re: Residential Property**

**Materials by:**

**Tammy Evans**

*Aird & Berlis LLP*

*Reproduced with Permission*

**Presented by:**

**Joel Kadish**

**Barrister and Solicitor**

November 9, 2023



**20<sup>TH</sup> REAL ESTATE LAW SUMMIT**  
**April 19 & 20, 2023**

**LATEST CONDOMINIUM ISSUES: New Taxes & Restrictions re: Residential Property**

My presentation will cover 3 primary items that should be of interest to lawyers who act for purchasers of residential real estate and are all related to recent changes or impacts on the housing industry due to the current economic climate and state of housing availability in Canada. While I act only for vendors, developers and builders, I am very much aware of the impact of these new legislative provisions on our clients' purchasers and the extra attention that is now required by purchasers' counsel.

**Ontario Vacant Home Tax**

The vacant home tax or VHT applies to residential properties in Ontario that are vacant for more than six months of the previous tax year. It is calculated annually on the assessed value as determined by the municipality under the Assessment Act. Under Part 9.1 of the Municipal Act, 2001, the Minister of Finance may designate municipalities to which the VHT applies. Once designated, the municipality then passes a by-law setting out the vacant home tax rate and the conditions of vacancy that trigger the imposition of the annual tax, as well as any exemptions, rebates and objections that would go to dispute resolution.

The City of Toronto passed its bylaw to implement the VHT on February 3, 2022 setting the tax rate at 1% of the assessed value.

The calculation of tax is determined by the City on the basis of occupation for the previous calendar year and the mandatory declaration (copy in the materials) that must be submitted by each residential homeowner by February 3 of each year commencing with 2023. Submission of the declaration is mandatory. If it is not submitted by the deadline required, that property will be deemed to be vacant and the VHT will be assessed against the property.

The exemptions to imposition of the VHT currently include a vacancy that would otherwise be taxable (ie. vacant for more than 6 months in the previous tax year) but where that vacancy is due to:

- death of a homeowner
- principal resident is in a hospital or other long-term care facility
- there is a court order preventing occupancy
- the owner lives outside the municipality, but requires the home for occupational residency for at least 6 months of the particular year
- the home is under repair or renovation (that does not allow for occupancy and is active)
- subject to a transfer of title that has not yet closed\*

the property is exempted.

Purchasers and their counsel should be mindful of closing dates that straddled the end of 2022 year, as the VHT must be addressed for the 2022 calendar year. The seller had an obligation to complete the declaration to be submitted to the City if the transaction closed between January 1 and February 28 of 2023 for the 2022 calendar year. The purchaser must submit a declaration for a closing date from and after March 1 until December 31, commencing 2023.

A VHT imposed on a home forms a lien against the property. Accordingly, any unpaid VHT becomes the subsequent purchaser's responsibility. I recommend the VHT be addressed at closing in the statement of adjustments if a purchaser's counsel does not have confirmation from the City that the declaration has been submitted and no payment is required.

Of note, there is a penalty for not submitting the declaration, and there are also considerable fines for false statements, up to \$10,000. Any disputes of the VHT assessed can be commenced by way of filing a Notice of Complaint found on the City's website.

The City of Toronto's website page [www.toronto.ca](http://www.toronto.ca) is comprehensive on the VHT, so I would direct you there for any more detailed questions, or you can give me a call.

Other municipalities that have taken up the VHT are Ottawa and Hamilton and the Region of Peel seems to be moving through the implementation process.

### **Federal Foreign Investor Tax**

Under the federal Underused Housing Tax Act, that took effect January 1, 2022, the federal government imposed a 1% tax on the ownership of vacant or underused housing in Canada generally by non-resident, non-Canadian owners, or those who do not fit within an exemption category.

There are basic exclusions for Canadian citizens and permanent residents, and then further exclusion categories for Canadian public corporations, registered charities, cooperative housing corporations, trustees of REITs, MFTs or SIFT and Indigenous governing bodies or their corporations. If the owner fits within one of these exclusions, this legislation does not apply. If the ownership does not fit within one of these exclusion categories, the owner is an "affected owner" under the legislation, and may be subject to the 1% tax based on the assessed value (or the FMV, if owner elects to use an appraisal to determine the value).

Once it is determined that the owner is an affected owner, there are exemption categories to being taxed based on the type of owner or resident; the availability for use of the residential property; and the location and use of the residential property.

Exempted owners or residents means:

a) where the residential property is the primary place of residence of owner, spouse or common law partner or child, who is a Canadian citizen or permanent resident, or owner, spouse or common law partner with a Canadian work permit; or

b) where an individual occupies under a written contract with the owner, spouse or common law partner or child (and is arm's length), or where the non-arm's length individual occupies under a written contract and pays fair market rent; and

c) where the residence is occupied for at least 180 days of the calendar year (can be multiple different occupancies to make up the 180 days, but to qualify as an occupancy period it must be at least one month in a calendar year) by a qualified occupant.

Affected owners must file an Underused Housing Tax Return for each calendar year commencing 2022 as an owner of residential property in Canada regardless of whether you fit into an exemption category or not. The return is due by April 30th 2023 for the previous tax year (2022) and any tax owing is required to be paid by April 30 using a social insurance number (or individual tax number (ITN) for non-residents) or business number (BN) for corporations. A corporate owner is required to apply for and register for the Underused Housing Tax (RU) Program account number first.

Each property requires its own RU tax return, and each owner who shares ownership with other co-owners must file his or her respective separate RU tax return. There are penalties for not filing the RU return, and considerably higher penalties for filing false information. For more detailed information, refer to the Government of Canada website Underused Housing Tax - Canada.ca.

### **Non-Canadian Buyer Restriction**

In your materials you should have 3 bulletins that my firm has issued out on this new piece of federal legislation that effectively prohibits non-Canadians (or those who do not fit within an exemption category) from purchasing, either directly or indirectly, residential property in Canada for 2 years from January 1, 2023.

Under the Prohibition on the Purchase of Residential Property by Non-Canadians Act (for simplicity, the Foreign Buyer Ban) every non-Canadian that contravenes the Act, and every person who counsels, induces, aids or abets in the contravention, is guilty of an offence and subject to a maximum fine of \$10,000. The liability under this Foreign Buyer Ban is drafted very broadly, potentially reaching to any individual involved in the offending transaction – for example mortgage brokers, salespersons, directors, officers, senior officials, lawyers and/or other advisors. It is not limited to the contracting parties (ie. named vendor/purchaser).

Note that the effect of a contravention is not to deem the transaction itself invalid, so the parties are still obligated under the contract. Section 7(1) of the Act states that if a non-Canadian is convicted of contravening the Act, the superior court in which the property is situated may order the property to be sold, with the proceeds of sale distributed by the court as it deems appropriate, including payment of any unpaid fines and repayment to the non-Canadian of no more than the amount paid for the property, with any balance remaining (or profit) going to the Receiver General for Canada.

In this statute there are a few terms that require specific attention.

Firstly, the Regulations made under the statute set out the definition of a “non-Canadian” - Generally, a non-Canadian is:

- an individual who is neither a Canadian citizen or permanent resident or a person registered under the Indian Act;
- a corporation or other entity incorporated or otherwise organized federally or provincially or even if incorporated or organized federally or provincially if it does not fit within the control requirements described below
- an entity (eg. partnership/trust) formed under Canadian or provincial laws that are controlled by entities not formed under Canadian laws.

The term control is also defined in the Regulations, as:

- direct or indirect foreign ownership of shares or ownership interests of the corporation or entity representing 10% (recently increased from the original 3%) or carrying 10% of more voting rights; or
- foreign control in fact of the corporation or entity, whether directly or indirectly, through ownership, agreement or otherwise.

Residential property includes single family homes, condo units duplexes and triplexes but is also clarified in the Regulations in that it must be within a certain geographical area based on definitions of a census agglomeration or a census metropolitan area which have certain population criteria as outlined by Statistics Canada. Generally, these areas include many smaller cities, towns and villages across Canada in addition to the major urban centres.

Certain transactions are not caught by this legislation. For example, the Regulations exempt acquisitions of property resulting from death, divorce, separation or gift, or rentals to occupying tenants.

It also by way of more recent amendment does not apply to land “for development” – so in general terms, vacant land or commercial land is not subject to the legislation, however one should refer to the CMHC guideline with respect to what “for development” means (Prohibition on the Purchase of Residential Property by Non-Canadians Act – Frequently asked questions | CMHC ([cmhc-schl.gc.ca](http://cmhc-schl.gc.ca))).

Certain individuals/entities are also not caught by this legislation. For example, the Foreign Buyer Ban does not apply to temporary residents, or those who meet certain conditions related to studies or work permits or foreign nationals with temporary resident visa status or refugee claimants (as defined in the Immigration and Refugee Protection Act), and, where the statute is incompatible with Indigenous rights, Indigenous rights prevail.

For lawyers who act for purchasers of residential property, it has now become a more in depth part of the transaction closing to “know your client”. While there are no specific compliance requirements in the legislation relating to collection of information or reporting when dealing with non-Canadian purchaser clients, it is important to keep in mind that any person who assists

in a contravening purchase can be held liable under the statute. Further, under the Regulatory Impact Analysis Statement that was issued with (but not part of) the Regulations, it is expected that Canadian professionals will establish “prudent business practices” with respect to identifying and advising the client on how the client may be impacted by this legislation (Canada Gazette, Part 2, Volume 156, Number 26: Prohibition on the Purchase of Residential Property by Non-Canadians Regulations).

I am aware that many of you act for non-Canadian buyers, particularly foreign investors, and in my role as counsel to developers acting on bulk closings, we see many foreign buyers, so this is not an insignificant piece of legislation for the real estate industry, and adds more work to the solicitor’s due diligence.

For our developer clients, we have prepared some additional provisions to go into our agreements of purchase and sale and assignment documentation and other forms of confirmation that any new buyer from January 2023 will have to sign. Expect to see these provisions in your purchaser’s documentation.

I recommend, when acting for a purchaser and completing the “know your client” due diligence required, that the solicitor start with the two basic questions – 1) is this residential property with a dwelling on it? 2) (if an individual), are you a Canadian citizen or permanent resident, have a work visa, study permit or a temporary resident or refugee authorized under the Immigration and Refugee Protection Act? OR 2) (if a corporation), trustee, partnership or other exempted entity, what is the shareholding/control as against the definition of control in the Regulations?

Feel free to call me or any other partner in my real estate group and to make use of the reference materials and links provided to the relevant government websites.

Thank you.

All owners of properties that are classified within the **Residential Property** tax class must complete and submit a Declaration of Occupancy Status to determine whether the residential property is subject to the Vacant Home Tax. Declarations must be submitted by February 2, 2023 to identify the occupancy status of the property for the 2022 calendar year. Declarations may also be submitted online by visiting: [www.toronto.ca/VacantHomeTax](http://www.toronto.ca/VacantHomeTax).

A declaration is not required if the residential property does not contain a residential unit. (For example, vacant land, parking space or condominium locker). A residential unit is comprised of one or more self-contained dwelling units that include a dedicated washroom and kitchen.

**I am making this declaration (check one box only):**

- As the registered owner.** You are declaring the property status as the registered legal owner of the residential property.
- On behalf of the registered owner(s).** You are declaring the property status as a personal representative of a registered owner.

**Section 1. Property and Owner Information (required)**

Assessment Roll Number (21 digits)											
1	9	-		-		-		-		-	
Property Address (Street Number, Street Name, Suite/Unit Number)											
Property Owner Name (First, Last or *Single) or Owner Name Business/Organization (if property is owned by a business or organization)											
Email Address (optional)									Telephone Number		

\*If first name and last name do not apply because you have either a registered birth certificate or change of name certificate bearing a single name you may use single name.

**Section 2. Representative Information (for declarations made on behalf of owner)**

I, the owner, authorize the below listed representative, to act on my behalf in respect to this declaration.

Name (First, Last or * Single, if applicable)	
Email Address (optional)	Telephone Number
Organization/Business Name (if applicable)	Job Position Title (if applicable)
Business Email Address (optional)	Business Telephone Number

**Section 3. Principal Residence and Occupants (required)**

**Principal Residence** - A residential unit in which a person ordinarily resides and conducts daily affairs, receives mail, pays bills etc. This applies even if you leave for extended periods of time due to travel or work (for example, snowbirds that spend more than six months away from their principal residence). A person may only have one principal residence, however a residential unit may be the principal residence of more than one person. The property must be your principal residence for at least six months during the taxation year to claim this occupancy status. Please read all options (A through D) and complete the below:

- A.  The property was the principal residence of the owner for at least six months.**
  - Yes (Go to Section 5, Declaration and Certification of Information)
  - No (Continue to B)
- B.  The property was the principal residence of a permitted occupant(s) or occupied by tenants for at least six months in 2022.**

**The property was occupied by (select one):**

  - Permitted occupant** - A person(s) who is authorized by the registered owner to occupy a residential unit as their principal residence (see definition above). This may include but is not limited to a family member or friend of the registered owner.
  - Tenant** - A person(s) who has a written lease or sublease to occupy the residential unit for at least 30 consecutive days in a year. The property must be occupied by one or more tenants for at least six months during the year.
  - Combination of occupancy**
  - None of the above** (Continue to C or D)

If selected for audit, you may be asked to provide supporting documentation for verifying the principal residence of any permitted occupants or occupancy of any tenants.

# Vacant Home Tax - Property Status Declaration

**C.  The property was vacant but an exemption from the tax applies.**

Go to Section 4, Exemptions.

**D.  The property was vacant and no exemptions apply. The Vacant Home Tax applies.**

Go to Section 5, Declaration and Certification of Information.

## Section 4. Exemptions (if applicable, supporting documents must be submitted with this declaration)

Check the box that applies and provide the effective date in 2022.

Effective Date

<input type="checkbox"/> <b>Death of registered owner</b> - This exemption may be claimed for up to two consecutive years if the registered owner has died in the taxation year or in the previous taxation year. Acceptable types of evidence include (but are not limited to): death certificate of registered owner.	(yyyy-mm-dd)
<input type="checkbox"/> <b>Property is undergoing renovations or repairs</b> - This exemption may be claimed if the vacant unit is undergoing repairs or renovations, and <b>all</b> the following conditions have been met: <ul style="list-style-type: none"> <li>• occupation and normal use of the vacant unit is prevented by the repairs and renovations for at least six months of the taxation year;</li> <li>• all requisite permits have been issued for the repairs and renovations;</li> <li>• the City is of the opinion that the repairs or renovations are being actively carried out without unnecessary delay.</li> </ul> • Provide copy of building permit(s) and a short description of the project.	(yyyy-mm-dd)
<input type="checkbox"/> <b>Principal resident is in care</b> - This exemption may be claimed for up to two consecutive taxation years, if the principal resident of the vacant unit is in a hospital, long term or supportive care facility for a period of an aggregate of at least six months during the taxation year. <ul style="list-style-type: none"> <li>• Provide signed letter from health care facility on letterhead.</li> </ul>	(yyyy-mm-dd)
<input type="checkbox"/> <b>Transfer of Property (sale of property)</b> - This exemption may be claimed if the legal ownership of the vacant unit has been transferred to a transferee in the taxation year. <ul style="list-style-type: none"> <li>• Provide a copy of land transfer deed.</li> </ul>	(yyyy-mm-dd)
<input type="checkbox"/> <b>Occupancy for full-time employment</b> - This exemption may be claimed if the vacant unit is required for occupation/employment purposes for an aggregate of at least six months in the year, by its owner who has a principal residence outside of the Greater Toronto Area. <ul style="list-style-type: none"> <li>• Provide proof of residency outside of the Greater Toronto Area and a signed letter from your employer on company letterhead, or employment contract that confirms requirement of physical presence in Toronto for the purpose of work.</li> </ul>	(yyyy-mm-dd)
<input type="checkbox"/> <b>Court Order</b> - This exemption may be claimed if there is a court order which prohibits occupancy of the vacant unit for at least six months of the taxation year. <ul style="list-style-type: none"> <li>• Provide copy of court order or court record.</li> </ul>	(yyyy-mm-dd)

## Section 5. Information Collection and Vacant Home Tax Agreement Statement (required)

### Vacant Home Tax Agreement Statement

By signing this form, I have read and agree with the below statements:

- I declare that the property status identified and all information provided are true and accurate.
- I understand that I may be asked to provide further information and evidence to support my declaration at a later date and that failing to do so, providing false declaration or false information can result in fines.
- I understand the City of Toronto's use of the personal information provided for the purposes of administering the Vacant Home Tax are in accordance with City of Toronto Municipal Code Chapter 778, Taxation, Vacant Home Tax.
- I agree not to submit any personal information relating to any other individual (personal information relating to any other individuals could include but is not limited to: Government-issued personal identification, income tax returns and notices of assessments, lease agreements, employment documents, financial statements, insurance certificates; and any medical information concerning an individual's residency in a medical facility) without obtaining the individual(s) prior consent to submit such personal information to the City, and ensuring that the individual has seen and understood the Notice of Collection outlined below.

Owner Name (First and Last or *Single)	Owner Signature	Date (yyyy-mm-dd)
Representative Name (First and Last or *Single) (if applicable)	Representative Signature (if applicable)	Date (yyyy-mm-dd)

**Submit your completed and signed declaration along with the supporting documentation (if applicable) by:**

**Mail:** City of Toronto, Revenue Services, Vacant Home Tax, 5100 Yonge St., Toronto, ON M2N 5V7

**In person:** At City Hall and Civic Centres Inquiry and Payment Counters, for location information visit:

[toronto.ca/inquirypaymentcounters](http://toronto.ca/inquirypaymentcounters)

Revenue Services collects personal information on this form under the legal authority of the City of Toronto Act, 2006, section 8 and Part XII.1, and the City of Toronto Municipal Code, Chapter 778, Taxation, Vacant Home Tax, Article 4, Declaration and Deemed Vacancy, Article 5, Assessment and Collection and Article 11, Offences and Fines. The information will be used for the purposes of administering and enforcing the Vacant Home Tax, specifically for the purposes of receiving and reviewing Declarations received pursuant to § 778-4.1, assess the Vacant Home Tax payable in respect of each taxable Vacant Unit, issuing a Notice of Tax to the Owner setting out the amount of Tax assessed and the Payment Date; as well as contacting the Owner and other parties concerning the administration and enforcement of the Vacant Home Tax. Questions about this collection can be directed to the Manager, Operational Support, Revenue Services, 5100 Yonge Street, Toronto, Ontario M2N 5V7 or by telephone at 416-395-0125.

Canada Gazette, Part II, Volume 156, Number 26

Registration

SOR/2022-250 December 2, 2022

**PROHIBITION ON THE PURCHASE OF RESIDENTIAL PROPERTY BY NON-CANADIANS ACT**

P.C. 2022-1259 December 2, 2022

<https://canadagazette.gc.ca/rp-pr/p2/2022/2022-12-21/html/sor-dors250-eng.html>

**CITY OF TORONTO**

**BY-LAW 97-2022**

To enact a new City of Toronto Municipal Code Chapter 778, Taxation, Vacant Home Tax and amend City of Toronto Municipal Code Chapter 169, Officials, City.

<https://www.toronto.ca/legdocs/bylaws/2022/law0097.pdf>

# Amendments to Regulation Banning Canadian Foreign Home Buyers Released

By: [Norman I. Kahn](#), [Kristian N. Arciaga](#), [Jennifer Glied-Goldstein](#), [Peter A. Dalglish](#) and [Jasraj Shergill](#)

On March 27, 2023, the Minister of Housing and Diversity and Inclusion introduced amendments (the “**Amendments**”)<sup>1</sup> to the regulation (the “**Regulation**”)<sup>2</sup> enabled under the federal *Prohibition on the Purchase of Residential Property by Non-Canadians Act* (the “**Act**”) which attempt to provide further clarity on this new prohibition.<sup>3</sup> The Amendments came into force the very same day they were introduced. The Act prohibits the purchase of residential real estate by non-Canadians, either directly or indirectly, for a two-year period that began on January 1, 2023. The Amendments to the Regulation have since narrowed the scope of the Act to lessen the impact on commercial transactions and property development.

This bulletin supplements our previous bulletins circulated on [November 3, 2022](#), and [December 28, 2022](#), and must be read in conjunction with them, as some of the information contained in these previous bulletins is no longer applicable.

## Zoning No Longer a Criteria

Section 3(2) of the Regulation originally prohibited “non-Canadians” (as defined under the Act) from purchasing property within most metropolitan areas that was zoned for either residential or mixed use.<sup>4</sup> This provision prevented non-Canadians from purchasing commercial real estate properties that were zoned residential or for mixed use. Scrutinizing the zoning of a property to define it as a “residential property” also inadvertently captured significant amounts of land used for commercial purposes such

as industrial warehouses, manufacturing facilities, office buildings and shopping centres. Subsequently, the Canada Mortgage and Housing Corporation (the “**CMHC**”) issued a clarification that this prohibition was intended to capture only vacant land that is zoned residential or mixed use. The Amendments have now repealed this provision altogether so that the prohibition no longer applies to the purchase of property (whether vacant or not) that does not contain any habitable dwellings and is zoned for residential and mixed use.

## **Threshold of *Control* Increased**

In our previous publication, we identified that the definition of “control” of a corporation or entity in the Regulation limited a far larger group of corporations from participating in real estate transactions involving residential property than what was likely intended. Previously, a corporation was deemed a non-Canadian under the Act if it was “controlled” by more than 3% of non-Canadians. This has now been addressed in paragraph 1 of the Amendments, where the threshold for “control” of a corporation or entity was increased from 3% to 10%.<sup>5</sup>

## **Publicly-Traded Canadian REITs and Limited Partnerships Excluded**

The Amendments broaden the scope of real estate transactions permitted under the Act for publicly-traded entities. Section 2(b) of the Regulation previously excluded publicly-traded corporations listed on a designated Canadian stock exchange from the definition of “non-Canadians.”<sup>6</sup> However, this narrow exception failed to also exclude publicly-traded non-corporate entities listed on a designated stock exchange, such as Canadian real estate investment trusts (“**REITs**”) and Canadian limited partnerships.

Accordingly, these publicly-traded non-corporate entities had to meet the control threshold to purchase residential property. Pursuant to the Amendments, Canadian REITs and other publicly-traded Canadian entities (including limited partnerships) can now participate in real estate transactions that involve residential property, without meeting any control threshold.

## Exception for Development

The most sweeping change contained in the Amendments is the introduction of an exception for the acquisition by a non-Canadian of residential property for the purposes of “development.”<sup>7</sup> The Amendments do not define “development,” but the CMHC has published a guideline (in the form of Frequently Asked Questions) that sets out criteria and indicia of what could constitute “development.”

The CMHC defines “development” as “the process of evaluating, planning and undertaking of alterations or improvements (with or without a change in use) to a residential property or the land on which the residential property is located and, for greater certainty, includes redevelopment of an existing building.” The key element is the existence of “good faith intention at the time of purchase.”<sup>8</sup>

## Wider Pool of Purchasers

The Amendments amend the requirements for non-Canadians who hold a work permit under the *Immigration and Refugee Protection Regulations*<sup>9</sup> to become eligible to purchase residential property. Such work permit holders are eligible if they have 183 days or more of validity remaining on their work permit or work authorization at time of the purchase of their residential property, as long as they have not purchased more than one residential property. The Amendments remove the previous requirement of having filed tax filings for a minimum period of three years within the preceding four years and having worked full time in Canada.

## Takeaways

While not all of the submissions from the real estate industry have been adopted, the Amendments represent a substantial improvement permitting commercial transactions, which were obviously not intended to be caught by the Act, to proceed without prohibition.

Nonetheless, parties to a transaction involving real estate should still be wary of the Act before proceeding, especially if a residential property may be involved.

If you have any questions about how this may impact you or your business, please contact a member of the Aird & Berlis Real Estate Group.

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[1] *Regulations Amending the Prohibition on the Purchase of Residential Property by Non-Canadians Regulations.*

[2] *Prohibition on the Purchase of Residential Property by Non-Canadians Regulations: SOR/2022-250.*

[3] *Prohibition on the Purchase of Residential Property by Non-Canadians Act, SC 2022, c 10, s 235.*

[4] *Supra* note 2.

[5] *Supra* note 1.

[6] *Supra* note 2.

[7] *Supra* note 1.

[8] *Prohibition on the Purchase of Residential Property by Non-Canadians Act – Frequently asked questions (March 2023)*, online: Canada Mortgage and Housing Corporation (CMHC) <<https://www.cmhc.schl.gc.ca/en/professionals/housing-markets-data-and-research/housing-research/consultations/prohibition-purchase-residential-property-non-canadians-act/faq>>

[9] *Immigration and Refugee Protection Regulations: SOR/2002-227.*



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## Disclaimer

This communication offers general comments on legal developments of concern to business organizations and individuals and is not intended to provide legal advice. Readers should seek professional legal advice on the particular issues that concern them.

# New Year, New Details: Canadian Regulations Banning Foreign Home Buyers Released

By: [Norman I. Kahn](#), [Kristian N. Arciaga](#), [Jennifer Glied-Goldstein](#) and [Jasraj Shergill](#)

On December 21, 2022, the Canadian federal government released the [Prohibition on the Purchase of Residential Property by Non-Canadians Regulations](#) (the “**Regulations**”)<sup>[1]</sup> made pursuant to Section 8 of the recently enacted [Prohibition on the Purchase of Residential Property by Non-Canadians Act](#) (the “**Act**”).<sup>[2]</sup> The Act prohibits the purchase of residential real estate by non-residents, directly or indirectly, for a two-year period beginning January 1, 2023. The Regulations outline exceptions, definitions and clarifications to the Act. This publication supplements our [previous bulletin](#) circulated on November 3, 2022, and should be read in conjunction with same.

## Who Is Deemed “Non-Canadian”?

Section 2 of the Act defines a *non-Canadian* as:<sup>[3]</sup>

- an individual who is neither a Canadian citizen nor a person registered as an Indian under the *Indian Act* nor a permanent resident;
- a corporation that is incorporated otherwise than under the laws of Canada or a province;
- a corporation incorporated under the laws of Canada or a province whose shares are not listed on a stock exchange in Canada for which a designation under section 262 of the *Income Tax Act*<sup>[4]</sup> is in effect and that is controlled by a person referred to in paragraph (a) or (b); and
- a prescribed person or entity.

Section 2(d) of the Act requires that the Regulations clarify what would constitute a *prescribed person or entity*. Accordingly, the Regulations outline the following as a *prescribed person or entity*.<sup>[5]</sup>

- entities not formed under the laws of Canada or a Canadian province; and
- entities formed under the laws of Canada or a Canadian province that are (a) controlled by entities not formed under the laws of Canada or (b) entities that are controlled by *non-Canadian* individuals or entities, as per Section 2 of the Act.

Both the Act and the Regulation use the word *control* as a tool in determining whether an entity is *non-Canadian*. The “control test” outlined in the Regulations particularly clarifies which corporations and entities are impacted by the Act.

Section 1 of the Regulations defines *control* as, with respect to a corporation or entity:

- direct or indirect ownership of shares or ownership interests of the corporation or entity representing 3% or more of the value of the equity in it, or carrying 3% or more of its voting rights; or
- control in fact of the corporation or entity, whether directly or indirectly, through ownership, agreement or otherwise.

While neither the Act nor the Regulations provide any guidance, the “control in fact” (de facto control) requirement in the definition of *control* has been similarly applied in foreign buyer legislation in British Columbia and Ontario, as well as in British Columbia’s unique *Land Owner Transparency Act*.

Furthermore, while the Act and the Regulations do not define “Entities”, it is clear that the intention was to include partnerships and trusts (in addition to corporations).

## What Is Residential Property?

The Regulations do, however, exclude properties not located within a census agglomeration (“**CA**”) or a census metropolitan area (“**CMA**”) from the definition of Residential Property.<sup>[6]</sup>

The definitions of CA and CMA are derived from the *Standard Geographical Classification (SGC) 2021*, which explains that a CA or CMA is formed:

by one or more adjacent municipalities centred on a population centre (known as the core)... To be included in the CMA or CA, other adjacent municipalities must have a high degree of integration with the core, as measured by commuting flows derived from data on place of work.<sup>[7]</sup>

A CA must have a core population of at least 10,000 based on data from the previous Census of Population Program (“**CPP**”). A CMA must have a total population of at least 100,000, based on data from the then-current CPP and 50,000 or more must live in the core based on adjusted data from the previous CPP.<sup>[8]</sup> Statistics Canada outlines these areas [here](#).

Accordingly, this definition includes many smaller cities, towns and villages across Canada, in addition to major urban centres.<sup>[9]</sup> Additionally, the Regulations widened the reach of the Act to capture land that is available for future residential use by adding to the definition of Residential Property in Section 2 of the Act to include land that does not contain any habitable dwelling, that is zoned for residential use or mixed use, and that is located within a CA or a CMA.<sup>[10]</sup>

## What Purchases Are Excluded?

A *purchase*, for the purposes of the Act, is the acquisition, with or without conditions, of a legal or equitable interest or a real right in a residential property.<sup>[11]</sup> While this definition does not expressly indicate the precise moment in time when the transaction is caught by the Act, it is quite obvious that it was intended to include any transaction upon the parties executing the agreement of purchase and sale even if the transaction is conditional in nature. However, the Regulations do specify Purchases that are not subject to the Act:<sup>[12]</sup>

- the acquisition of residential property resulting from death, divorce, separation or a gift;
- the rental of a dwelling unit to a tenant for the purpose of its occupation by the tenant;

- the transfer under the terms of a trust that was created prior to the coming into force of the Act; and
- the transfer resulting from the exercise of a security interest or secured right by a secured creditor.

## Who Is Exempt From the Requirements?

The Act does not apply to temporary residents within the meaning of the *Immigration and Refugee Protection Act* (“**IRPA**”) who satisfy the following prescribed conditions:<sup>[13]</sup>

1. if they are enrolled in a program of authorized study at a designated learning institution per the *IRPA Regulations*,
  - they filed all required income tax returns under the *Income Tax Act* for the five preceding taxation years,
  - they were physically present in Canada for a minimum of 244 days in each of the five preceding calendar years,
  - the purchase price of the property does not exceed \$500,000, and
  - they have not purchased more than one residential property; or
2. if they hold a work permit pursuant to the *IRPA Regulations*, or are authorized to work under section 186 of the *IRPA Regulations*,
  - they worked in Canada for a minimum period of three years within the preceding four years, if the work is *full-time* work as defined in subsection 73(1) of the *IRPA Regulations*,
  - they filed all required income tax returns under the *Income Tax Act* for a minimum of three of the four preceding taxation years, and
  - they have not purchased more than one residential property.

The Regulations also deem the following to be prescribed classes of persons to whom the Act does not apply:<sup>[14]</sup>

- foreign nationals who hold a passport that contains diplomatic, consular, official or special acceptance issued by the Department of Foreign Affairs, Trade and Development;

- foreign nationals with temporary resident status whose temporary resident visa was issued or temporary resident status was granted pursuant to an exemption under section 25.2 of *IRPA*; and
- persons that have made a claim for refugee protection in accordance with subsection 99(3) of *IRPA*.

Further, the Regulations specify that the prohibition on non-Canadians looking to purchase residential property in Canada is not effective to the extent that the Act is incompatible with the Indigenous rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, which recognizes and affirms Aboriginal and treaty rights of Aboriginal peoples.<sup>[15]</sup>

## Orders To Sell Property

Pursuant to section 7(1) of the Act, if a non-Canadian is convicted of having contravened the Act, the superior court of the province in which the Residential Property is situated may order the property to be sold.<sup>[16]</sup> The Regulations clarify that such order can only be made if the following conditions are met:<sup>[17]</sup>

- the non-Canadian is the owner of the property at the time the order is made;
- notice has been given to every person who may be entitled to receive proceeds from the sale; and
- the superior court of the province is satisfied that the impact of the order would not be disproportionate to the nature and gravity of the contravention, the circumstances surrounding the commission of the contravention, and the resulting conviction.

Orders that are granted under section 7(1) of the Act must provide that the proceeds of the sale are distributed in the following order:

- payment of the costs of the sale, including the costs incurred by the Minister in bringing the application for the order, along with any unpaid fines by the non-Canadian;

- payment to the Canadians who are entitled to receive the proceeds of the sale according to priorities that the superior court may determine;
- the repayment to the non-Canadian of an amount that is not greater than the purchase price they paid for the property; and
- the payment of any amount remaining to the Receiver General for Canada.

## Implications

Neither the Act nor the Regulations impose any compliance requirements related to information collection, processing or reporting by Canadian professionals when dealing with potential non-Canadians. However, any person or entity that counsels, induces, aids or abets a non-Canadian to purchase a residential property in contravention of the Act is liable. The *Regulatory Impact Analysis Statement* that was published with the Regulations creates an expectation that Canadian professionals will establish prudent business practices with respect to the review of information in the course of a business transaction that employs more rigorous due diligence practices in relation to non-Canadians. Unfortunately, there is a lack of helpful guidance as to what is expected in that regard. Real estate professionals such as builders, developers, real estate brokers and agents, and lawyers are advised to broaden their current “know your customer” due diligence systems to ensure compliance with the Act and Regulations over the next two years.

In addition, entities interested in purchasing residential property in Canada should especially pay attention to the definition of *control*. This definition creates a very low threshold and will ultimately capture a far broader group of corporations or entities than was originally expected. Such entities looking to purchase residential property should examine their ownership structure and composition to determine whether this Act will restrict their purchasing power for the next two years.

If you have any questions about how this may impact your business, please contact a member of the [Aird & Berlis Real Estate Group](#).

<sup>[1]</sup> *Prohibition on the Purchase of Residential Property by Non-Canadians Regulations: SOR/2022-250.*

<sup>[2]</sup> *Prohibition on the Purchase of Residential Property by Non-Canadians Act, SC 2022, c 10, s 235.*

<sup>[3]</sup> Section 262 of the *Income Tax Act* gives the Minister of Finance authority to designate a stock exchange, or a part of a stock exchange.

<sup>[4]</sup> *Supra* note 2.

<sup>[5]</sup> *Supra* note 1.

<sup>[6]</sup> *Supra* note 1.

<sup>[7]</sup> Statistics Canada, *Dictionary, Census of Population, 2021 Census metropolitan area (CMA) and Census agglomeration* (Ottawa: Statistics Canada, 2021) <  
<https://www12.statcan.gc.ca/census-recensement/2021/ref/dict/az/Definition-eng.cfm?ID=geo009>> accessed December 27, 2022.

<sup>[8]</sup> *Ibid.*

<sup>[9]</sup> *Ibid.*

<sup>[10]</sup> *Supra* note 1.

<sup>[11]</sup> *Supra* note 1.

<sup>[12]</sup> *Supra* note 1.

<sup>[13]</sup> *Supra* note 1.

<sup>[14]</sup> *Supra* note 1.

<sup>[15]</sup> *Supra* note 1.

<sup>[16]</sup> *Supra* note 2.

<sup>[17]</sup> *Supra* note 1.





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This communication offers general comments on legal developments of concern to business organizations and individuals and is not intended to provide legal advice. Readers should seek professional legal advice on the particular issues that concern them.

# Toronto Vacant Home Tax Occupancy Declarations Due Before February 2, 2023

By: [Brodie Kirsh](#) and [Megan Lambert](#)

In 2021, the City of Toronto introduced an annual tax to be levied on vacant Toronto residential property, payable beginning in 2023. A Vacant Home Tax of one per cent (1%) of the Current Value Assessment of the property will apply to residences that are vacant or deemed vacant. Residential property is considered vacant where the property has been unoccupied for a total of six months throughout the previous year or is otherwise deemed vacant under the City of Toronto [bylaw](#) unless an eligible exemption applies. Eligible exemptions include the death of the registered owner and where the principal resident is in a hospital, long-term or supportive care facility.

**All residential property owners in Toronto** are required to declare the occupancy status of their property or properties, even if the property is occupied. The City of Toronto has sent yellow notices by mail containing the information required to make a declaration.

A late declaration or failure to make a declaration will result in a minimum fine of \$250 and may result in your property being deemed vacant. Once deemed vacant, your property will be subject to the Vacant Home Tax and you will be issued another notice. The declaration of occupancy status is made through the City of Toronto's [online declaration portal](#) or a paper declaration form that can be obtained by contacting [311 - Toronto at Your Service](#). The paper declaration form must be completed and received by the City of Toronto before February 2, 2023.

If you have any questions or would like more information on the Vacant Home Tax, please contact a member of our [Tax Group](#).



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# Canada's Prohibition on Foreign Home Buyers Knocking on the Door

By: [Norman I. Kahn](#), [Kristian N. Arciaga](#), [Jennifer Glied-Goldstein](#) and [Jasraj Shergill](#)

Canada's Parliament recently passed the [Prohibition on the Purchase of Residential Property by Non-Canadians Act](#) (the "**Act**"), which has prohibited the purchasing of residential real estate by non-residents, directly or indirectly, for a two-year period beginning January 1, 2023.<sup>1</sup> Individuals who do not have Canadian citizenship or permanent residency will not be able to purchase Canadian residential real estate during this two-year window, unless liability under the agreement of purchase and sale is assumed prior to January 1, 2023.<sup>2</sup>

## Who Is Deemed "Non-Canadian"?

For the purposes of the Act, a "non-Canadian" is defined as follows:<sup>3</sup>

- an individual who is not:
  1. a Canadian citizen,
  2. a person registered as an Indian under the *Indian Act*, or
  3. a permanent resident of Canada;
- a corporation that has not been incorporated in Canada;
- a corporation incorporated in Canada that is controlled by foreign corporations or foreign individuals; and
- a prescribed person or entity pursuant to regulations.

“Control” of a corporation has not yet been defined in the Act, but is expected to be fleshed out in the regulations.

## **What Type of Properties Are Affected?<sup>4</sup>**

Non-Canadians will not be able to purchase detached houses or similar buildings that contain up to three dwelling units. Semi-detached houses, rowhouse units, residential condominium units, or any part of these buildings that are intended to be owned separately from other units in the building are also captured. Notably, detached houses that contain more than three dwelling units are not captured by the Act.

## **Exceptions to the Act<sup>5</sup>**

The following are exempt from the application of the Act:

- temporary residents within the meaning of the *Immigration and Refugee Protection Act*;<sup>6</sup>
- non-Canadians who purchase residential property in Canada with their spouse or common-law partner, if the spouse or common-law partner is:
  1. a Canadian citizen,
  2. a person registered as an Indian under the *Indian Act*, or
  3. a permanent resident of Canada; and
- foreign states that purchase residential property in Canada for diplomatic or consular purposes.

## **Offences and Penalties<sup>7</sup>**

Under the Act, every non-Canadian that contravenes the Act and every “person or entity” that “counsels, induces, aids or abets or attempts to counsel, induce, aid or abet” the contravention of the Act is: (1) guilty of an offence and (2) is liable on summary conviction to a maximum fine of \$10,000.

Directors, officers, senior officials and managers of corporations can also be found liable if they aid or authorize a corporation to commit or aid in the offence, whether the

corporation has been prosecuted or convicted. The superior court of the province in which the residential property is located may also, on application by the Minister, order the property to be sold in a manner and with conditions to be addressed in supporting regulations. Furthermore, upon the court-ordered sale of the property, the non-Canadian purchaser would not receive more than the amount paid for the property, and may even receive less.

This offence provision of the Act imposes a broad range of liability that is not limited to the contracting parties of an agreement of purchase and sale. It is currently unclear whether and under what circumstances any non-contracting party that is involved in a transaction, such as developers, mortgage agents, professional advisers, lawyers and others, may be considered to have been counselling, inducing, aiding, or abetting the contravention of the Act.

## **Takeaways for Developers, Vendors and Purchasers**

Agreements of purchase and sale entered into that do not comply with the Act will not be deemed invalid simply due to such contravention of the Act.<sup>8</sup> In effect, contracting parties will still be required to adhere to their contractual legal obligations. It may be prudent for contracting parties to negotiate contractual terms regarding the validity of agreements of purchase and sale contravening the Act. For example, participants in Canadian residential real estate transactions may seek to include contractual provisions confirming whether the purchasers are residents within the meaning of the Act and involve ancillary documents, such as requiring a statutory declaration or other evidence.

Developers, mortgage agents, real estate agents, lawyers and others should inform their respective staffs of the requirements of the Act to avoid potential liability by inadvertently entering into agreements of purchase and sale with non-Canadians. However, until the regulations are released, it is still unclear as to where the requirements of the Act and the scope of liability extend.

Meanwhile, the Act could face constitutional challenges on the basis that property rights fall under the purview of provincial governments, pursuant to Section 92 of the *Constitution Act, 1867*.

Many details about the applicability and enforceability of the Act are to be set by regulations in the coming months. The Aird & Berlis Real Estate Group will continue to monitor further developments. Please contact a member of the group for more information.

---

<sup>1</sup> *Prohibition on the Purchase of Residential Property by Non-Canadians Act*, SC 2022, c 10, s 235.

<sup>2</sup> *Ibid*, s 5.

<sup>3</sup> *Ibid*, s 2.

<sup>4</sup> *Ibid*.

<sup>5</sup> *Ibid*, s 4(2).

<sup>6</sup> Subject to the satisfaction of prescribed conditions.

<sup>7</sup> *Ibid*, s 6.

<sup>8</sup> *Ibid*, s 5.



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**TAB 8**

# 13<sup>th</sup> Business Law Summit

Drafting Pitfalls and Techniques to Avoid Them  
(PowerPoint)

**Angela Swan**  
*Aird & Berlis LLP*

November 9, 2023





LAW SOCIETY OF ONTARIO

# Drafting Pitfalls and Techniques to Avoid Them

November 9, 2023

Angela Swan

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AIRD BERLIS

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The goal of the drafter is well set out by Boswell, *The Life of Samuel Johnson*, Vol. 1 (London & Toronto: J.M. Dent & Sons, 1925) p. 192:

- We have here an example of what has been often said, and I believe with justice, that there is for every thought a certain nice adaptation of words which none other could equal, and which, when a man has been so fortunate as to hit, he has attained, in that particular case, the perfection of language.



---

Remember that a well-drafted agreement creates, controls and reduces or limits the expectations that the parties may have from entering into the contract. It is as important to limit a party's expectations as it is to create them.

“Yes, I'm going to sell you a car; but no, I'm not going to promise that it's a good car, so be warned.”



---

Contractual relations run into problems in many different ways but I want to focus principally on the problems that can be avoided by careful drafting.

Problems created by changed or unforeseen circumstances can be exacerbated by bad drafting but good drafting can't always avoid them.



---

Recitals are extremely important. They help the reader, particularly one who comes to the agreement with no familiarity with its background – as would a judge – quickly understand what is going on.

Ignore the (wrong-headed and very technical) argument that they do not form part of the agreement.

Use them to explain the genesis and purpose of the agreement and its relation to other agreements that exist or will exist.



---

Use defined terms.

See them as a result of a process of factorization, *i.e.*, as reducing the length and complexity of an agreement by permitting a single word or phrase to replace a much longer one which may have to be used more than once in the agreement.

Remember the convention that defined terms have an initial upper case letter.

Remember first-year contracts.

## 8.1 Indemnities

(1) Seller agrees to indemnify and save Buyer, its directors, officers and employees (together, the “Buyer’s Indemnified Parties”) harmless from and against any claims, demands, actions, causes of action, damage, loss, deficiency, cost, liability and expense which may be made or brought against the Buyer’s Indemnified Parties or which the Buyer’s Indemnified Parties may suffer or incur as a result of, in respect of or arising out of:

...

Is the promise to the Buyer’s Indemnified Parties enforceable?

Third party beneficiary problems exist in a great many agreements and some poor third party beneficiary will be sadly disappointed (and probably very angry) when her or his claim is rejected.



---

You might have to add something like this:

For the purpose of making the Seller's promise to indemnify the Buyer's Indemnified Parties enforceable, the Seller and Buyer acknowledge that the Buyer is acting as the agent and trustee for its indemnified parties.

There is no harm in and much to be gained by saying explicitly what you want to happen.



---

Consider simple drafting techniques that can enhance the precision of your drafting:

- 1 it may sometimes be easiest to use mathematical formulæ;
- 2 “sculpting” your language may make the sense of what you are saying much clearer;
- 3 be prepared to give reasons for the provision you are drafting;
- 4 remember that something can be defined as the sum of other things ( $X = A + B + C$ ) or as the difference between things ( $A = X - B - C$ ).



---

Which is easier to read:

PLEASE READ THE FOLLOWING CLAUSES CAREFULLY. THEY DEAL WITH IMPORTANT ASPECTS OF THE UNDERTAKINGS OF THE SUPPLIER UNDER THIS AGREEMENT,

or

**Please read the following clauses carefully. They deal with important aspects of the undertakings of the Supplier under this agreement?**

It has been shown that ALL CAPS is much harder to read than ordinary text.

Avoid incoherence:

**Section 10.1 Indemnification Obligations of the Sellers.** Notwithstanding the Closing, the Sellers covenant and agree, jointly and severally, to indemnify, defend and hold the Purchasers and their Affiliates, directors, managers, officers, employees, equity holders, successors and assigns (collectively, the “Purchaser Indemnitees”) harmless from and against all (collectively, “Damages”) losses, Liabilities, demands, claims, actions or causes of action, regulatory, legislative or judicial proceedings or investigations, assessments, levies, fines, penalties, damages, costs and expenses (including reasonable attorneys’, accountants’, investigators’, and experts’ fees and expenses) incurred in connection with the defence or investigation of any claim but excluding *unforeseeable, speculative, special, indirect, consequential, exemplary and punitive damages* (except to the extent that a Purchaser Indemnitee pays any such damages to a Third Party) sustained or incurred by any Purchaser Indemnitee arising from or related to:...

(Emphasis added.)



---

Leaving the third party beneficiary issue aside, the limitation of liability in the indemnity is incoherent. First note the inconsistency between this part of the section:

... losses, Liabilities, demands, claims, actions or causes of action, regulatory, legislative or judicial proceedings or investigations, assessments, levies, fines, penalties, damages, costs and expenses (including reasonable attorneys', accountants', investigators', and experts' fees and expenses)...

and the limitation of liability:

... excluding unforeseeable, speculative, special, indirect, consequential, exemplary and punitive damages...

Are you clear what is included and what's excluded? And, by the way, if you can't exclude an obligation to perform in good faith — *Bhasin v. Hrynew* — how can anyone possibly imagine that you can exclude liability for punitive damages?



Some practical problems to avoid.



---

Beware of “null and void”.

An agreement provided:

SHOULD there be any default other than the payment of the monthly sums, the Vendor, before he takes default proceedings will give written notice to the Purchaser of the default who will have two (2) months to correct and provide proof of correction to the Vendor otherwise the Vendor is entitled to retake possession of the premises and *this agreement of purchase and sale will be null and void.*

(Emphasis added.)

The court held that the vendor, though entitled to retake possession on the Purchaser’s default, could not claim damages; the contract, being “null and void” on the Purchaser’s breach, was rescinded and no right to claim damages remained.



---

It would be better to say, whether the point comes up with a condition precedent or a default, that the party who has still to perform but who is either protected by the condition precedent or is the non-defaulting party, is simply “excused from further performance”. This achieves what the vendor wanted in my example without threatening the vendor’s right to sue the purchaser for damages for breach of contract.

In other words, express what is to happen in terms of the parties’ obligations, *i.e.*, whether they are excused or not, and not in legal terms or conclusions.



---

Avoid creating problems later on:

- 1 draft termination provisions with great care;
- 2 use the concept of “events of default”;
- 3 provide for notice of default and a cure period;



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Remember that notice of termination does not have to be an express term of an agreement; the law generally provides that any agreement that is without term may be terminated on reasonable notice.



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Events of default deal with the endemic problems of anticipatory breach. The specification of an event of default goes some way to avoid the uncertainty when a solicitor has to advise his or her client what to do in the face of a breach by the other side.

An event of default should define what breach is an “event of default” and say what should happen. Depending on the gravity of the breach, the occurrence of the event of default may permit one party to terminate the relation and claim to be excused from further performance or such other less drastic remedy as will protect the innocent party.



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The provision of cure periods permits one of the parties to bring an allegation of breach to the other's notice without triggering any obligation then to take any irrevocable steps. The period also allows the party to whom the notice was given to dispute the breach before things spiral out of control.

A cure period is good evidence that your client was reasonable and willing to act so as to preserve the relation.



---

Avoid “should” and “must” with respect to the parties’ obligations or options; say either “shall” or “may”. “Must” can be used to describe a condition: “The City’s approval must be obtained by ...”. Even in this situation, I’d prefer to say, “If the City’s approval is not obtained by ..., the Buyer may ...”. In other words, spell out exactly what may happen when the event described does or does not happen. This form of words is particularly important if you are worried about the law on “conditions precedent”.



---

Consider what the agreement is for or who its readers will be. Will it be read principally by lawyers or by the parties' employees? Is it, for example, to accomplish one step in a transaction or is it to set out the terms upon which a relation will be based and to which the parties can refer to find out what they have to do during the term of the relation?



---

Avoid legal jargon and affectations. There is never a justification for saying “said corporation” or “said party”. There is equally no need ever to say, “herein”, “hereinbefore”, “hereinafter”, etc.

Avoid “in the event that”, say “if”. Avoid “in the event of”, say “in”.

There is never a need to say, “Party of the First Part”, etc. Those terms became obsolete when the handwritten indenture was replaced by the typewriter.



---

The best advice that I can give is to think what you want to say and then say it. If you are not clear in your thinking, in what you want to say, what you draft won't be clear.

# Thank You

Presented by:

**AIRD BERLIS**



**Law Society**  
of Ontario

**Barreau**  
de l'Ontario

**TAB 9**

# 13<sup>th</sup> Business Law Summit

Cybersecurity and Privacy (PowerPoint)

**Imran Ahmad**

*Norton Rose Fulbright Canada LLP*

November 9, 2023





# Cybersecurity and Privacy

**Imran Ahmad, Partner**

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November 2023

Norton Rose Fulbright Canada LLP



# Current trends



# Current trends

- **Ransomware attacks**
  - Double extortion attacks remain prevalent however, data hostage attacks emerging
  - In 2021, more than half of all Canadian ransomware victims were in the critical infrastructure sector
  - Financial losses due to operational disruption and litigation
  - Increased Threat Actor sophistication – disabling security solutions, destroying backups
  - Malware-as-a-Service
- **Nation-state intrusions:** Growing frequency and severity, often with the aim of carrying out monitoring/ profile building/ IP theft / financial gain
- **Climate of regulatory sensitivity:** Leading to over-reporting of personal data breaches, with potentially harmful consequences
- **A more activist/aggressive approach from regulators and customers:** Highlights the importance of legal involvement and safeguarding legal privilege

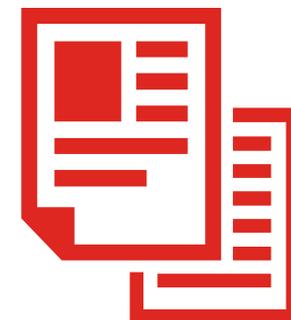
# Legislative updates



# Legislative updates

## Quebec's new Bill 64 adopted in September 2021

- New obligations coming in 2022, 2023, 2024
- Only applies to information that can be used to identify individuals
- September 2022
  - Obligation to notify regulator and individuals of data incidents if there's a risk of harm
  - Businesses must appoint a person in charge of the protection of personal information: responsible for ensuring legal compliance
- September 2023
  - Develop and publish data protection and confidentiality policies
  - Assessment of privacy related factors
  - Increased penalties and fines – up to \$25,000,000 or 4% of worldwide revenue
- September 2024
  - Data portability rights



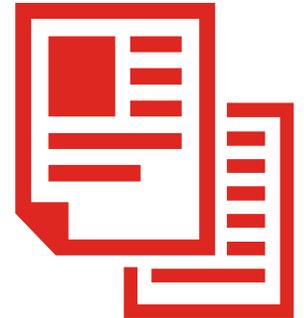
# Legislative updates (Continued)

## Ontario

- Still no provincial private-sector privacy law as of yet
- *White Paper on Modernizing Privacy in Ontario*
  - Expanded scope under a potential Ontario legislation
  - Plain language requirements
  - Nothing regarding breach of security safeguards

## British Columbia

- *Freedom of Information and Protection of Privacy Amendment Act*
  - Changes to public-sector privacy law
  - Mandatory breach reporting
  - Overseas data transfers
  - Application fees
  - Lots of opposition



# Effective Response

The image is a composite of two distinct visual styles. The left half features a dark, almost black background with a complex network of thin, light-colored lines and nodes. Some nodes are highlighted with small, glowing icons, and there are faint numerical values like '711.43' and '168.6' scattered throughout. A horizontal dotted line is positioned near the top of this section. The right half of the image shows a close-up, low-angle view of a blue, crystalline or geometric structure. The structure is composed of many sharp, angular facets that reflect light, creating a sense of depth and complexity. The overall aesthetic is futuristic and technological.

# Role of External Legal Counsel

## Coordinate Breach Response

- Containment
- Restoration & Remediation
- Forensics

## Retain Vendors

- Digital Forensics
- Crisis Communications
- Data mining
- Credit monitoring

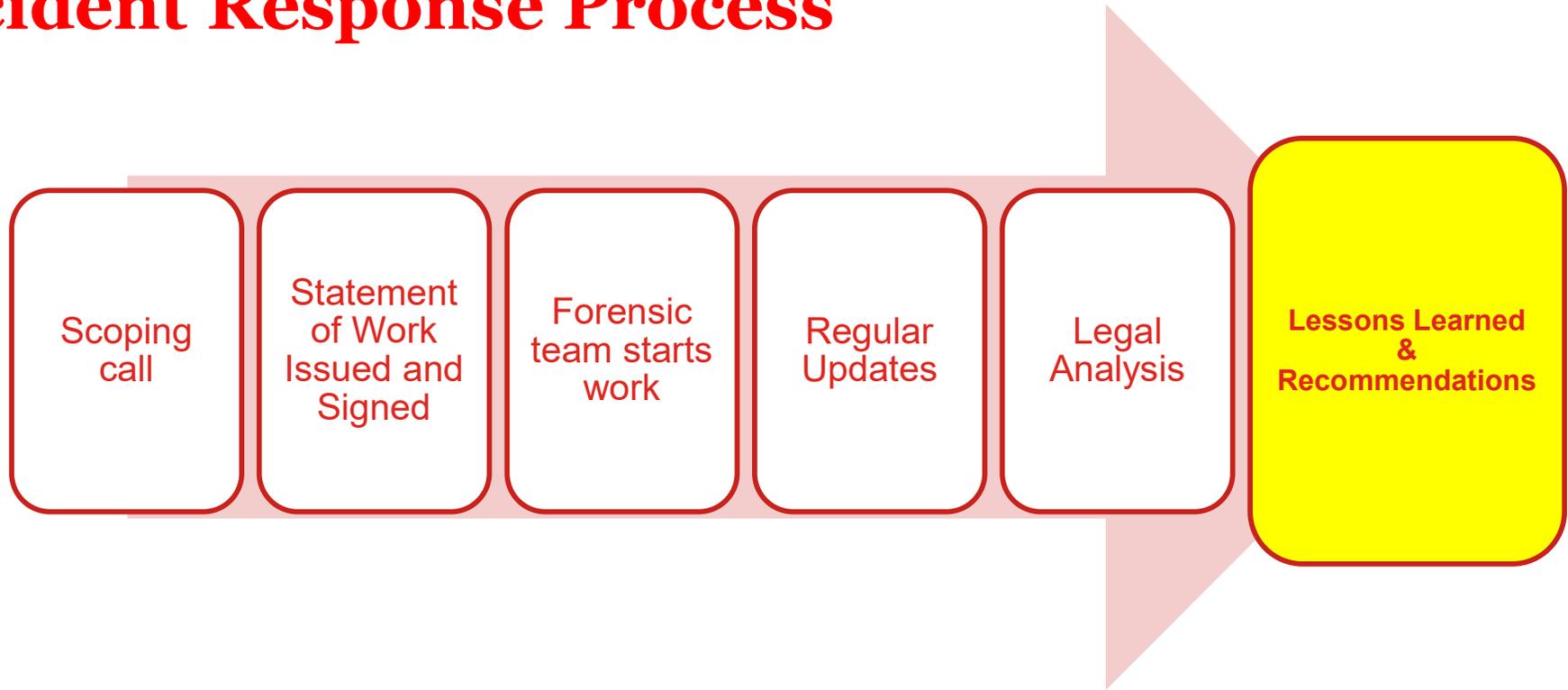
## Legal/Regulatory

- Notifications to affected parties
- Reports to regulators
- Business partners
- Litigation/Regulatory investigations

## Other

- Asserting legal privilege (where appropriate)
- Communications protocols
- Coordinating with law enforcement
- Cross border issues

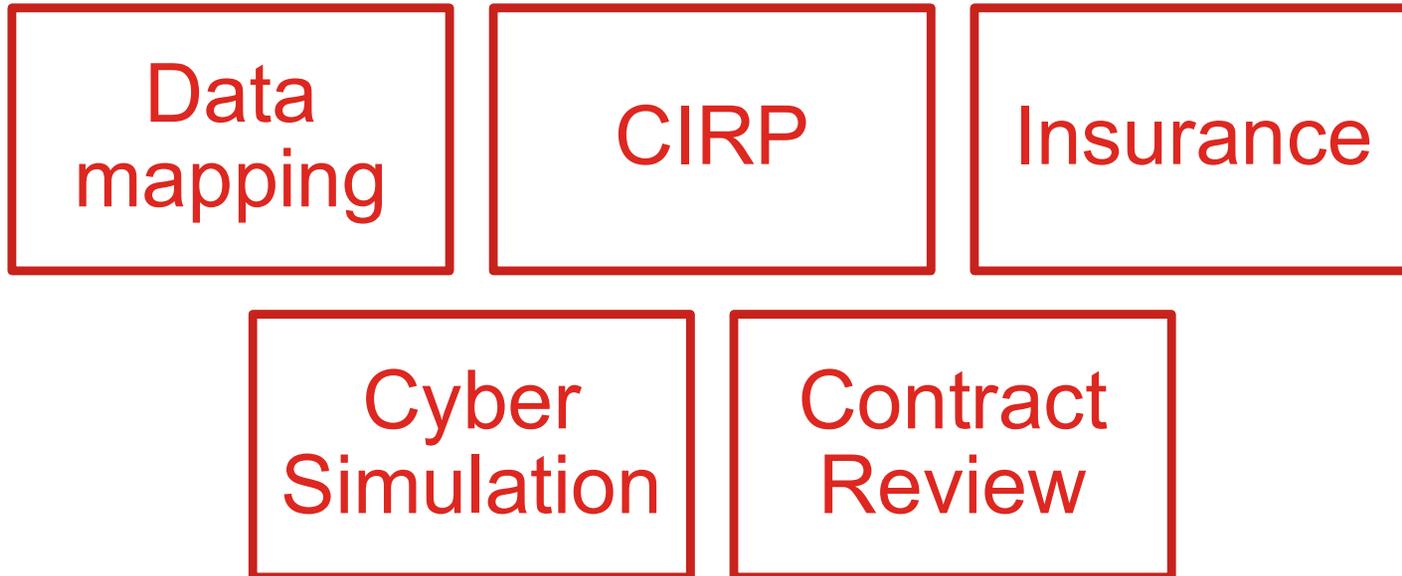
# Incident Response Process



# Common Challenges

<b>Challenges</b>	<b>Impact</b>
Data assets not mapped	<ul style="list-style-type: none"><li>• Unclear whether hackers accessed/stole data</li><li>• Inconclusive findings</li></ul>
Cyber response protocol not followed/known	<ul style="list-style-type: none"><li>• <i>Ad hoc</i> response</li><li>• Not following protocol required under insurance</li><li>• Rights experts not engaged</li></ul>
Contractual requirements related to cyber not known	<ul style="list-style-type: none"><li>• Delayed notification to business partners</li><li>• Loss of trust</li></ul>
Communication strategy unclear	<ul style="list-style-type: none"><li>• Stakeholders not identified (internal, external, frequency &amp; content)</li></ul>

# Top Five Quick Wins



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# Questions

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