



Coronavirus Guidance

This Coronavirus Guidance for Canada features select content that addresses emerging issues in the following practice areas:

- Employment
- Commercial
- Corporate and Private M&A
- In-House Counsel
- Capital Markets and M&A
- Intellectual Property & Technology
- Finance
- Litigation and Dispute Resolution
- Insolvency & Restructuring
- Family Law
- Wills, Trusts & Estates

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Current as of: 05/05/2020

The World Health Organization (“WHO”) has now characterized the novel coronavirus (“COVID-19”) as a pandemic. As this is not just a public health crisis but one that will touch every sector, businesses, organizations and the legal community must also be prepared. This practice note provides an overview of practical guidance on COVID-19 covered in many practice area offerings in Lexis Practice Advisor, including Employment, Commercial, Corporate and Private M&A, In-House Counsel, Capital Markets & M&A, Intellectual Property and Technology, Finance, Personal Injury and Litigation and Dispute Resolution. It will be updated regularly with new content additions.

Employment

Employers have statutory obligations to provide safe and healthy workplaces for their employees. Accordingly, employers must take into account a number of considerations when dealing with workplaces amid the COVID-19 outbreak, including emergency/pandemic policies, health and safety obligations, and secure access to the workplace. Some employers may implement work from home arrangements; those that do not may face work refusals from employees. Additionally, employers have privacy, discrimination and accommodation issues to take into account. Employers must juggle various competing interests in these scary times, including their obligations to maintain a safe workplace, the rights of employees to take a leave of absence and/or refuse work, and their need to protect their businesses and prevent serious financial loss.

Practical Guidance Documents	Notes	Practical Guidance Content Type
<u>COVID-19: Employment-Related Considerations</u>	Provides best practices for managing employees during the COVID-19 outbreak.	Practice Note
<u>Workplace Health and Safety in Canada</u>	Provides an overview of workplace health and safety in Canada.	Practice Note
<u>Occupational Health and Safety Laws (ON)</u>	Discusses specific health and safety laws in Ontario and employers' obligations under these laws to provide a healthy and safe work environment	Practice Note
<u>Occupational Health and Safety Laws (Federal)</u>	Discusses specific health and safety laws in federal jurisdictions and employers' obligations under these laws to provide a healthy and safe work environment.	Practice Note

<u>Occupational Health & Safety Posting Obligations across Jurisdictions</u>	Outlines the materials that employers must post to meet occupational health and safety law obligations across Canada.	Table
<u>Health and Safety Policy (Occupational Health and Safety)</u>	Provides an example of an occupational health and safety policy.	Precedent
<u>Workplace Health and Safety Policy</u>	Provides an example of a company's workplace health and safety policy.	Precedent
<u>Constructive Dismissal</u>	Discusses the concept of constructive dismissal, including the test for constructive dismissal and strategies for employers to make changes to terms and conditions of employment without it being considered a constructive dismissal.	Practice Note
<u>Temporary Layoffs at Common Law</u>	Discusses the availability of temporary layoffs at common law and when it may constitute a constructive dismissal.	Practice Note
Individual Termination Notice Requirements by Jurisdiction	Reviews the individual termination provisions and notice requirements in employment standards legislation in Canada.	Table
Individual Termination Notice Requirements: Exceptions by Jurisdiction	Reviews the exceptions to employers' requirements to provide termination notice across Canada.	Table
<u>Group Termination and Notice Requirements by Jurisdiction</u>	Reviews the group termination and notice requirements in employment standards legislation in Canada.	Table
<u>Group Termination and Notice Requirements: Exceptions by Jurisdiction</u>	Reviews the exceptions to employers' requirements to provide notice of group terminations across Canada.	Table
<u>Employment Insurance in Canada</u>	Reviews the employment insurance system in Canada, including eligibility, benefits, and work-sharing programs.	Practice Note
<u>Employee Personal Information Management</u>	Reviews how employers should limit the collection and disclosure of employee personal information.	Practice Note

<u>Employees' Right to Privacy (ON)</u>	Reviews the rights of employees to workplace privacy in Ontario.	Practice Note
<u>Employer's Right to Intrude on Employees' Privacy (ON)</u>	Reviews the right of employers in Ontario to intrude upon the privacy of their employees in the workplace.	Practice Note
<u>Personal Information Protection and Electronic Documents Act</u>	Reviews an employer's obligations under the <i>Personal Information Protection and Electronic Documents Act</i> , S.C. 2000, c. 5.	Practice Note
<u>Privacy Legislation by Jurisdiction</u>	Provides an overview of the privacy legislation governing the private sector, public sector and health information across Canada.	Table
<u>Privacy Compliance Checklist</u>	Outlines the key steps that an employer should take to ensure that it is in compliance with its privacy obligations to its employees.	Checklist
<u>Privacy Policy (Personal Information of Employees)</u>	Provides an example of a privacy policy to be used in the workplace.	Precedent
<u>Work Refusal Process Flowchart</u>	Outlines the process where a worker refuses to work because he or she has reason to believe that work endangers health or safety.	Flowchart
<u>Bilateral Stop Work Process Flowchart</u>	Outlines the process where either a supervisor or worker believes that dangerous circumstances exist in the workplace and need to be investigated, or believes that work endangers health and safety, so work is stopped.	Flowchart
<u>Work Refusals Checklist</u>	Outlines how an employer should document and respond to occupational health and safety work refusal.	Checklist
<u>Sick Leave</u>	Discusses employees' entitlement to a leave of absence for medical purposes, pursuant to employment standards legislation in federal, Alberta and Ontario jurisdictions.	Practice Note

<u>Sick Leave by Jurisdiction</u>	Sets out the minimum amount of sick leave employees are entitled to under applicable employment standards legislation across Canada.	Table
<u>Short-Term Illness Leave Policy</u>	Provides a sample sick leave policy.	Precedent
<u>Critical Illness Leave</u>	Discusses employees' entitlement to a leave of absence to care for a family member that is critically ill, pursuant to employment standards legislation in federal, Alberta and Ontario jurisdictions.	Practice Note
<u>Critical Illness Leave by Jurisdiction</u>	Sets out the minimum amount of critical illness leave employees are entitled to under applicable employment standards legislation across Canada.	Table
<u>Critical Illness Leave Policy</u>	Provides a sample critical illness leave policy.	Precedent
<u>Compassionate Care Leave</u>	Discusses employees' entitlement to a leave of absence to provide care or support to a family member, pursuant to employment standards legislation in federal, Alberta, British Columbia, and Ontario jurisdictions.	Practice Note
<u>Compassionate Care Leave by Jurisdiction</u>	Sets out the minimum amount of compassionate care leave employees are entitled to under applicable employment standards legislation across Canada.	Table
<u>Compassionate Care Leave Policy</u>	Provides a sample compassionate care leave policy.	Precedent
<u>Personal and Family Responsibility Leave</u>	Discusses employees' entitlement to a leave of absence to deal with personal and/or family responsibilities, pursuant to employment standards legislation in federal, Alberta, British Columbia and Ontario jurisdictions.	Practice Note
<u>Family Responsibility Leave by Jurisdiction</u>	Sets out the minimum amount of family responsibility leave employees are entitled to under	Table

	applicable employment standards legislation across Canada.	
<i>Family Caregiver Leave Policy</i>	Provides a sample family caregiver care leave policy.	Precedent
<i>Leaves of Absence by Jurisdiction</i>	Outlines the various leaves of absence across Canada and the minimum entitlements to such leaves.	Table
<i>Building Security Policy</i>	Provides an example of a company's building security policy.	Precedent
<i>Visitors in the Workplace Policy</i>	Provides an example of a company's policy with respect to visitors in the workplace.	Precedent
<i>Declared Emergencies and Infectious Disease Emergencies Leave (ON)</i>	Discusses employees' entitlements to an unpaid leave of absence in the case of a declared emergency, including as a major disease outbreak such as COVID-19.	Practice Note
<i>Emergency and Fire Policy</i>	Provides an example of a policy outlining a company's procedures in the case of emergency, such as a pandemic illness, and/or fire.	Precedent
<i>Emergency Response Plan</i>	Provides an example of a company's emergency response plan, such as what to do in the context of a major disease outbreak.	Precedent
<i>Emergency Action Plan Checklist</i>	Outlines considerations to take into account when developing an emergency action plan.	Checklist
<i>Telework Agreement</i>	Provides an example of an agreement between an employer and employee whereby the employee works remotely, usually from home.	Precedent
<i>Accommodation</i>	Provides an overview of an employer's obligation to accommodate employees in the workplace, to the point of undue hardship.	Practice Note
<i>Accommodating Disability</i>	Discusses employers' obligations to specifically accommodate employees' disabilities.	Practice Note
<i>Discrimination</i>	Discusses discrimination generally, including what is	Practice Note

	considered to be discrimination and the types of discrimination.	
<u>Accommodation Checklist</u>	Outlines the considerations when assessing an employer's accommodation policies and whether they are sufficient.	Checklist
<u>Accommodation Flowchart</u>	Outlines the general process for accommodating an employee with a disability, to the point of undue hardship.	Flowchart
<u>Accommodation: Duties and Responsibilities in the Accommodation Process Checklist</u>	Outlines the responsibilities of an employee, employer, and union/professional association, if applicable, in the accommodation process.	Checklist
<u>Human Rights Legislation: Prohibited Grounds of Discrimination by Jurisdiction</u>	Reviews the prohibited grounds of discrimination in human rights legislation across Canada.	Table
<u>Accommodation Policy (ON)</u>	Provides an example of a company's policy for accommodating employees.	Precedent
<u>Record-Keeping Requirements by Jurisdiction</u>	Discusses employers' responsibilities with respect to maintaining employment records pursuant to employment standards legislation in federal, Alberta, British Columbia, and Ontario jurisdictions.	Table
<u>Legal Risks May Lurk In Employers' Coronavirus Response</u>	Discusses legal risks of preventative measures to safeguard against the spread of coronavirus.	Article
<u>Lawyer's Daily: COVID-19: Employer, employee give and take</u>	Looks at employer obligations during COVID-19 including a consideration of employee travel, self-isolation and employment insurance.	Article
<u>Lawyer's Daily: Canadian employers facing challenges over COVID-19</u>	Discusses challenges faced by employers as a result of COVID-19.	Article
<u>Lawyer's Daily: COVID-19 relief bill gets royal assent; wage subsidies boosted to \$52 billion from \$27 billion</u>	Provides an overview of the numerous measures taken by the federal government to protect Canadians in the response to COVID-19, including protections for employees, pursuant to Bill C-13, An Act respecting certain	Article

	measures in response to COVID-19, which received Royal Assent on March 25, 2020.	
Canada: Cross Country Survey of Changes to Workers' Compensation System in Response to COVID-19	Reviews the changes to workers' compensation systems in response to the COVID-19 crisis.	Article

Commercial

The impact of the COVID-19 pandemic on commercial transactions has become readily apparent. Events are being cancelled or postponed, parties in the supply chain are unable to secure necessary materials and supplies, distribution and shipping channels have been disrupted, and there are shortages in the labour force, among other negative consequences. Lawyers should look closely at all the transactions and contracts they enter into to ensure that their clients' interests are protected. A careful review of contracts must also be undertaken to determine actions with respect to clients' agreements in light of the COVID-19 situation.

Lexis Practice Advisor Documents	Notes	Lexis Practice Advisor Content Type
Coronavirus and Force Majeure Checklist	Provides guidance on issues and measures counsel should consider when determining the applicability of the coronavirus with respect to force majeure clauses in your clients' commercial contracts.	Checklist
Force Majeure Clauses Explained	Discusses the purpose and general interpretation of force majeure clauses which specify events that excuse performance or absolve a party from liability for non-performance and typically refer to circumstances beyond the parties' control.	Practice Note
Force Majeure Clause	Provides a force majeure clause.	Clause
Amendments Clauses Explained	Discusses the inclusion of an amendments clause intended to eliminate oral agreements to amend, thereby reducing the uncertainty that may arise from such amendments.	Practice Note
Amendment Clause	Provides an amendment clause.	Clause
"Best Efforts" Clauses Explained	Looks at the purpose, meaning and interpretation of "best efforts" clauses in a contract, as well as how "best efforts" is	Practice Note

	measured and determined in the context of an agreement.	
<u>Commercially Reasonable Efforts Clauses Explained</u>	Identifies the purpose and main principles of contractual obligations subject to “commercially reasonable efforts”, establishes the standard for the interpretation of such clauses, and sets out the difference between commercially reasonable efforts and best efforts clauses.	Practice Note
<u>Best Efforts / Reasonable Efforts Clause</u>	Provides a best efforts clause.	Clause
<u>Exclusion or Exemption Clauses Explained</u>	Looks at exclusion and exemption provisions in a contract which serve to limit or exclude the liability a party would otherwise face for breach of contract.	Practice Note
<u>Exclusion or Exemption Clause</u>	Provides an exclusion clause.	Clause
<u>Further Assurances Clauses Explained</u>	Discusses the inclusion of a further assurances clause in an agreement to cure defects or cover matters that may not have been expressly dealt with in the agreement.	Practice Note
<u>Further Assurances Clause</u>	Provides a further assurances clause.	Clause
<u>Penalty Clauses (Stipulated Remedy Clauses Specifying Damages) Explained</u>	Discusses the enforceability of penalty clauses in a contract which specify a remedy in the event of a breach of that contract.	Practice Note
<u>Waiver Clauses Explained</u>	Discusses the inclusion of a waiver clause in an agreement to ensure that a party's failure to strictly enforce contractual rights does not constitute a waiver of those rights or remedies.	Practice Note
<u>Waiver Clause</u>	Provides a waiver clause.	Clause
<u>Survival Clause</u>	Provides a survival clause to ensure that the parties' desire for a right or obligation to continue after termination or expiration of the agreement is expressly stated in the contract.	Clause

<u>Termination Clause</u>	Provides a termination clause.	Clause
<u>Termination and Reverse Break Fee Clause</u>	Provides a sample termination and reverse break fee clause.	Clause
<u>Defence: Frustration of Contract</u>	Discusses the circumstances when a contract is frustrated and the legal effects.	Practice Note
<u>Commercial Contracts in International Jurisdictions</u>	Provides links to international guides addressing essential aspects of commercial contracts law and policy.	Practice Note
<u>Healthcare Enforcement and Litigation in International Jurisdictions</u>	Provides links to international guides on how government agencies around the world regulate and investigate the healthcare industry.	Practice Note
<u>Life Sciences in International Jurisdictions</u>	Provides links to international guides on healthcare systems, as well as their pharmaceutical regulatory regimes.	Practice Note
<u>The COVID-19 Crisis and Franchisors</u>	Examines the consequences of the Coronavirus pandemic on franchises and discusses what franchisors should be considering during this time and the changes they should be making to their systems.	Practice Note

Corporate and Private M&A

COVID-19 is expected to have an impact on the ability of corporations to hold in person meetings, and it may be necessary to consider alternative forms of communication. In addition, corporations, their directors, officers and other representatives will need to consider liability implications under occupational health and safety laws, should workers become ill at this time.

Transactions may also be impacted, and corporations should be mindful of the implications of termination, including the break fees which may apply in such circumstances.

Practical Guidance Documents	Notes	Practical Guidance Content Type
<u>COVID-19: Business Considerations Checklist</u>	This checklist reviews key considerations for businesses addressing the COVID-19 pandemic. Items covered include business emergency and continuity plans, director duties, meetings and other corporate requirements, occupational	Checklist

	health and safety, force majeure, M&A, commercial leasing, existing credit facilities, IT and cybersecurity, privacy and immigration.	
<i>Annual General Meeting</i>	Summarizes the statutory provisions governing the annual general meeting of shareholders, including the procedure for calling the meeting and the requirements for holding the meeting.	Practice Note
<i>Virtual and Hybrid Meetings (Non-profit Corporations): Jurisdictional Comparison Table (Canada, AB, BC, ON)</i>	Outlines requirements for virtual and hybrid member and director meetings under various statutes.	Table
<i>Shareholder Meetings and Resolutions (CBCA)</i>	Provides guidance with respect to shareholder meetings, including meetings by electronic means.	Practice Note
<i>Director Meetings and Resolutions (CBCA)</i>	Provides guidance with respect to director meetings, including meetings by electronic means.	Practice Note
<i>Shareholder Meeting Procedure (OBCA)</i>	Provides guidance with respect to the procedure at shareholder meetings, including meetings by electronic means.	Practice Note
<i>Director Meeting Procedure (OBCA)</i>	Provides guidance with respect to director meetings, including meetings by electronic means.	Practice Note
<i>Member Meetings (Conduct) (CNCA)</i>	Provides guidance with respect to the procedure at member meetings, including meetings by electronic means.	Practice Note
<i>Director Meetings (CNCA)</i>	Provides guidance with respect to director meetings, including meetings by electronic means.	Practice Note
<i>Director's Obligations to Employees – Occupational Health and Safety</i>	Sets out the subject of occupational health and safety, as well as how it is of concern to a director.	Practice Note
<i>Termination and Reverse Break Fee Clause</i>	Provides a termination and reverse break free clause in the context of a private M&A transaction.	Clause

The In-House Counsel must ensure that their company or organization is prepared to respond to the COVID-19 pandemic. Policies and procedures should be in place to ensure that the business remains operational in the midst of this pandemic but at the same time protecting employees, clients or customers and any other parties with whom the organization has dealings. The IHC must also be able to identify, respond to and mitigate risks during this time. Part of the IHC responsibility is to manage any crisis related to this pandemic including any crisis communications dealing with this situation.

Practical Guidance Documents	Notes	Practical Guidance Content Type
<u>Business Continuity Plan</u>	Contains suggested procedures to help you ensure that if your business is interrupted, you can become fully operational as quickly as possible and, in doing so, protect your staff, clients or customers and any other parties with whom you have dealings.	Precedent
<u>Business Continuity Plan Cascade System</u>	Provides a cascade or communication system used as part of the business continuity plan ("BCP") procedures to ensure all staff are covered.	Precedent
<u>Business Continuity Plan Contacts List</u>	Provides a schedule for recording the names and contact details of all personnel and other contacts and suppliers who play a key role in delivering and maintaining the organization's BCP and recovery process.	Precedent
<u>Business Continuity Plan Functions and Risk Assessment</u>	Provides further detailed consideration to the actions that will be taken in the event that a specific risk materializes. It also encourages a review of the key elements of the business that are needed to continue functioning during a business interruption might have.	Precedent
<u>Business Continuity Plan Risk Evaluation</u>	Provides common business continuity risks faced by organizations and what to consider when conducting a business continuity plan risk assessment.	Precedent
<u>Legal Risk Identification</u>	Provides guidance on how to work effectively with senior managers to identify legal risks	Practice Note

	and sets out an approach one might follow to put processes in place to manage those risks within an organization.	
<u>Legal Risk Management</u>	Provides guidance on using risk management matrices and cost/benefit analysis to classify the level of risk, communicating the levels of risk to the business and managing risk using playbooks and impact assessments.	Practice Note
<u>Communications in a Crisis</u>	Outlines the concept of crisis communications and the role of in-house counsel in dealing with crises.	Practice Note
<u>Crisis Management Checklist</u>	Outlines the steps to be undertaken when managing a crisis.	Checklist
<u>Internal Communications: Successfully Getting Your Message Across</u>	Guides in-house lawyers to effectively communicate their message to the business.	Practice Note
<u>Internal Communications Checklist</u>	Assists in-house counsel in designing effective messages for internal communication.	Checklist
<u>Internal Communications Planning Process Flowchart</u>	Guides in-house counsel through the key steps in an internal communications plan.	Flowchart
<u>Lawyer's Daily: Program Can Minimize Business Interruptions Like COVID-19, Rail Strike</u>	Looks at the federal Work-Sharing program which aims to provide relief to companies experiencing a temporary reduction in their normal levels of business activity.	Article
<u>GCs Swing Into Action As Cos. Hope To Avoid Virus Outbreaks</u>	Offers perspectives for corporate general counsel on coronavirus implications.	Article
<u>Insurers Braced For Claims Following Coronavirus Lockdown</u>	Describes how insurance companies are being warned by their lawyers and loss adjusters to expect a jump in claims under business interruption policies as the impact of the spread of coronavirus from China continues to cut into business activity.	Article

COVID-19 Claims Impact Entire Insurance Coverage Spectrum	Identifies the types of insurance that policyholders might pursue for coverage and the positions insureds and insurers are likely to take for and against coverage, so practitioners can consider a client's situation, address coverage weaknesses and gaps, and determine whether to litigate any coronavirus claim.	Article
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Capital Markets and M&A

COVID-19 is having sweeping effects on businesses across Canada, including impacts on their operations and financial performance. As a result, deciphering what should be disclosed and when disclosure should be made will be top-of-mind for Canadian public companies in the upcoming weeks and months. Companies will need to assess their risk factors, whether in their annual/interim filings or securities offering documents, to ensure the potential impact on their business is properly communicated to current and prospective investors. In addition, any forward-looking information or guidance will need to be assessed in light of the outbreak and timely disclosure of material changes should be made as necessary. It will also be important to consider the impact of COVID-19 on corporate governance generally, including the holding of shareholder meetings. Companies entering into M&A transactions, or with existing transactions that have not closed, will also want to be aware of clauses that may be invoked to terminate or alter obligations. For instance, while difficult to invoke, parties are beginning to look to material adverse change ("MAC") or material adverse effect ("MAE") clauses, which provide for the termination or alteration of obligations in light of a "materially adverse" event.

Practical Guidance Documents	Notes	Practical Guidance Content Type
<u>COVID-19: Public Company Considerations Checklist</u>	A checklist discussing key implications of COVID-19 for Canadian public companies.	Checklist
<u>Virtual Shareholder Meetings: Jurisdictional Comparison Table</u>	A table comparing the corporate statutory requirements relating to holding virtual shareholder meetings across every jurisdiction in Canada.	Table
<u>COVID-19: Reporting Issuer Filing Extensions Table</u>	A table summarizing the filing extensions offered by Canadian securities regulators for reporting issuers.	Table
<u>Market Trends: COVID-19 Virtual Shareholder Meetings and Risk Factors</u>	A practice note surveying trends in recent SEDAR proxy materials and annual information forms.	Practice Note
<u>Material Adverse Change Definitions</u>	Discusses MAC or MAE definitions, including drafting considerations and carve-outs.	Practice Note

<u>Annual Information Forms</u>	Discusses the annual information form (“AIF”), a comprehensive disclosure document that prescribes information about a company, its operations and projects, risks and other external factors that impact an issuer specifically.	Practice Note
<u>Management’s Discussion and Analysis</u>	Discusses the preparation and filing of management’s discussion and analysis.	Practice Note
<u>Materiality, Material Changes and Material Facts</u>	Provides an overview of materiality in the context of Canadian securities laws looking at the difference between “material changes” and “material facts”, as well as the meaning of “materiality” and determinations of what constitutes “material information”.	Practice Note
<u>Timely Disclosure Requirements</u>	Provides an overview of timely disclosure requirements under Canadian securities laws.	Practice Note
<u>Termination Triggering Events in M&A Transaction Agreements</u>	Discusses different types of triggering events that may give rise to a termination right.	Practice Note
<u>Capital Markets and M&A: Transactions Search Sample Searches</u>	Provides access to pre-filtered searches of EDGAR filings created using Transactions Search powered by Intelligize®, including several searches that provide access to COVID-19 disclosure.	Practice Note
<u>Lexis® Securities Mosaic® SEDAR Sample Searches</u>	Provides access to pre-filtered searches of SEDAR filings created using Lexis® Securities Mosaic®, including several searches that provide access to COVID-19 disclosure.	Practice Note
<u>MAC or MAE Clause (Arrangement Agreement)</u>	Provides a sample MAC or MAE clause.	Clause
<u>Termination Clause (Arrangement Agreement)</u>	Provides a sample termination clause.	Clause
<u>Risk Factor (Pandemics, Natural Disasters, Terrorism and Unforeseen Events)</u>	A risk factor covering pandemics, natural disasters or other unforeseen events.	Clause

<u>Timely Disclosure Flowchart</u>	Provides an overview of when issues are required to make timely disclosure of information and what type of disclosure is required.	Flowchart
<u>Coronavirus and Corporate Financial Performance</u>	Discusses UK securities regulators' response to COVID-19 and related company disclosures.	Article
<u>Coronavirus Outbreak Prompts Corporate Disclosures</u>	Discusses recent COVID-19 disclosure made by issuers in Securities and Exchange Commission filings in the U.S.	Article
<u>Coronavirus Disclosures, Compliance Starting to Come into Focus</u>	Provides an update on the types of disclosure and compliance protocols U.S. issuers are adopting in the face of COVID-19.	Article
<u>Coronavirus Likely Means More Virtual Shareholder Meetings</u>	Discusses the trend of more and more U.S. issuers looking at virtual shareholder meetings.	Article
<u>SEC Reporting Companies: Considering the Impact of the Coronavirus on Public Disclosure and Other Obligations: First Analysis</u>	Provides an in-depth look at U.S. reporting obligations in light of COVID-19.	Article
<u>Diagnosing and Treating Coronavirus Risks in M&A Transactions</u>	Discusses risks posed by COVID-19 to ongoing and new M&A transactions.	Article

Intellectual Property and Technology

In light of the COVID-19 pandemic, it is anticipated that we may start to see products advertised as providing some benefit to treating or preventing symptoms associated with COVID-19. Many of these claims may lead to the product being considered a drug and Health Canada will require scientific evidence backing the claim and have restrictive advertising requirements. If the product is made of natural substances, it may instead be classified as a natural health product, and while compliance requirements are less onerous, there is still a rigid process in place and Health Canada maintains oversight for marketing purposes.

Manufacturers claiming products have health benefits associated with COVID-19 should, prior to making any such claims, ensure that the product has the appropriate regulatory and advertising approvals.

With respect to technology it is important for companies to make sure stay at home employees are aware of COVID-19 scams and are following cybersecurity policies and breach procedures.

Practical Guidance Documents	Notes	Practical Guidance Content Type
<u>Cybersecurity and COVID-19</u>	Sets out the most common cyber attacks and considerations for cybersecurity in the wake of COVID-19.	Practice Note
<u>Canadian Intellectual Property Office COVID-19 Update</u>	Discusses the practices of the Canadian Intellectual Property Office during the COVID-19 Pandemic.	Practice Note
<u>Government Emergency Patent Use COVID-19</u>	Discusses the passing of Bill C-13 amending the <i>Patent Act</i> to permit the Federal Government to use patented inventions for the purposes of dealing with the COVID-19 public health emergency.	Practice Note
<u>Lawyer's Daily: Effective IP Strategy: Patenting Treatment for COVID-19 Infections</u>	Looks at patent controversies surrounding the race for IP rights to potential COVID-19 treatments.	Article
<u>Lawyer's Daily: Beer Company Takes High Road Amid Pandemic</u>	Looks at a situation where a company's brand has been associated with the corona virus.	Article
<u>Lawyer's Daily: Guaranteed to Cure the Flu...But Can You Prove It?</u>	Looks at appropriate drug licensing and the regulation of claims made to support a product.	Article
<u>Prepare Your Law Firm Tech for Coronavirus Impact</u>	Discusses implications for system access, calendaring, telephone systems, remote conferencing services and custom paper functions.	Article
<u>Electronic Signatures</u>	Discusses federal and provincial laws dealing with electronic signatures, including definitions, equivalence to non-electronic signatures and situations in which electronic signatures may not be used.	Practice Note
<u>Security and Encryption of Electronic Signatures</u>	Discusses situations where additional security measures are required to verify the authenticity of an electronic signature and what constitutes a "secure electronic signature".	Practice Note

Finance

COVID-19 will have a negative impact on many borrowers' ability to comply with the financial covenants in their debt documents. Borrowers and lenders should review the representations and warranties and events of default provisions in their financing agreements to ensure compliance. Borrowers should review any applicable notice requirements and lenders should be prepared to consider waivers or amendments as needed.

Practical Guidance Documents	Notes	Practical Guidance Content Type
<u>Coronavirus (COVID-19) Impact on Borrowers and Lenders</u>	A review of the key considerations for borrowers and lenders addressing the COVID-19 pandemic.	Practice Note
<u>Event of Default Provisions</u>	Discusses the events of default section of a credit agreement by outlining the common types of events of default, payment defaults and different types of covenant defaults.	Practice Note
<u>MAC Clauses</u>	Sets out the purpose, effects, content, and considerations for the use of material adverse change clauses, or MAC clauses, in various documents in an acquisition transaction, including commitment letters, acquisition or purchase agreements, and credit agreements.	Practice Note
<u>Waiver and Consent Requests</u>	Describes the situations where the borrower's circumstances have changed in a more temporary way than would warrant a full-blown amendment.	Practice Note
<u>Financial Covenants</u>	Describes the use of financial covenants in credit agreements, which require the borrower to comply with negotiated financial performance benchmarks.	Practice Note
<u>Negative Covenants</u>	Explains what negative covenants are and the usual types of negative covenants found in credit agreements.	Practice Note
<u>Representations and Warranties</u>	Discusses the meaning and purpose of representations and warranties in the context of a loan transaction.	Practice Note

<u>Market Trends 2018: Equity Cure Rights</u>	Provides examples of equity cure right provisions in publicly filed credit agreements.	Practice Note
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Personal Injury

It is anticipated that a number of establishments such as hospitals, stores, nursing homes, cruise ships, restaurants and hotels could be vulnerable to litigation on the basis that they were negligent in protecting customers/patients. In fact, a couple in Florida have already filed a lawsuit against Princess Cruise Lines over its handling of COVID-19. Establishments should therefore be mindful of the test for negligence which looks at the exercise of care that a reasonable person would exercise in the circumstance.

Nursing homes should exercise extra care in order to avoid negligence claims given that the elderly are at particular risk of becoming seriously ill. A nursing home or a nursing home employee could be liable for negligence if the resident contracts the illness and becomes sick as a result of negligence such as failing to take appropriate precautionary steps or allowing an ill staff member to come to work. Nursing homes are subject to other legislation such as the *Occupiers' Liability Act*.

Practical Guidance Documents	Notes	Practical Guidance Content Type
<u>Law of Negligence</u>	Explains the law of negligence, which requires a wrongful act or omission by a person who has a duty of care to the claimant and a breach of that duty.	Practice Note
<u>Proving Negligence</u>	Examines the four elements that must be established for proof of a claim in negligence, along with the standard of proof to be applied (balance of probabilities) and the onus of proof, which is on the person seeking damages.	Practice Note
<u>Duty and Standard of Care under the Occupiers' Liability Act</u>	Explains the duty of care under the <i>Occupiers' Liability Act</i> , R.S.O. 1990, c. O.2, which requires occupiers to take such care as in all the circumstances of the case is reasonable to see that persons entering on premises are reasonably safe.	Practice Note
<u>Civil Resolution Tribunal Remains Open (COVID-19)</u>	Discusses the Civil Resolution Tribunal Policy during COVID-19	Practice Note

Litigation and Dispute Resolution

Manufacturers may end up suing over missed or delayed deadlines, and any number of supply chain interruptions could have serious consequences and lead to subsequent lawsuits. Companies should familiarize themselves with breach of contract laws and available remedies.

Practical Guidance Documents	Notes	Practical Guidance Content Type
<u>Courts Close in Response to COVID-19 Pandemic</u>	Discusses how the courts — the Ontario Small Claims Court, the Ontario Superior Court of Justice (handling civil, family and criminal matters), the Ontario Court of Appeal, the Federal Court and the Supreme Court of Canada — have reacted to the COVID-19 worldwide pandemic, from court closures to modified schedules.	Practice Note
<u>Cause of Action: Breach of Contract</u>	Discusses the elements required to establish a breach of contract, damages and alternatives to breach of contract.	Practice Note
<u>Remedies: Overview</u>	Provides a discussion of both legal and equitable remedies including damages, injunctions, declaratory relief, constructive trusts, accounting of profits, and rectification.	Practice Note
<u>Statement of Claim (Breach of Contract) (ON)</u>	Provides practical tips for drafting a Statement of Claim for breach of contract in Ontario. Includes a discussion of damages, and how to set out details of the contract and breach.	Precedent
<u>Urgent Civil Motions During COVID-19</u>	Discusses urgent civil motions in the Superior Court of Justice and provides practical tips to assist counsel when bringing an urgent civil motion.	Practice Note
<u>COVID-19 Update: Supreme Court of Canada Announces Appeals to Be Heard in June 2020</u>	This update, issued by the Supreme Court of Canada, announces the list of appeals that will be heard in June 2020 and September 2020.	Practice Note

Insolvency & Restructuring

The impact of COVID-19 will inevitably result in the bankruptcy of countless businesses and industries worldwide. Already, airline and cruise ship industries have reported significant losses due to travel restrictions and growing skepticism regarding the risks of leisure travel in the months ahead. Businesses in the hospitality industry are also on shaky ground as populations are advised to exercise social-distancing and remain home. Of note is the effect of COVID-19 on business supply chains. Businesses may experience strain or interruptions in their supply chains, and as a result may be unable to continue operating as usual due to a lack of products and essential materials.

Practical Guidance Documents	Notes	Practical Guidance Content Type
<u>Supplier Perspectives</u>	Discusses retail insolvencies from the perspective of third-party inventory suppliers and service providers.	Practice Note
<u>Critical Suppliers under the CCAA</u>	Sets out the statutory provisions for critical suppliers under the CCAA, factors considered by the court in making the critical supplier designation, critical supplier charges and payment of pre-filing claims.	Practice Note
<u>Critical Supplier Charge</u>	Notes reasons why a court would declare a supplier of a debtor company as a critical supplier.	Practice Note
<u>Bankruptcy Fundamentals and Effects</u>	Sets out Canada's bankruptcy and insolvency regime.	Practice Note
<u>Voluntary Assignment in Bankruptcy</u>	Provides a review of bankruptcy proceedings initiated by an insolvent person upon the filing of an assignment of all the person's property for the benefit of the creditors.	Practice Note
<u>Involuntary Bankruptcy Applications</u>	Sets out the conditions for bringing an involuntary bankruptcy application and appointment of Trustee.	Practice Note
<u>Companies' Creditors Arrangement Act</u>	Looks at the purpose and nature of the CCAA, who qualifies for relief, and pre-conditions for granting relief.	Practice Note
<u>CCAA Restructuring Considerations</u>	Discusses the advantages and disadvantages of CCAA filing.	Practice Note
<u>CCAA Proceedings Commencement</u>	Sets out how to commence CCAA proceedings, including the application for initial order, model	Practice Note

	orders, supporting material and discretionary supplemental material.	
<u>Coronavirus (COVID-19) Tracker of insolvency reforms globally</u>	Looks at how coronavirus (COVID-19) is causing countries around the world to try to expedite finalisation of new restructuring laws or temporarily suspend onerous directors' duties requiring them to file for insolvency within a set period of the onset of insolvency to assist struggling companies during this period of extreme volatility and uncertainty.	Practice Note
<u>OSB Guidance in Response to COVID-19</u>	This document highlights important information regarding the <i>COVID-19 Emergency Response Act</i> and examines GST/HST credits and income support payments. This document also provides temporary guidance for Licensed Insolvency Trustees with respect to options to support social distancing, and information regarding e-filing and adopting interim measures, such as virtual oaths.	Practice Note
<u>COVID-19: Ontario Construction Act Exempt from Limitation and Procedural Time Periods Effective April 16, 2020</u>	This update issued by the Ontario Government discusses the amendment to the March 20, 2020 order which lifts the suspension of limitation and procedural time periods under the <i>Construction Act</i> , effective April 16, 2020.	Practice Note

Family

The COVID-19 pandemic will affect many family law issues. The Ontario courts have closed as a result of COVID-19, except for the list of urgent and expanded family law matters set out in the March 15th and April 2nd Notices to the Profession. Counsel are using other alternative dispute resolutions to resolve their matter as a result of the court closures. Counsel have to navigate the new practice directions for each court in order to bring their urgent motion. The current situation of social distancing, quarantine and isolation will create conflict for the primary residence and parenting time of the children. The closing of businesses and the effect on the stock market (including the real estate market) will impact property issues. For example, each party's assets may decline in value and property owners may initiate a separation in order to benefit from the low equalization payment. Separation agreements and court orders usually include a provision to vary child and

spousal support due to a material change in circumstances. During this time, support payors will seek to reduce their support obligation due to dire financial circumstances. Counsel will need to be aware of the vulnerable environment parties are living and the potential for the cause or exacerbation of family violence due to increased social isolation.

Practical Guidance Documents	Notes	Practical Guidance Content Type
<u>Service Requirements During COVID-19</u>	Discusses the service requirements for family law cases during the COVID-19 pandemic in the Ontario Court of Appeal, Superior Court of Justice and the Ontario Court of Justice.	Practice Note
<u>Urgent Family Law Motions During COVID-19</u>	Discusses urgent family law motions in the Ontario Superior Court of Justice during the COVID-19 pandemic.	Practice Note
<u>Urgent Family Law Cases During COVID-19</u>	Lists all the current urgent family law motions from March 18, 2020 to April 2, 2020 in the Ontario Superior Court of Justice during the COVID-19 pandemic.	Table
<u>Video Conferencing Checklist (COVID-19)</u>	Sets out the information and steps counsel should take when conducting a video conference with a client to identify and verify a client and to commission a document.	Checklist
<u>Arbitration and Litigation Management Agreement</u>	Provides a sample arbitration and litigation management agreement, in which the parties agree to the process and procedure for arbitration. This is an alternative solution for parties in light of the court closures due to the COVID-19 pandemic.	Precedent
<u>COVID-19 Update: Family Law Referral Line Set up by the LSO</u>	Discusses an emergency referral telephone line launched by the Law Society of Ontario to help self-represented individuals determine whether their family court matter falls under the criteria of matters to be heard on an 'urgent' basis.	Practice Note
<u>COVID-19 Update: B.C. Suspends Regular Provincial Court Operations</u>	Discusses the recent suspension of all regular Provincial Court operations in B.C. It lists the type of urgent matters that will be	Practice Note

	heard as well as the manner for determining whether a matter is urgent.	
<u>COVID-19 Update: B.C. Supreme Court Registries Not Providing In-Person Registry Services during the Suspension of the Court's Regular Operations</u>	Discusses the closure of in-person registry services at the B.C. Supreme Court in response to COVID-19.	Practice Note
<u>COVID-19 Update: Affidavits for Use in Civil and Family Proceedings</u>	Discusses new requirements approved by the Law Society of British Columbia in light of COVID-19 aimed at accommodating means of providing affidavits to be used in the Provincial Court.	Practice Note
<u>COVID-19 Update: Additional Matters to Be Heard Remotely by the Ontario Superior Court of Justice</u>	This update issued by the Ontario Superior Court of Justice discusses the expansion of family law matters that can be heard remotely by the court during the COVID-19 pandemic.	Practice Note
<u>Virtual Commissioning and Remote Client Verification in Response to COVID-19</u>	This legal update discusses the alternative virtual means to identify a client or commission documents as a result of the COVID-19 pandemic.	Practice Note
<u>COVID-19 Update: B.C. Supreme Court Extends Adjournments until May 29</u>	Discusses the automatic adjournment by the B.C. Supreme Court of all family matters scheduled for hearing between March 19 and May 29, unless deemed essential or otherwise directed by the court.	Practice Note
<u>COVID-19 Update: Video Conference Proceedings in the B.C. Court of Appeal</u>	Provides practical guidance on using Zoom Video Conference links for hearings before the B.C. Court of Appeal as well as directions on decorum and etiquette to follow during submissions.	Practice Note

Wills, Trusts & Estates

The COVID-19 pandemic and the social distancing mandate issued by all levels of government means that law firms will have to review their practices when it comes to meeting with clients to discuss their estate planning wishes. An important consideration is how to approach the problem of executing and witnessing wills and powers of attorney. Unlike in other provinces such as B.C. where courts are able to validate a will that has not been duly executed, Ontario's *Succession Law Reform Act*, [R.S.O. 1990, c. S.26](#), sets out very strict

legislation for signing and witnessing wills. The emergency Order issued on April 7 by the Ontario government relaxed the requirement that a testator or witness be present for the making or acknowledgement of a signature on a will or power of attorney and stated that this requirement may be satisfied by means of audio-visual communication technology provided that at least one person who is providing services as a witness is a licensee within the meaning of the *Law Society Act*, [R.S.O. 1990, c. L.8](#), at the time of the making, acknowledgment or subscribing. Careful consideration will have to be given to verifying the client's identification, their instructions, their capacity and to confirming they are not being unduly influenced, all of which will be more complicated in a "virtual" world".

Practical Guidance Documents	Notes	Practical Guidance Content Type
Execution of Wills, Affidavits, Assessing Capacity and Electronic Signatures in Response to COVID-19	Highlights guidance provided by the Law Society of Ontario surrounding the execution of wills, affidavits, assessing capacity and electronic signatures in light of social distancing requirements brought about by the Coronavirus (COVID-19).	Practice Note
COVID-19 Update: Affidavits for Use in Civil and Family Proceedings	Discusses new requirements approved by the Law Society of British Columbia in light of COVID-19 aimed at accommodating means of providing affidavits to be used in the Provincial Court.	Practice Note
COVID-19 Update: B.C. Suspends Regular Provincial Court Operations	Discusses the recent suspension of all regular Provincial Court operations in B.C. It lists the type of urgent matters that will be heard as well as the manner for determining whether a matter is urgent.	Practice Note
COVID-19 Update: B.C. Supreme Court Registries Not Providing In-Person Registry Services during the Suspension of the Court's Regular Operations	Discusses the closure of in-person registry services at the B.C. Supreme Court in response to COVID-19.	Practice Note
COVID-19 Update: Virtual Execution of Wills and Powers of Attorney	Sets out the details of an emergency Order released by the Government of Ontario which temporarily allows the virtual execution of wills and powers of attorney by means of "audio-visual communication technology".	Practice Note

Virtual Witnessing of Wills – Tips to Reduce Your Risk of a Malpractice Claim	Lists tips set out by LawPro’s practicePro to reduce the risk of malpractice claims when complying with the Ontario Government’s emergency Order temporarily allowing virtual execution of wills and powers of attorney by “audio-visual communication technology”.	Checklist
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Related Content

For other useful information on COVID-19, see the following:

- See [The Lawyer’s Daily](#) for free coverage on COVID-19 including news, analysis, opinion and Insider items.
- For an overview of the numerous measures undertaken by the federal government in response to COVID-19 pursuant to [Bill C-13](#), *An Act respecting certain measures in response to COVID-19*, which received Royal Assent on March 25, 2020, see [Lawyer’s Daily: COVID-19 relief bill gets royal assent; wage subsidies boosted to \\$52 billion from \\$27 billion](#). Also see DLA Piper’s article, [Canada’s COVID-19 Economic Response Plan](#), for a succinct summary of these measures.
- For a discussion of whether the government could justifiably engage in actions to contain a threat like the COVID-19, see [Lawyer’s Daily: Canada’s Rights, Limitations in Face of Plague](#).
- To see how the Canadian courts are addressing this pandemic, see the [Message from the Chief Justice of Canada](#), dated March 20, 2020, which includes links to each court’s website and their notice regarding COVID-19 measures. See also [Superior Court of Justice \(SCJ\)](#), [Lawyer’s Daily: Jury Trials Nixed over COVID-19: SCC Closed to Public: Courts Offer Remote Hearings, Adjournments](#) and [Lawyer’s Daily: What Our Courts Can and Should Do to Address COVID-19 Concerns](#).
- The [Centers for Disease Control and Prevention](#) (“CDC”) has useful information on steps to prevent illness, what to do if you are sick and how to keep work, schools and communities safe. The CDC also provides transcripts of Media Telebriefings and [Interim Guidance for Businesses and Employers](#).
- The Government of Canada has published [Guidelines on Public Gatherings](#) and the Guidelines include risk mitigation strategies at mass gatherings.
- Elsevier provides free health and medical research information on COVID-19 [here](#).
- For resources issued by the Canadian Federation of Independent Business, see [Coronavirus and small business: keeping you and your employees safe](#).
- The Law Society of Ontario has recently issued a [corporate statement](#) providing guidance for lawyers and paralegals as a result of the COVID-19 pandemic. In particular, the corporate statement provides guidance on using virtual means to identify a client or commission documents.

COVID-19: Employment-Related Considerations

Current as of: *05/05/2020*

Employers across Canada have an obligation to provide a safe and healthy workplace for their employees. For more information on what these obligations entail, see the practice notes [Occupational Health and Safety Laws \(ON\)](#), [Occupational Health and Safety Laws \(Federal\)](#) and [Workplace Health and Safety in Canada](#).

The following are best practices for managing employees during the COVID-19 outbreak:

- Avoid mass hysteria — stay informed:
 - Keep abreast of recent developments.
 - Depending on the size of your company, consider appointing a leader to track and communicate the latest developments on COVID-19. This person should have the authority to make, or advise on, decisions with respect to operations, including travel restrictions, meeting cancellations, office closures, etc.
- Educate your employees on COVID-19:
 - Provide information to employees on the symptoms of COVID-19 and how to distinguish it from the common cold/flu.
 - Review and encourage proper hygiene both inside and outside the workplace, including regular hand washing with soap and water, using hand sanitizer, not touching your face, and covering your mouth when you sneeze and cough.
 - Send e-mail reminds to employees about cold/flu season etiquette.
 - Review with employees what they should do if they think they have symptoms of COVID-19, including but not limited to self-imposed quarantine and medical treatment.
- Consider whether you qualify for the Canada Emergency Wage Subsidy program, which provides a 75% wage subsidy of up to \$847 per employee per week to eligible employers for up to 12 weeks. Get more information and begin your application [here](#).
- If you have had to lay off considerable staff as a result of COVID-19, consider whether your employees would qualify for the Canada Emergency Response Benefit, which provides a benefit of \$2,000 for qualifying individuals for 4-week periods, to add address the overwhelming number of Employment Insurance (“EI”) applications during this pandemic. Get more information about the benefit [here](#).
- If your business operates in a space that you lease, and you pay a monthly rent of \$50,000 or less and have temporarily ceased operations or have experienced at least a 70% drop in your revenue, you can benefit from the Canada Emergency Commercial Rent Assistance. See the announcement [here](#) for details about this relief.

COVID-19: Employment-Related Considerations

- Ensure sufficient hygiene products are in the workplace, including soap, tissues, receptacles, hand sanitizer, wipes, etc.
- Educate employees on employment policies:
 - Ensure employees are familiar with various health and safety policies, including:
 - Health and Safety Policy (see, for example, [Workplace Health and Safety Policy](#));
 - Sick Leave Policies (see, for example, [Declared Emergencies and Infectious Disease Emergencies Leave \(ON\)](#), [Compassionate Care Leave Policy](#), [Critical Illness Leave Policy](#), [Family Caregiver Leave Policy](#), [Short-Term Illness Leave Policy](#));
 - Emergency Plan (see, for example, [Emergency and Fire Policy](#), [Emergency Response Plan](#) and [Emergency Action Plan Checklist](#));
 - Disability Benefits (see, for example, the coverage of disability in the [Employee Handbook \(Policies and Practices\)](#); and
 - Building Security Policy and Visitors in the Workplace Policy (see, for example, [Building Security Policy](#) and [Visitors in the Workplace Policy](#)).
 - Ensure both employees and management are familiar with the following policies:
 - Accommodation Policy (see, for example, [Accommodation Policy \(ON\)](#));
 - Telework/Work from Home Policy and any telework agreements (see, for example, [Telework Agreement](#)); and
 - Privacy Policy (see, for example, [Privacy Policy \(Personal Information of Employees\)](#)).
- Practice social distancing and avoid unnecessary personal interactions:
 - Limit in-person meetings to just a few people (some jurisdictions, such as Ontario, have banned gatherings of 50 people or more). Consider hosting meetings online via Skype or some other video conference technology, or even just a telephone call or e-mail.
 - Consider rescheduling non-urgent meetings.
- Have employees work from home to the extent this is possible.
- Upon your business re-opening, consider implementing a thermal screening and medical questionnaire (such as this [one](#) provided by the Ontario government) for employees seeking to enter the workplace. Deny entry to anyone with a temperature over 38 degrees Celsius or anyone whose questionnaire presents a risk of the virus while these are drastic measures and typically seen as privacy violations, they appear to be permissible during this unprecedented pandemic.
- Limit or restrict access to and from the company office, especially visitors to the office. See the precedent [Visitors in the Workplace Policy](#), which may have to be amended to restrict access.
- Restrict non-essential corporate travel:
 - Require self-imposed quarantine on any employees who have recently travelled to locations where there has been a serious COVID-19 outbreak, such as China, Hong Kong, Iran, Japan, Italy, Singapore, and South Korea.
 - The Canadian border is currently closed to all non-Canadian citizens and non-permanent residents, which may affect your employees and your ability to conduct business.

COVID-19: Employment-Related Considerations

However, these border restrictions will not apply to commerce or trade; products will continue to flow in and out of the country.

- Accommodate employees as required:
 - Bear in mind the employer's accommodation to the point of undue hardship. For further information, see the practice notes [Accommodation](#), [Accommodating Disability](#) and [Discrimination](#), as well as the checklists [Accommodation Checklist](#), [Accommodation: Duties and Responsibilities in the Accommodation Process Checklist](#) and [Human Rights Legislation: Prohibited Grounds of Discrimination by Jurisdiction](#).
 - Ensure that employees who need time to go to medical appointments can do so.
 - Take all necessary steps and implement all necessary measures to ensure that employees can work from home.
 - With the closures of schools and daycares, many parents will need to be home to care for their children. To the extent it is possible, allow parents who are unable to come in to work to work remotely so they can fulfil their parenting duties.
- Review insurance coverage:
 - Consider whether you have sufficient insurance coverage for all employees who will require sick leave and/or disability leave.
 - Review your employment insurance coverage policy (see, for example, [Employment Insurance Coverage Policy \(Sample\)](#)). Note that the 1-week waiting period before receiving EI has now been waived.
 - Review entitlements under Canada's Employment Insurance benefits. See [Sickness Benefits Table \(Employment Insurance\)](#), [Family Caregiver Benefits Table \(Employment Insurance\)](#), and [Compassionate Care Benefits Table \(Employment Insurance\)](#).
 - Note the changes to the *Employment Insurance Act*, [S.C. 1996, c. 23](#), as well as other measures the federal government has taken to protect employees in Canada. For a summary of the various changes brought pursuant to [Bill C-13, An Act respecting certain measures in response to COVID-19](#), which received Royal Assent on March 25, 2020, see [COVID-19 relief bill gets royal assent; wage subsidies boosted to \\$52 billion from \\$27 billion](#). For a succinct summary of the new Canada Emergency Response Benefit (CERB), including who is eligible, how to apply for it, and how it impacts employment insurance, see the article by Bennett Jones, [An Overview of the Canada Emergency Response Benefit in Respect of COVID-19 Employment Disruptions](#).
 - If necessary, consider a work-sharing program, which helps avoid layoffs where there is a temporary decrease in business activity beyond the employer's control. The program provides EI benefits to eligible employees who agree to reduce their normal working hours and share the available work while the employer recovers. Amidst the COVID-19 crisis, the government has implemented changes to the work-sharing program effective March 15, 2020 to March 14, 2021, including extending the maximum possible duration from 38 weeks to 76 weeks, waiving the mandatory cooling off period for employers who have already used the work-sharing program, so that they may immediately enter into a new agreement, and reducing the requirement and expanding eligibility to employers affected by accepting business who have been in business for only 1 year rather than 2.

COVID-19: Employment-Related Considerations

- Be prepared for work refusals in both the unionized and non-unionized environment:
 - In the non-unionized setting, where an employee has a reasonable basis to believe that there is a dangerous condition in the workplace, the employee may be able to refuse to attend work.
 - The employer must respond per applicable occupational health and safety legislation, which will include an investigation and, if appropriate, measures to eliminate or reduce workplace danger.
 - An employee cannot be punished for reasonably exercising his/her rights to ensure a safe and healthy workplace.
 - For information on work refusals, see [Work Refusal Process Flowchart](#), [Bilateral Stop Work Process Flowchart](#) and [Work Refusals Checklist](#).
- Quarantine!
 - Stay abreast of various legislative changes while your employees are at home in self-isolation or quarantine. Many jurisdictions are amending their employment standards and occupational health and safety legislation to protect workers while they are in isolation/quarantine from losing their jobs. For example, many jurisdictions in Canada have introduced COVID-19-related leaves of absence, including Alberta, British Columbia, Manitoba, Ontario, New Brunswick, Saskatchewan, and Newfoundland and Labrador.
- Ensure sufficient staffing so that operations can continue as individuals are quarantined and/or working remotely. Consider whether you will need to replace sick employees temporarily.
- Assess whether you have the right or ability to cut employee wages or lay off employees, even temporarily. Review employment contracts and collective agreements, if applicable. If you do not have a contractual right to make these unilateral changes, you may be exposing yourself to a claim for constructive dismissal. Consider whether there are alternative cost-saving arrangements you can implement before taking such drastic measures.
- Consider requiring medical clearance after an employee has been quarantined. If the employee was quarantined out of an abundance of caution and did not display symptoms, a letter from the employee's doctor clearing him/her for work may not be required. However, where the employee displayed symptoms and/or was treated for COVID-19, consider requiring such medical clearance.
- Have a proper communicable illness plan in place that includes:
 - how to communicate information to employees about COVID-19;
 - how to implement and enforce quarantines;
 - how to manage returns to work;
 - how to restrict/limit access to workplace; and
 - how to implement flexible and non-punitive alternate work arrangements, including working remotely.
- Comply with all applicable legislation:
 - Ensure that you as an employer are complying with appropriate privacy requirements, for example:
 - While employers are obligated to keep employee personal information confidential, including health status, this right must be balanced with the employers' obligations to maintain a safe and healthy workplace. Review the practice notes [Employee Personal Information](#)

COVID-19: Employment-Related Considerations

[Management](#), [Personal Information Protection and Electronic Documents Act](#) and [Employer's Right to Intrude on Employees' Privacy \(ON\)](#).

- Additionally, there is a limit on the types of questions you can ask employees involving their medical information and personal travel information.
- However, public safety takes priority over privacy in a state of emergency.

For a succinct summary of privacy issues, including whether employers can ask employees if they have COVID-19 symptoms, if they can provide a doctor's note, and if they can be tested before reporting to work, see the article [Employee privacy issues during COVID-19 pandemic](#).

- Be sure not to violate any human rights legislation. Employers cannot discriminate against groups of employees who may or may not have symptoms of COVID-19.
- Also, comply with employment standards legislation. For example, do not terminate an employee due to physical disability (including illness) and ensure that employees are receiving their full sick leave entitlements. For information on the minimum standards for leaves of absence across Canada, see [Leaves of Absence by Jurisdiction](#), [Compassionate Care Leave by Jurisdiction](#), [Critical Illness Leave by Jurisdiction](#), [Family Responsibility Leave by Jurisdiction](#) and [Sick Leave by Jurisdiction](#).
- During the COVID-19 outbreak, employees no longer need to provide a doctor's note to establish entitlement to sick leave.
- Bear in mind the special recording requirements for designated individuals under health and safety legislation and privacy legislation, including but not limited to:
 - regulated health professionals;
 - hospital administrators;
 - lab operators;
 - school principals; and
 - superintendents of stipulated institutions.
- Maintain Detailed Records:
 - Keep records of what actions have been taken to prevent COVID-19, what measures have been taken in response, which employees have taken leaves of absence, for how long, *etc.*
 - Take note of the privacy and human rights limits on record-keeping, and the company's record-keeping policy.
 - For information on each jurisdiction in Canada's record-keeping requirements, see [Record-Keeping Requirements by Jurisdiction](#).

Workplace Health and Safety in Canada

Reviewed on: *11/10/2019*

Practical Guidance

Canadian occupational health and safety ("OHS") legislation is premised on the concept of joint responsibility of the workplace parties for health and safety. To that end, OHS legislation creates health and safety obligations for both employers and employees to minimize the risk of workplace accidents.

As employers have the most control over the conditions of work and how it is done, they have the greatest legal responsibility for health and safety in the workplace. In all jurisdictions, employers have a general duty to take all reasonable precautions to protect the health and safety of their workers (in some jurisdictions, employers may also be responsible for the safety of other workers or persons who are at or near the workplace).

In addition to the employer's general duty to protect worker safety, employers also have specific legal duties under the OHS acts and regulations. Some of these specific legal duties only apply to certain industries, such as mining, construction or health care. Other specific duties relate to particular hazards that may exist in the workplace, including the use of toxic substances and hazardous materials or equipment.

Across Canada, OHS legislation gives the following fundamental rights to workers:

- the right to know or to be informed about known or foreseeable hazards in the workplace;
- the right to refuse work that they believe is dangerous to either their own health and safety or that of another worker; and
- the right to participate in identifying and resolving job-related health and safety problems.

End of Document

Occupational Health and Safety Laws (Federal)

Daniel Wong, WeirFoulds LLP

Reviewed on: *12/16/2019*

Application and Purpose

In the federal jurisdiction, occupational health and safety legislation has been consolidated under Part II of the *Canada Labour Code*, [R.S.C. 1985, c. L-2](#) ("CLC"). Part II of the CLC applies to federally regulated businesses and industries. Examples of federally regulated businesses and industries include:

- banks;
- marine shipping, ferry and port services;
- air transportation;
- telephone;
- radio and television broadcasting;
- inter-provincial services such as railways, road transportation, pipelines and bridges;
- businesses dealing with the protection of fisheries as a natural resource;
- many First Nation activities;
- most federal Crown corporations; and
- private businesses essential to the operation of a federal act.

Part II of the CLC does not apply to certain undertakings regulated by the *Nuclear Safety and Control Act*, [S.C. 1997, c. 9](#).

The primary purpose of Part II of the CLC is to protect workers from health and safety hazards on the job. The legislation prescribes certain duties for the various workplace parties and rights for workers. It also establishes procedures for dealing with workplace hazards and provides for enforcement of the law where compliance has not been achieved voluntarily.

Employer Duties

The CLC defines the term "employer" to mean a person who employs one or more employees, and includes an employers' organization and any person who acts on behalf of an employer (CLC, s. [122\(1\)](#)). Pursuant to s. [124](#) of the CLC, employers have a general duty to ensure that the health and safety of every person employed by them is protected while they are working.

Occupational Health and Safety Laws (Federal)

Sections [125](#) - [125.3](#) of the CLC outlines an employer's specific legal duties to deal with specific hazards in the workplace. For example, pursuant to s. [125](#)(1) of the CLC, employers are required to:

- ensure that all buildings and structures meet the prescribed standards;
- investigate, record and report all accidents, occupational diseases and other hazardous occurrences known to them;
- post in a conspicuous place accessible to every employee a copy of Part II of the CLC, their general safety policy and any other printed material as directed by the Minister of Labour;
- keep and maintain health and safety records;
- provide every person granted access to the workplace by the employer with prescribed safety materials, equipment, devices and clothing;
- provide employees with the information, instruction, training and supervision necessary to ensure their health and safety at work;
- ensure that employees are aware of every known or foreseeable health or safety hazard in the area where the employee works;
- ensure that the machinery, equipment and tools used by the employees in the course of their employment meet prescribed health, safety and ergonomic standards and are safe under all conditions of their intended use;
- ensure that employees who have supervisory or managerial responsibilities are adequately trained in health and safety and are informed of the responsibilities they have under Part II of the CLC where they act on behalf of their employer;
- respond as soon as possible to reports of hazardous circumstance made by employees;
- develop, implement and monitor, in consultation with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative, a hazard prevention program that is appropriate to the size of the workplace and the nature of the hazards;
- develop health and safety policies and programs in consultation with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative; and
- take the prescribed steps to prevent and protect against violence in the workplace.

The above is only a partial list of the employer duties set out in the CLC. Sections [125](#) - [125.3](#) of the CLC should be consulted for the complete list.

In the recent decision *Canada Post Corp. v. Canadian Union of Postal Workers*, [\[2019\] S.C.J. No. 67](#), (S.C.) the Supreme Court of Canada confirmed that specific employer obligations, including the requirement to inspect the workplace for health and safety purposes, only extend to that part of the workplace over which an employer has physical control. The issue in that case was whether the inspections should be limited to a mailing depot or whether they should cover all letter carrier routes and locations where mail was being delivered. Applying the new standard of review from *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [\[2019\] S.C.J. No. 65](#), (S.C.) the court upheld the lower court's decision that in order to fulfill the inspection obligation under s. [125](#)(1)(z.12) of the CLC, control over the workplace is necessary because the purpose of such workplace inspection is to permit the identification of hazards and the opportunity to fix them or have them fixed. It would have been impractical for Canada Post to inspect every location, especially where it does not own or have the right to alter the structure of the location.

Occupational Health and Safety Laws (Federal)

Additional legislation outlines employers' duty to protect worker health and safety with regard to such things as:

- coal mines (Coal Mining Occupational Health and Safety Regulations). Section [125.3](#) of the CLC also outlines special requirements for employers of workers employed in a coal mine);
- marine activities (Maritime Occupational Health and Safety Regulations, [SOR/2010-120](#));
- working on board trains (On Board Trains Occupational Health and Safety Regulations, [SOR/87-184](#));
- work involving oil and gas (Oil and Gas Occupational Safety and Health Regulations, [SOR/87-612](#));
- working in confined spaces (Part XI of the Canada Occupational Health and Safety Regulations, [SOR/86-304](#) ("COHSR"));
- diving operations (Part XVIII of the COHSR);
- investigation and reporting of hazardous occurrence (Part XV of the COHSR);
- materials handling (see: Part XIV of the COHSR);
- safe occupancy of the workplace (Part XVII of the COHSR);
- temporary structures and excavations (Part III of the COHSR);
- explosives (*Explosives Act*, [R.S.C. 1985, c. E-17](#)) and their use (Explosives Regulations, [SOR/2013-211](#)); and
- smoking in the workplace (*Non-Smokers' Health Act*, R.S.C. 1985, c. 15 (4th Supp.), and the Non-Smokers' Health Regulations, [SOR/90-21](#)).

Inspections and Investigations

Pursuant to the CLC, the Minister of Labour can enter and inspect any workplace (unless it is situated in an employee's residence and the employee does not consent) at any reasonable time (CLC, ss. [141](#)(1)(a) and [143.2](#)).

Inspections of the workplace are conducted in the presence of an employee member and an employer member of the workplace committee or the health and safety representative and a person designated by the employer (CLC, s. [141.1](#)(1)). However, an inspection can proceed in the absence of any of these individuals if that individual chooses not to be present (CLC, s. [141.1](#)(2)).

The Minister of Labour has broad authority to perform their duties, including the following powers:

- conduct or direct the employer to conduct examinations, tests, inquiries, investigations and inspections;
- take or remove, for analysis, samples of any material or substance or any biological, chemical or physical agent;
- be accompanied or assisted by any person and bring any equipment that the Minister deems necessary;
- take or remove, for testing, any material or equipment;

Occupational Health and Safety Laws (Federal)

- take photographs and make sketches;
- direct the employer to ensure that any place or thing specified by the Minister not be disturbed for a reasonable period pending an examination, test, inquiry, investigation or inspection in relation to the place or thing; and
- meet with any person in private or, at the request of the person, in the presence of the person's legal counsel or union representative.

The Minister of Labour also has the power to direct:

- any person not to disturb any place or thing pending an examination, test, inquiry, investigation or inspection;
- the employer to produce documents and information relating to the health and safety of the employees or the workplace and to permit the Minister to examine and make copies of or take extracts from those documents and that information;
- the employer or an employee to make or provide statements respecting working conditions and material and equipment that affect the health or safety of employees; and
- the employer, an employee or a person designated by either of them to accompany the Minister while the Minister is in the workplace.

The Minister will investigate every death of an employee that occurs in the workplace or while the employee was working, or that was the result of an injury that occurred in the workplace or while the employee was working (CLC, s. [141.1](#)(4)).

Penalties, Fines and Charges

Pursuant to s. [148](#)(1) of the CLC, every person who contravenes a provision of Part II of the CLC is guilty of an offence and liable:

- on conviction on indictment to a maximum fine of \$1,000,000 and/or up to 2 years imprisonment; or
- on summary conviction to a maximum fine of \$100,000.

Any person who contravenes a provision of Part II of the CLC that results in the death, serious illness or serious injury to an employee is guilty of an offence and liable:

- on conviction on indictment to a maximum fine of \$1,000,000 and/or up to 2 years imprisonment; or
- on summary conviction to a maximum fine of \$1,000,000 (CLC, s. [148](#)(2)).

Any person who willfully contravenes a provision of Part II of the CLC knowing that the contravention is likely to cause death, serious illness or serious injury to an employee is guilty of an offence and liable:

- on conviction on indictment to a maximum fine of \$1,000,000 and/or up to 2 years imprisonment; or

Occupational Health and Safety Laws (Federal)

- on summary conviction to a maximum fine of \$1,000,000 (CLC, s. [148](#)(3)).

End of Document

Occupational Health and Safety Laws (ON)

Daniel Wong, WeirFoulds LLP

Reviewed on: *12/16/2019*

In Ontario, occupational health and safety laws fall into three categories:

- general health and safety statutes which apply to most workplaces;
- sectoral workplace statutes which regulate particular industries such as mining, construction, or health care; and
- hazard-oriented statutes which deal with specific hazards or substances rather than workplaces.

In Ontario, the main statute governing general occupational health and safety in the workplace is the *Occupational Health and Safety Act*, [R.S.O. 1990, c. O.1](#) ("OHSA"). There are a number of other statutes that address occupational health and safety matters that also apply to certain workplaces in Ontario, including the following:

- *Healing Arts Radiation Protection Act*, [R.S.O. 1990, c. H.2](#);
- *Health Protection and Promotion Act*, [R.S.O. 1990, c. H.7](#); and
- *Technical Standards and Safety Act*, 2000, [S.O. 2000, c.16](#).

Application and Purpose of the Occupational Health and Safety Act

The OHSA applies to most workers, supervisors, employers and workplaces in Ontario. It does not apply to certain work locations, including work done by the owner or occupant or a servant in a private residence or workplaces that are under federal jurisdiction.

The primary purpose of OHSA is to protect workers from health and safety hazards on the job. The legislation prescribes certain duties for the various workplace parties and rights for workers. It also establishes procedures for dealing with workplace hazards and provides for enforcement of the law where compliance has not been achieved voluntarily.

Employer General Duties

Under the OHSA, employers must ensure that:

- the equipment, materials and protective devices as prescribed by the regulations are provided;
- the equipment, materials and protective devices provided by the employer are maintained in good condition;

Occupational Health and Safety Laws (ON)

- the measures and procedures prescribed are carried out in the workplace;
- the equipment, materials and protective devices provided by the employer are used as prescribed; and
- every part of the physical structure of the workplace can support all loads to which it may be subjected in accordance with the *Ontario Building Code*, O. Reg. 332/12, in effect at the time of construction, any standards prescribed by the Ministry or with good engineering practice (OHSA, s. [25\(1\)](#)).

Employer-Specific Duties

In addition to the general duties, employers must:

- provide information, instruction and supervision to a worker to protect the health or safety of the worker;
- in a medical emergency for the purpose of diagnosis or treatment, provide, upon request, information in the possession of the employer, including confidential business information, to a legally qualified medical practitioner and to such other persons as may be prescribed;
- appoint competent persons as supervisors;
- acquaint a worker or a person in authority over a worker with any hazard in the work and in the handling, storage, use, disposal and transport of any article, device, equipment or a biological, chemical or physical agent;
- afford assistance and cooperation to health and safety committees and representatives to carry out their functions;
- not employ workers who are under such age as may be prescribed or knowingly permit underage persons to be in or about the workplace;
- take every precaution reasonable in the circumstances for the protection of a worker;
- post in the workplace a copy of the OHSA and any explanatory material prepared by the Ministry of Labour, both in English and the majority language of the workplace, outlining the rights, responsibilities and duties of workers;
- prepare and review at least annually a written occupational health and safety policy and develop and maintain a program to implement that policy;
- post at a conspicuous location in the workplace a copy of the occupational health and safety policy;
- provide to the joint health and safety committee ("JHSC") or the representative with the results of any occupational health and safety report that the employer has and, if that report is in writing, the employer must also provide a copy of the relevant portions of the report;
- advise workers of the results of a report referred to in duty 11 above and, if the report is in writing, make available to them on request copies of the portions of the report that concern occupational health and safety; and
- notify a Director if a committee or a health and safety representative, if any, has identified potential structural inadequacies of a building, structure, or any part thereof, or any other part of a workplace, whether temporary or permanent, as a source of danger or hazard to workers (OHSA, s. [25\(2\)](#)).

Occupational Health and Safety Laws (ON)

In addition to the general rules applicable to all workplaces, there are also regulations specific to particular industries. Employers have an obligation to know which regulations apply to their workplaces.

Where a regulation applies to a workplace, an employer must:

- establish and maintain an occupational health service for workers, as prescribed;
- keep and maintain accurate records of the handling, storage, use and disposal of biological, chemical or physical agents;
- accurately keep, maintain and make available to the worker affected such records of the exposure of a worker to biological, chemical or physical agents;
- notify a director of the Ministry of Labour of the use or introduction into a workplace of such biological, chemical or physical agents;
- monitor at such time(s) or at such interval(s) the levels of biological, chemical or physical agents in a workplace and keep and post accurate records thereof;
- comply with a standard limiting the exposure of a worker to biological, chemical or physical agents;
- establish a medical surveillance program for the benefit of workers;
- provide for safety-related medical examinations and tests for workers;
- only permit a worker to work or be in a workplace if he/she has undergone such medical examinations, tests or x-rays and is found to be physically fit to do the work in the workplace;
- provide a worker with written instructions as to the measures and procedures to be taken for the protection of a worker; and
- carry out such training programs for workers, supervisors and committee members (OHSA, s. [26](#)).

Supervisor Duties

To be deemed a “supervisor” for the purposes of OHSA, the individual need not hold a managerial title, but rather be someone in charge of a workplace or who has authority over a worker. Determining whether an individual is a supervisor is an objective analysis that involves the consideration of the authority to promote, discipline, schedule work, handle employee complaints, grant leaves of absence and determine pay (see the Ontario Ministry of Labour: [“Who is a Supervisor under the Occupational Health and Safety Act?”](#)).

Pursuant to s. [27](#)(1) of the OHSA, supervisors in Ontario must ensure that workers:

- work in the manner and with the protective devices, measures and procedures required by the OHSA and the regulations; and
- use or wear the equipment, protective devices or clothing that the workers’ employer requires to be used or worn.

In addition, supervisors must:

- advise a worker of the existence of any potential or actual danger to the health or safety of the worker of which the supervisor is aware;

Occupational Health and Safety Laws (ON)

- where so prescribed, provide a worker with written instructions as to the measures and procedures to be taken for protection of the worker; and
- take every precaution reasonable in the circumstances for the protection of a worker (OHSA, s. [27](#)(2)).

Worker Duties

Workers in Ontario must:

- work in compliance with the provisions of the OHSA and the regulations;
- use or wear the equipment, protective devices, or clothing that the employer requires to be used or worn;
- report to his or her employer or supervisor the absence of or defect in any equipment or protective device of which the worker is aware and which may endanger himself, herself, or another worker; and
- report to his or her employer or supervisor any contravention of the legislation or the regulations or the existence of any hazard of which he or she knows (OHSA, s. [28](#)(1)).

In addition, workers must not:

- remove or make ineffective any protective device required by the regulations or by his or her employer, without providing an adequate temporary protective device, and when the need for removing or making ineffective the protective device has ceased, the protective device must be replaced immediately;
- use or operate any equipment, machine, device, or thing or work in a manner that may endanger himself, herself or any other worker; or
- engage in any prank, contest, feat of strength, unnecessary running or rough and boisterous conduct.

Inspections and Investigations

The Ontario Ministry of Labour ensures compliance with OHSA through workplace inspections. Workplace inspections typically occur in one of following scenarios:

- inspector spot audits;
- inspector investigations of work refusals by an employee;
- inspections related to bilateral or unilateral work stoppage by a certified member of a JHSC; or
- where an inspector has been informed of a workplace death or injury.

Inspectors are provided broad authority to perform their duties, including the following powers:

- the right to enter a workplace at any time without warrant or notice;
- the right to take up or use any machine, device, article, thing, material or biological, chemical or physical agent in the workplace;

Occupational Health and Safety Laws (ON)

- the right to require the production of any drawings, specifications, licence, document, record or report and inspect, examine and copy the same;
- the right to conduct or take tests of any equipment, machine, device, article, thing, material or biological, chemical or physical agent in the workplace and to take samples away as necessary;
- the right to make inquiries of any person in the workplace that may be relevant to an inspection, examination, inquiry or test;
- the right to require that a workplace or part thereof not be disturbed for a reasonable period of time for the purposes of carrying out an examination, investigation or test;
- the right to require that any equipment, machine, device, thing or process be tested at the employer's expense by a professional engineer and a report be prepared by the engineer declaring that the machine, device or thing does not pose a danger; and
- the right to require that any equipment, machinery or device not be used until further testing is conducted (OHSA, s. [54](#)(1)).

Penalties and Fines

The penalties for contravening OHSA are considerable as individual supervisors and managers may be found liable in addition to the corporation. In Ontario, convicted individuals are subject to a fine not exceeding \$100,000, imprisonment for a term of not more than 12 months or both (OHSA, s. [66](#)(1)). Corporations are liable for a maximum fine of \$1,500,000 (OHSA, s. [66](#)(2)).

End of Document

Employee Personal Information Management

Reviewed on: *10/21/2019*

Chris Foulon, Israel Foulon LLP

Employers are advised to exercise care in managing the personal information it collects from its employees. It is important to limit the collection and disclosure of employee personal information only to that which is necessary for the purpose it is being collected, and also to restrict access to such information to those who need it to manage the workplace or the business. The following are common examples where it is worth considering separating employee personal information into different files and to restrict access accordingly:

- *General Employee Personal Information* — All personal information necessary for general human resource management should be kept in one file and access should be restricted to the individual(s) responsible for managing human resources. For example, personal contact information such as address, telephone number, emergency contact number, a job description, payroll information, employment agreements, training records and a record of disciplinary action taken.
- *Workplace Safety & Insurance Board ("WSIB") Information* — Files which contain medical and health information related to an injury or illness in the workplace should be kept separately, and access should only be given to those responsible for health and safety and managing workplace absences relating to WSIB matters.
- *Long-Term Disability ("LTD") Information* — Files which contain medical and health information related to an injury or illness unrelated to the workplace should be kept separately, and access should only be given to those responsible for managing workplace absences and implementing required accommodation.
- *Accommodation Information* — Information collected and used for the purpose of providing workplace accommodations to an ill or disabled employee, such as particular medical restrictions and limitations, prognosis and return to work plan, should only be accessible by those responsible for managing employee accommodations.
- *Harassment and Discrimination Complaint Files* — Where an investigation is conducted in response to an employee complaint related to alleged acts of harassment, violence or discrimination in the workplace, all correspondence, notes, documents, evidence, reports and subsequent corrective action taken should be recorded and preserved in a discrete file. Documentation relating to the corrective action taken should also be included in the general personnel file.

Employers should endeavor to keep employee personal information as described above separate so as to avoid the unauthorized disclosure of such information to individuals that do not have employee consent to access and review and/or who do not have any legitimate business interest to have access to such information.

Employee Personal Information Management

The [Privacy Compliance Checklist](#) sets out additional best practices when it comes to managing the personal information of employees in order to protect employee privacy and limit employer liability.

End of Document

Sick Leave

Practical Guidance

Updated on: 03/25/2020

This practice note discusses employees' entitlement to a leave of absence for medical purposes, pursuant to employment standards legislation in Federal, Alberta, British Columbia and Ontario jurisdictions. Specifically, it discusses whether the employee must be employed for a period of time prior to entitlement to sick leave and, if applicable, the length of this qualifying period; the length of entitlement to the leave of absence; when the leave can be taken; notice requirements; including whether documentation may be required to support the leave of absence; and employee protections, including the prohibition on termination, right to benefit continuation, reinstatement and continuity of employment.

Federal

Under the *Canada Labour Code*, R.S.C. 1985, c. L-2 ("Code"), an employee is entitled to a medical leave of absence from employment of up to 17 weeks as a result of:

- personal illness or injury;
- organ or tissue donation; or
- medical appointments during working hours (Code, s. [239\(1\)](#)).

If the medical leave of absence is 3 days or longer, the employer may require that the employee provide a certificate issued by a health care practitioner certifying that the employee was incapable of working for the period of time that he/she was absent from work (Code, s. [239\(2\)](#)).

Notice Requirements

An employee must give written notice to the employer of the day on which the medical leave is to begin and the expected duration of the leave at least 4 weeks before that day, unless there is a valid reason why that notice cannot be given, in which case the employee must provide the employer with written notice as soon as possible (Code, s. [239\(3\)](#)). Notice of any change in the length of medical leave must be given in writing to the employer as soon as possible (Code, s. [239\(4\)](#)).

Right to Benefits During Sick Leave

The pension, health, and disability benefits and the seniority of any employee who takes a sick leave accumulate during the entire period of the leave (Code, s. [209\(8\)](#)).

Where the employee contributes to a benefit plan, the employee must continue to pay his/her contributions

Sick Leave

and the employer must continue to pay the employer's contributions to the benefit plan during the leave of absence (Code, s. [239](#) (9) and (10)). Employment is deemed continuous with employment before the leave of absence (Code, s. [239](#)(12)).

Employer's Obligations

An employer cannot dismiss, suspend, lay off, demote or discipline an employee because of sick leave taken due to illness or injury (Code, s. [239](#)(6)). However, an employer may assign to a different position, with different terms and conditions of employment, any employee who, after an absence due to illness or injury, is unable to perform the work performed by the employee prior to the absence (Code, s. [239](#)(7)).

Work-Related Illness or Injury Leave

Additionally, any employee who has suffered a work-related illness or injury is entitled to a leave of absence (Code, s. [239.1](#)(1)).

Every federally regulated employer must subscribe to a plan that provides an employee who is absent from work due to work-related illness or injury with wage replacement (Code, s. [239.1](#)(2)). Such a wage replacement is payable at an equivalent rate to that provided under the applicable workers' compensation legislation in the employee's province of permanent residence.

The employer must return an employee to work after the employee's absence due to a work-related illness or injury where reasonably practicable. This obligation begins on the date that, according to a certificate from the health care practitioner, the employee is fit to return to work with or without qualifications, and ends 18 months after that date (Code, s. [239.1](#)(3) and Canada Labour Standards Regulations, C.R.C., c. 986 (the "Regulations"), s. [34](#)(1)).

However, an employer may assign the employee to a different position, with different terms and conditions of employment, if the employee is unable to perform the work he or she previously performed (Code, s. [239.1](#)(4)).

In addition, an employer cannot dismiss, suspend, layoff, demote or discipline an employee because of absence from work due to work-related illness or injury (Code, s. [239.1](#)(1)). If an employer lays off or terminates the employment of an employee or discontinues a function of an employee within 9 months after an employee's return to work, the employer must demonstrate to an inspector that it was not because of the absence of the employee from work due to work-related illness or injury (Regulations, s. [34](#)(2)).

Alberta

Entitlement

Under the *Employment Standards Code*, [RSA 2000, c. E-9](#) ("ESC"), an employee who has been employed for at least 90 days with the same employer is entitled to unpaid leave due to illness, injury or quarantine of the employee (ESC, s. [53.97](#)(1)). The maximum amount of leave that may be taken by an employee is 16 weeks in a calendar year (ESC, s. [53.97](#)(2)).

Sick Leave

Notice Requirements

An employee must provide written notice to the employer that he or she will be taking a long-term illness and injury leave as soon as is reasonable and practicable in the circumstances (ESC, s. [53.97](#)(5)). The notice must include the estimated date of the employee's return to work. An employee must also provide the employer with a copy of a medical certificate stating the estimated duration of the leave prior to commencing the leave or as soon as is reasonable and practicable in the circumstances (ESC, s. [53.97](#)(3) and (4)).

The employee must inform the employer of any change in the estimated date of returning to work and provide at least 1 week's written notice of the date they intend to return to work unless the employee and employer agree otherwise (ESC, ss. [53.97](#)(6) and [53.972](#)(1)). If the employee decides not to return to work at the end of the leave, he or she must give the employer at least 2 weeks' written notice of this decision (ESC, s. [53.972](#)(3)).

Leave and Vacation Conflict

If an employee is on leave on the day by which his or her vacation must be used, any unused part of the vacation must be used immediately after the leave expires or, if the employer and employee agree to a later date, by that later date (ESC, s. [53.974](#)).

Employee Protections

No Termination of Employment

An employer cannot terminate or lay-off an employee who has started long-term illness and injury leave unless the employer suspends or discontinues the business, in whole or in part, or the reason for the termination is unrelated to the employee requesting or taking the leave (ESC, s. [53.971](#)). If the business has been suspended or discontinued, but starts up again within 52 weeks of the end of the employee's leave period, the employer must reinstate the employee in the position he or she previously occupied (with at least the same earnings and other benefits) or in an alternate position (with no loss of seniority or other benefits) (ESC, s. [53.973](#)).

Right to Reinstatement

At the end of the long-term illness and injury leave, the employer must reinstate the employee to the position occupied before the leave (or in a comparable position), at not less than the earnings and other benefits that had accrued to the employee when the leave started (ESC, s. [53.972](#)(2)).

Right to Benefits

The ESC does not require an employer to make any payments to the employee or continue to pay for any benefits during a statutory leave of absence. However, where an employer has benefit plans such as sick leave for employees, there may be obligations under the *Alberta Human Rights Act*, [RSA 2000, c. A-25](#).

Sick Leave

British Columbia

Entitlement

Under the *Employment Standards Act*, R.S.B.C. 1996, c. 113 ("ESA"), every employee who has completed 90 consecutive days of employment with an employer is entitled to up to 3 days of unpaid leave in each year for personal illness or injury (ESA, s. 49.1(1)).

Notice Requirements

If requested, the employee must, as soon as practicable, provide to the employer reasonably sufficient proof that the employee is entitled to leave (ESA, s. 49.1(2)).

Employee Protections

Conditions of Employment Remain the Same

An employer may not terminate an employee, or change a condition of employment, because of a leave of absence without the employee's written consent (ESA, ss. [54](#)(2) and [55](#)).

An employee who is absent from work on a statutory leave of absence (except for reservists' leave) continues to participate in pension, medical or other plans of benefit to an employee, if:

- the employer pays the total cost of the plan; or
- both the employer and the employee pay the cost of the plan and the employee chooses to continue to pay his or her share of the cost (ESA, s. [56](#)(2) and (5)).

All employees absent from work on a statutory leave of absence are entitled to all increases in wages and benefits the employee would have been entitled to had they not been on leave or jury duty (ESA, s. [56](#)(3)).

Length of Employment

If an employee is on a statutory leave of absence or jury duty, employment is considered continuous for the purposes of calculating:

- annual vacation;
- termination entitlements; and
- pension, medical or other plans of benefit to the employee (ESA, s. [56](#)(1)).

Right to Reinstatement

As soon as the leave ends, the employer must place the employee in the position the employee held before taking the leave or in a comparable position. If the employer's operations are suspended or discontinued when the leave ends, the employer must similarly reinstate the employee, subject to the seniority provisions in a collective agreement, as soon as operations resume (ESA, s. [54](#)(3) and (4)).

Sick Leave

Ontario

Entitlement

Under the Ontario *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("ESA"), every employee who has been employed for at least 2 consecutive weeks is entitled to 3 days of unpaid leave in a calendar year because of a personal illness, injury or medical emergency (ESA, s. [50](#)(1) and (2)).

Notice Requirements

An employee who wishes to take sick leave must advise his/her employer as soon as possible that he/she will be doing so (ESA, s. [50](#)(3) and (4)). An employer may (but is not obliged to) require an employee to provide evidence reasonable in the circumstances that the employee is entitled to the leave (ESA, s. [50](#)(6)).

Employee Protections

Continuation of Benefits

An employee who is absent from work on a statutory leave of absence (except for a reservist leave) continues to participate in:

- pension plans;
- life insurance plans;
- accidental death plans;
- extended health plans;
- dental plans; and
- any other prescribed plans.

During a statutory leave of absence, an employer must continue to make its contributions with respect to such types of plans unless the employee gives the employer written notice that he or she does not want to pay his or her contributions, if any (ESA, s. [51](#)).

Length of Employment

The period that an employee is absent from work during a statutory leave of absence must be included for the purposes of calculating his or her length of employment, his or her length of service and his or her seniority. The period is not counted for the purposes of determining whether or not an employee has completed a probationary period (ESA, s. [52](#)).

Right to Reinstatement

An employee is entitled to be reinstated to the position he or she most recently held if it still exists or to a comparable position if it does not at the end of a statutory leave of absence. An employee returning from a reservist leave may have his or her reinstatement postponed by the employer by two weeks or until the first pay day that falls after the day that the reservist leave ends. The reinstated employee must be paid the greater of the most recent wage rate he or she earned with the employer, or the rate that the employee would have

Sick Leave

earned had he or she worked throughout the leave. Where an employer does not reinstate an employee after his or her leave, the employer must be prepared to establish that the reasons for the failure to reinstate are unrelated to the employee's leave (ESA, s. [53](#)).

Vacation Entitlements

Employees may defer taking any vacation time until the end of their statutory leave of absence. Vacation pay is still calculated based on actual wages, which in the case of an unpaid leave, may amount to zero. The employer and employee can agree to waive some or all of the time off owing or to reschedule when it will be taken, however entitlement to any vacation pay owing cannot be waived (ESA, s. [51.1](#)).

End of Document



Short-Term Illness Leave Policy

Practical Guidance

[NAME OF COMPANY] SHORT-TERM ABSENCE DUE TO ILLNESS POLICY

Effective Date: [date]

1 Eligibility

To become eligible, an employee must meet the following conditions:

- (a) he or she must have become totally disabled while covered;
- (b) he or she must be a permanent employee;
- (c) he or she must be actively working a minimum of [20] hours a week; and
- (d) he or she must have completed [3] months of continuous employment.

2 Illness Absences of up to [15] Uninterrupted Days

The first [5] days or absence will be paid out of the employee's personal days (see precedent: [Personal Days Policy](#)) allotment.

If an absence extends longer than [5] days, the period between [6] days and [15] days will be paid at 100% of the base salary, excluding overtime, bonus and commission earnings, through the company payroll.

3 Illness Absences Exceeding [15] Uninterrupted Days

The employee will need to apply for a continuation of benefits through the company benefits provider.

The level of benefit through the company benefits provider is [85]% of the base salary from the [16th] day to the [26th] week of absence, inclusive.

4 Guidelines

- (a) "Day(s)" refers to work days Monday to Friday.

Short-Term Illness Leave Policy

(b) An employee will be considered to be “totally disabled” when continuously unable, due to an illness, to do the essential duties of his or her own occupation. An employee will not be considered to be “totally disabled” if the disability results from drug or alcohol abuse, unless the employee participates in a company benefits provider–approved treatment program or the employee has an organic disease that would cause total disability even if drug or alcohol abuse ended.

(c) Should an employee have a reoccurrence of an illness that is due to the same or related causes of the initial illness, the absence will be considered to be a continuation of the previous illness if it occurs within [2] weeks of the end of the previous illness. The employee must be covered under this policy when the illness reoccurs.

(d) Benefit payments end the earlier of the following dates:

- (i) the date an employee is no longer totally disabled;
- (ii) the end of the maximum benefit period of [26] weeks;
- (iii) the date the employee retires or reaches age [65], whichever is earlier; or
- (iv) the date the employee dies.

5 For Absences of up to [15] Days

(a) If the absence is [1] or [2] days only, the employee must complete an Absence Request & Report form upon returning, for management approval. This form is forwarded to human resources for record-keeping.

(b) If the absence is [3] to [5] days in length, the employee must submit a medical certificate supporting the absence and complete an Absence Request & Report form upon returning, for management approval. Both forms are forwarded to human resources for record-keeping.

Note: A medical certificate must specify that:

- (i) the employee was unable to work during the days absent;
- (ii) the employee was under the care of a physician during that time; and
- (iii) the employee is fit to work, on a specified date.

(b) If the absence is [6] to [15] days in length, human resources will forward a Company Attending Physician Statement form to the employee, which must be duly completed and submitted along with an Absence Request & Report form for management approval upon the employee’s return. Both forms are forwarded to human resources for record-keeping.

6 For Absences Exceeding 15 Days

(a) The employee is removed from the company’s payroll.

Short-Term Illness Leave Policy

(b) The employee should apply for the company benefits provider illness benefits as soon as he or she knows the absence will exceed [15] days. To do so, the employee must inform human resources and the reporting manager that the absence will exceed [15] days.

(c) Human resources will forward a Company Benefits Provider Employee Statement and Attending Physician Statement to the employee for completion.

(d) The physician may charge for completion of the Attending Physician Statement. If so, these charges are considered an eligible medical expense and can be claimed from the employee's health care spending account, which is part of the company's benefit program.

(e) Once completed, the employee forwards both forms to human resources, who will complete a Company Benefits Provider Employer Statement and send all documentation to the benefits provider. It is critical that the employee completes and forwards the forms to human resources as soon as possible.

(f) The company benefits provider will assess the employee's application for short-term illness benefits and notify the company and the employee of their decision.

(g) If the employee is able to return to work before the end of [26] weeks of illness, he or she must provide the reporting manager with a minimum of [24] hours' notice. The employee must submit a medical certificate that supports the employee's ability to return to work and complete an Absence Request & Report form, for management approval. Both forms are forwarded to human resources for record-keeping. An employee cannot return to work without medical support.

Those in the human resources department privy to the information on the Company Benefits Provider Attending Physician Statement are bound by the legal rules of confidentiality, which state that an employee's medical condition cannot be discussed with anyone else inside the company. However, if an employee wishes to send the form directly to the company benefits provider, he or she may do so. If he or she does send the form directly, however, it is important that the employee contacts the human resources department to notify them of his or her actions. The human resources department will then forward the required Benefits Provider Employer Statement.

Critical Illness Leave

Practical Guidance (Federal, Alberta and Ontario jurisdictions) and [Kacey Krenn](#), [Harris & Company LLP](#)
(British Columbia jurisdiction)

Updated on: **12/03/2019**

This practice note discusses employees' entitlement to a leave of absence to care for a family member that is critically ill, pursuant to employment standards legislation in federal, Alberta, British Columbia, and Ontario jurisdictions. Specifically, it discusses whether the employee must be employed for a period of time prior to entitlement to this leave and, if applicable, the length of this qualifying period; the length of entitlement to the leave of absence; who is considered to be a family member under this leave; who is considered to be a "critically ill child" and a "critically ill adult" under this leave; when the leave can be taken; notice requirements; including whether documentation may be required to support the leave of absence; and employee protections, including the prohibition on termination, right to benefit continuation, reinstatement and continuity of employment.

Federal

Under the *Canada Labour Code*, R.S.C. 1985, c. L-2 ("Code"), every employee who is the family member of a critically ill child is entitled to an unpaid leave of absence from employment of up to 37 weeks in order to care for or support that child (Code, s. [206.4](#)(2)).

In addition, every employee who has completed 6 consecutive months of continuous employment with an employer and who is the family member of a critically ill adult is entitled to an unpaid leave of absence from employment of up to 17 weeks in order to care for or support that adult (Code, s. [206.4](#)(2.1)).

To be eligible for these leaves, the employee must provide the employer with a certificate from a health care practitioner that states that the child or adult is a critically ill and requires the care or support of one or more of their family members and that sets out the period during which the child or adult requires that care or support (Code, s. [206.4](#)(2) and (2.1)).

The aggregate amount of leave related to critical illness that may be taken by employees is 37 weeks in respect of the same critically ill child and 17 weeks in respect of the same critically ill adult (Code, s. [206.4](#)(5)). A leave of absence may only be taken in periods of not less than 1 weeks' duration (Code, s. [207.01](#)).

Who Is Considered to Be a "Family Member", a "Critically Ill Child" and a "Critically Ill Adult"?

"Family member", "critically ill child" and "critically ill adult" all have the same meanings as in the regulations made under the *Employment Insurance Act*, [S.C. 1996, c. 23](#) (Code, s. [206.4](#)(1)). For a list of who is included as a family member see table: Compassionate Care and Family Caregiver Benefits: Family Member Defined (Employment Insurance)?

Critical Illness Leave

A “critically ill child” is a person under 18 years of age whose baseline state of health has significantly changed and whose life is at risk as a result of an illness or injury (Employment Insurance Regulations, [SOR/96-332](#) (the “Regulations”), s. [1\(6\)](#)).

A “critically ill adult” is a person who is 18 years of age or older whose baseline state of health has significantly changed and whose life is at risk as a result of an illness or injury (Regulations, s. [1\(7\)](#)).

When Can the Leave Be Taken?

The leave of absence can be taken on the first day of the week in which the medical certificate is issued or, if the leave begins before the day on which the certificate is issued, the day from which the health care practitioner certifies that the child or adult is critically ill. The leave must end when the allowed leave ends (37 weeks or 17 weeks within a 52-week period) or on the last day of the week in which the child or adult dies (Code, s. [206.4\(4\)](#)). An employee may interrupt a leave of absence in order to be absent for a work-related illness or injury (Code, s. [207.02\(1\)](#)).

Employees cannot take a leave related to a critically ill adult before the end of a leave related to a critically ill child in respect of the same person ([206.4\(6\)](#)). Nor can an employee take compassionate care leave before the end of a leave related to critical illness in respect of the same person (Code, s. [206.4\(7\)](#)).

Notice Requirements

An employee must, as soon as possible, provide the employer with a notice in writing of the reasons for the leave and the length of the leave that they intend to take, as well as notice of any change in the length of the leave. If the length of the leave is more than 4 weeks, written notice of any change in the length of the leave must be provided on at least 4 weeks’ notice unless there is a valid reason why it cannot be done (Code, s. [207.3](#)).

An employer may require an employee to provide documentation in support of the reasons for the leave and of any change in the length of leave that the employee intends to take (Code, s. [207.3\(4\)](#)).

Right to Benefits during Leave

The pension, health and disability benefits, and the seniority of any employee who takes a leave of absence accumulate during the entire period of the leave (Code, s. [209.2](#)). Where the employee contributes to a benefit plan, the employee must continue to pay his/her contributions and the employer must continue to pay the employer’s contributions to the benefit plan during the leave of absence (Code, s. [209.2\(2\)](#) and (2.1)). Employment is deemed continuous with employment before the leave of absence (Code, s. [209.2\(4\)](#)).

Employer’s Reinstatement Obligations

As a general rule, the employee must be reinstated in his or her former position, or be given a comparable position in the same location, and with the same wages and benefits (Code, s. [209.1](#)). The employer cannot dismiss, suspend, lay off, demote or discipline an employee because the employee has applied for a leave of absence to deal with a critically ill family member (Code, s. [209.3](#)).

Critical Illness Leave

Alberta

Under the *Employment Standards Code*, [RSA 2000, c. E-9](#) ("ESC"), an employee who has been employed for at least 90 days with the same employer is entitled to an unpaid leave of absence to provide care or support to a family member who is a critically ill child or critically ill adult (ESC, s. [53.96\(1\)](#)). In the case of a leave related to a critically ill child, the employee is entitled to up to 36 weeks, and in the case of a leave related to a critically ill adult, that entitlement is up to 16 weeks (ESC, s. [53.96\(2\)](#)).

The ESC does not define "critically ill", but a "child" is defined as a person who is under 18 years of age (ESC, s. [53.96\(1\)\(a\)](#)). The definition of "family member" is the same as the one used for the purposes of compassionate care leave (please see the practice note: [Compassionate Care Leave](#)).

An employer is not required to grant a critical illness of child leave to more than one employee at a time with respect to the same child (ESC, s. [53.96\(3\)](#)).

Length of Leave

A critical illness of child leave of absence may be taken in one or more periods, but no period may be less than 1 weeks' duration, up to a maximum of 36 weeks in the case of a critically ill child and up to a maximum of 16 weeks in the case of a critically ill adult (ESC, s. [53.96\(9\)](#)).

A critical illness leave ends on the earliest of the following occurrences:

- the last day of the work week in which the critically ill child or adult dies;
- the period of 36 weeks (critically ill child) or 16 weeks (critically ill adult) of leave ends;
- the end date specified in the medical certificate; or
- the last day of the work week in which the employee ceases to provide care or support to the critically ill child or adult (ESC, s. [53.96\(10\)](#)).

If more than one child of the employee is critically ill as a result of the same event, the period during which the employee may take critical illness leave begins on the earlier of the dates specified on the first medical certificate issued in respect of any of the children that are critically ill (ESC, s. [53.96\(4\)](#)). The leave ends on the earliest of the following occurrences:

- the last day of the work week in which the last of the critically ill children dies;
- the expiry of 36 weeks following the date leave began under clause (a);
- the expiry of the latest period referred to on the medical certificates for the critically ill children; or
- the last day of the work week in which the employee ceases to provide care or support to the last of the critically ill children (ESC, s. [53.96\(4\)](#)).

Notice Requirements

Every employee must provide at least 2 weeks' written notice to the employer that he or she will be taking a critical illness leave, unless circumstances necessitate a shorter period, in which case it must be provided as soon as reasonable and practicable in the circumstances (ESC, s. [53.96\(7\)](#)). The notice must include the

Critical Illness Leave

estimated date of the employee's return to work. An employee must also give the employer a copy of a medical certificate prior to commencing the leave or as soon as is reasonable and practicable in the circumstances (ESC, s. [53.96](#)(5) and (6)). The medical certificate must state:

- the child or adult is critically ill and requires the care or support of one or more family members;
- the start and end date of the period during which the child or adult requires care or support; and
- if the leave was begun before the certificate was issued, the day leave began (ESC, s. [53.96](#)(5)).

The employee must inform the employer of any change in the estimated date of returning to work and provide at least 1 week's written notice of the date they intend to return to work, unless the employee and employer agree otherwise (ESC, ss. [53.96](#)(8) and [53.962](#)(1)). If an employee decides not to return to work at the end of the critical illness of child leave, the employee must give the employer 2 weeks' written notice of this decision (ESC, s. [53.962](#)(3)).

British Columbia

Entitlement

Under the *Employment Standards Act*, R.S.B.C. 1996, c. 113 ("ESA"), an employee is entitled to a leave of absence to care for or support a critically ill family member. In the case of a leave related to a critically ill child (under 19 years old), the employee is entitled to up to 36 weeks in a 52-week period (ESA, s. [52.11](#)(2)(a)). In the case of a leave related to a critically ill adult (19 years and older), the employee is entitled to up to 16 weeks in a 52-week period (ESA, s. [52.11](#)(2)(b)). To be entitled to this leave, an employee must obtain and provide to the employer as soon as possible a medical certificate issued by a medical practitioner or nurse practitioner (ESA, s. [52.11](#)(2)).

Who Is a "Family Member"?

An employee may take leave where a family member is critically ill. "Family member" means a member of an employee's immediate family and any other individual who is a member of a prescribed class. "Immediate family" is defined to include the spouse, child, parent, guardian, sibling, grandchild or grandparent of an employee, and any person who lives with the employee as a member of the employee's family (ESA, s. [52.11](#)(1)).

Timing of Leave

A critical illness leave can last up to 36 weeks in the case of a critically ill child (defined as a person under 19 years old) or 16 weeks in the case of a critically ill adult (defined as a person 19 years and older) per year, provided a certificate is provided by a medical practitioner or nurse practitioner (ESA, s. [52.11](#)(2)). However, if the medical certificate sets out a period of less than 36 weeks or 16 weeks as the case may be, the employee is only entitled to take the leave up to the number of weeks indicated in the medical certificate (ESA, s. [52.11](#)(3)).

Notice Requirements

The employee must provide the employer with a copy of a certificate issued by a medical practitioner or

Critical Illness Leave

nurse practitioner as soon as practicable (ESA, s. [52.11](#)(5)). The certificate must

- state that the baseline state of health of the family member has significantly changed and the life of the family member is at risk as a result of an illness or injury;
- state that the care or support required by the family member can be met by one or more persons who are not medical professionals; and
- set out the period for which the family member requires care or support (ESA, s. [52.11](#)(4)).

Employee Protections

Conditions of Employment Remain the Same

An employer may not terminate an employee, or change a condition of employment, because of a leave or jury duty without the employee's written consent (ESA, ss. [54](#)(2) and [55](#)).

An employee who is absent from work on a statutory leave of absence (except for reservists' leave) continues to participate in pension, medical or other plans of benefit to an employee, if:

- the employer pays the total cost of the plan; or
- both the employer and the employee pay the cost of the plan and the employee chooses to continue to pay his or her share of the cost (ESA, s. [56](#)(2) and (5)).

All employees absent from work on a statutory leave of absence are entitled to all increases in wages and benefits the employee would have been entitled to had they not been on leave or jury duty (ESA, s. [56](#)(3)).

Length of Employment

If an employee is on a statutory leave of absence or jury duty, employment is considered continuous for the purposes of calculating:

- annual vacation;
- termination entitlements; and
- pension, medical or other plans of benefit to the employee (ESA, s. [56](#)(1)).

Right to Reinstatement

As soon as the leave ends, the employer must place the employee in the position the employee held before taking the leave or in a comparable position. If the employer's operations are suspended or discontinued when the leave ends, the employer must similarly reinstate the employee, subject to the seniority provisions in a collective agreement, as soon as operations resume (ESA, s. [54](#)(3) and (4)).

Critical Illness Leave

Ontario

Entitlement

Pursuant to the Ontario *Employment Standards Act, 2000*, [S.O. 2000, c. 41](#) ("ESA, 2000"), an employee who has been employed for at least 6 consecutive months is entitled to an unpaid leave of absence to provide care or support to a family member who is a critically ill minor child or adult (ESA, 2000, ss. [49.4](#)(2) and (3)). In the case of a leave related to a critically ill child, the employee is entitled to up to 37 weeks and in the case of a leave related to a critically ill adult, up to 17 weeks (ESA, 2000, s. [49.4](#)(3) and (6)).

A "minor child" is defined as an individual who is under 18 years of age and an "adult" is an individual who is 18 years or older (ESA, 2000, s. [49.4](#)(1)). "Critically ill means a minor child or adult whose baseline state of health has significantly changed and whose life is at risk as a result of an illness or injury" (ESA, 2000, s. [49.4](#)(1)).

This leave is separate from the Family Medical Leave, which is available when a family member has a serious medical condition (see practice note: [Compassionate Care Leave](#)), child death leave, crime-related child disappearance leave, domestic or sexual violence leave and the personal emergency leave (see practice note: [Declared Emergencies and Infectious Disease Emergencies Leave \(ON\)](#)) (ESA, 2000, s. [49.4](#)(21)).

Who Is a "Family Member"?

The below table sets out who is a family member for the purposes of a critical illness leave under the ESA, 2000 (ESA, 2000, s. [49.4](#)(1)).

Family Member	Employee	Employee's Spouse
Spouse	X	—
Parent, step-parent or foster parent	X	X
Child, step-child or foster child	X	X
Child under legal guardianship	X	X
Brother, step-brother, sister, or step-sister	X	-
Grandparent, step-grandparent, grandchild or step-grandchild	X	X
Brother-in-law, step-brother-in-law, sister-in-law or step-sister-in-law	X	-
Son-in-law or daughter-in-law	X	X
Uncle or aunt	X	X
Nephew or niece	X	X
Spouse of grandchild, uncle, aunt or niece	X	-
Person considered to be like a family member	X	-

Critical Illness Leave

Timing of Leave

A critical illness leave can last up to 37 weeks in the case of a critically ill minor child or 17 weeks in the case of a critically ill adult within a 52-week period (ESA, 2000, s. [49.4](#)(4) and (6)). However, if the medical certificate sets out a period of less than 37 weeks or 17 weeks as the case may be, the leave must end on the last day specified in the medical certificate (ESA, 2000, s. [49.4](#)(8)).

If the period specified in the medical certificate is 52 weeks or longer, the leave may end no later than the last day of the 52-week period that begins on the earlier of the first day of the week in which the minor child or adult became critically ill or the first day of the week in which the certificate is issued (ESA, 2000, s. [49.4](#)(9)).

If a critically ill minor child or adult dies while an employee is on a leave, the leave ends on the last day of the week in which the minor child or adult dies (ESA, 2000, s. [49.4](#)(10)).

Notice Requirements

The employee is required to provide the employer with written notice that he or she will be taking a critical illness leave, prior to taking the leave, or as soon as possible after beginning the leave and provide the employer with a written plan that indicates the weeks in which the employee will take the leave (ESA, 2000, s. [49.4](#)(17) and (18)). The employee is required to provide a copy of a medical certificate as soon as possible if requested by the employer (ESA, 2000, s. [49.4](#)(20)).

Employee Protections

Continuation of Benefits

An employee who is absent from work on a statutory leave of absence (except for a reservist leave) continues to participate in:

- pension plans;
- life insurance plans;
- accidental death plans;
- extended health plans;
- dental plans; and
- any other prescribed plans.

During a statutory leave of absence, an employer must continue to make its contributions with respect to such types of plans unless the employee gives the employer written notice that he or she does not want to pay his or her contributions, if any (ESA, 2000, s. [51](#)).

Length of Employment

The period that an employee is absent from work during a statutory leave of absence must be included for the purposes of calculating his or her length of employment, his or her length of service and his or her

Critical Illness Leave

seniority. The period is not counted for the purposes of determining whether or not an employee has completed a probationary period (ESA, s. [52](#)).

Right to Reinstatement

An employee is entitled to be reinstated to the position he or she most recently held if it still exists or to a comparable position if it does not at the end of a statutory leave of absence. An employee returning from a reservist leave may have his or her reinstatement postponed by the employer by 2 weeks or until the first pay day that falls after the day that the reservist leave ends. The reinstated employee must be paid the greater of the most recent wage rate he or she earned with the employer, or the rate that the employee would have earned had he or she worked throughout the leave. Where an employer does not reinstate an employee after his or her leave, the employer must be prepared to establish that the reasons for the failure to reinstate are unrelated to the employee's leave (ESA, 2000, s. [53](#)).

Vacation Entitlements

Employees may defer taking any vacation time until the end of their statutory leave of absence. Vacation pay is still calculated based on actual wages, which in the case of an unpaid leave, may amount to zero. The employer and employee can agree to waive some or all of the time off owing or to reschedule when it will be taken, however entitlement to any vacation pay owing cannot be waived (ESA, 2000, s. [51.1](#)).

For more information on critically ill child care leave see the [guide](#) prepared by the Ontario Ministry of Labour.

Compassionate Care Leave

Practical Guidance (Federal, Alberta and Ontario jurisdictions) and [Kacey Krenn, Harris & Company LLP](#)
(British Columbia jurisdiction)

Updated on: **12/02/2019**

This practice note discusses employees' entitlement to a leave of absence to provide care or support to a family member, pursuant to employment standards legislation in federal, Alberta, British Columbia, and Ontario jurisdictions. Specifically, it discusses whether the employee must be employed for a period of time prior to entitlement to compassionate care leave and, if applicable, the length of this qualifying period; the length of entitlement to the leave of absence; who is considered to be a family member under this leave; when the leave can be taken; notice requirements; including whether documentation may be required to support the leave of absence; and employee protections, including the prohibition on termination, right to benefit continuation, reinstatement, and continuity of employment.

Federal

Entitlement

Under the *Canada Labour Code*, [R.S.C. 1985, c. L-2](#) ("Code"), every employee is entitled to an unpaid leave of absence from employment of up to 28 weeks to provide care or support to a family member (Code, s. [206.3](#)(2)). The employee must provide the employer with a certificate from a health-care practitioner stating that the family member has a serious medical condition with a significant risk of death within 26 weeks of the certificate or the beginning of the leave (whichever comes first) (Code, s. [206.3](#)(2)). If the leave is to be taken after the end of the period of 26 weeks, it is not necessary for a health-care practitioner to issue an additional certificate (Code, s. [206.3](#)(3.1)).

Two or more employees under federal jurisdiction may share the entitlement to compassionate care leave. However, the total amount of leave that may be taken by two or more employees for the same family member is 28 weeks (Code, s. [206.3](#)(7)). An employee cannot take a leave under s. [206.4](#)(2) before the end of the compassionate care leave in respect of the same person (Code, s. [206.3](#)(7.1)).

Who Is Considered to Be a "Family Member?"

Family member has the same meaning as in the regulations made under the *Employment Insurance Act*, see the table: Compassionate Care and Family Caregiver Benefits: Family Member Defined (Employment Insurance)

Compassionate Care Leave

Notice Requirements

An employee must, as soon as possible, provide the employer with a notice in writing of the reasons for the leave and the length of the leave that they intend to take, as well as notice of any change in the length of the leave. If the length of the leave is more than 4 weeks, written notice of any change in the length of the leave must be provided on at least 4 weeks' notice unless there is a valid reason why it cannot be done (Code, s. [207.3](#)).

An employer may require an employee to provide documentation in support of the reasons for the leave and of any change in the length of leave that the employee intends to take (Code, s. [207.3](#)(4)).

Right to Benefits during Leave

The pension, health, disability benefits and the seniority of any employee who takes a leave of absence accumulate during the entire period of the leave (Code, s. [209.2](#)).

Where the employee contributes to a benefit plan, the employee must continue to pay his/her contributions and the employer must continue to pay the employer's contributions to the benefit plan during the leave of absence (Code, s. [209.2](#)(2) and (2.1)). Employment is deemed continuous with employment before the leave of absence (Code, s. [209.2](#)(4)).

Employer's Reinstatement Obligations

As a general rule, the employee must be reinstated in his or her former position, or be given a comparable position, in the same location and with the same wages and benefits (Code, s. [209.1](#)). The employer cannot dismiss, suspend, lay off, demote or discipline an employee because the employee has applied for a leave of absence to deal with a critically ill family member (Code, s. [209.3](#)).

For more information on compassionate care leave see the [Labour Program's Interpretations, Policies and Guidelines](#).

Alberta

Eligibility

Under the *Employment Standards Code*, RSA 2000, c. E-9 ("ESC"), an employee who has worked for at least 90 days with an employer is entitled to an unpaid job-protected leave to provide care and support to a seriously ill family member (ESC, s. [53.9](#)(2)).

To be eligible for compassionate care leave, the employee must provide to the employer a medical certificate issued by the physician caring for the ill family member stating that:

- the employee's family member has a serious medical condition with a significant risk of death within 26 weeks from:
 - the day the certificate is issued; or
 - if the leave was begun before the certificate was issued, the day the leave began; and
- the family member requires the care or support of one or more family members (ESC, s. [53.9](#)(4)).

Compassionate Care Leave

If the employee cannot provide the certificate prior to starting the leave, they must provide it as soon as is reasonable.

Length

The maximum amount of compassionate care leave that may be taken by an employee is 27 weeks (ESC, s. [53.9\(2\)](#)). A leave may be broken into one or more periods but each period must be at least 1 week length (ESC, s. [53.9\(8\)](#)).

Compassionate care leave ends when the earliest of one of the following occurs:

- the last day of the work week in which the family member dies;
- the 27 weeks of compassionate care leave ends; or
- the last day of the work week in which the employee ceases to provide care or support to the seriously ill family member (ESC, s. [53.9\(9\)](#))

Family Member Defined

The following table sets out who is defined as a “family member” under the ESC (ESC, s. [53.9\(b\)](#); and Employment Standards Regulation, Alta. Reg. 14/97, s. [54.1](#)):

Family Member	Employee	Employee's Partner ¹
Spouse, common-law partner or adult interdependent partner	x	—
Child (including their partner)	x	x
Parent (including their partner)	x	x
Siblings, half-siblings, step siblings (including their partner)	x	x
Grandparent (including their spouse, common-law partner or adult interdependent partner)	x	x
Grandchild (including their partner)	x	x
Uncle, aunt, niece, nephew (including their partner)	x	x ²
Current or former foster parent	x	x
Current or former foster child (including their partner)	x	
Current or former ward	x	x
Current or former guardian (including their partner)	x	

Compassionate Care Leave

Family Member	Employee	Employee's Partner ¹
An unrelated person considered to be like a close relative	x	

¹ Partner is defined as a spouse, common-law partner or an adult interdependent partner (Regulations, s. [54.1](#)(1)(c)).

² Excludes spouse, common-law partner or an adult interdependent partner.

Notice Requirements

An employee must provide at least 2 weeks' written notice to the employer that he or she will be taking a compassionate care leave unless circumstances necessitate a shorter period in which case it must be provided as soon as reasonable and practicable in the circumstances (ESC, s. [53.9](#)(6)). The notice must include the estimated date of the employee's return to work. An employee must also give the employer a copy of the physician's certificate prior to commencing the leave or as soon as is "reasonable and practicable" in the circumstances (ESC, s. [53.9](#)(5) and (6)).

An employee must provide at least 1 week's written notice of the date the employee intends to return to work, unless they agree otherwise (ESC, s. [53.92](#)(1) and (2)).

If an employee decides not to return to work at the end of the compassionate care leave, the employee must give the employer 2 weeks' written notice of this decision (ESC, s. [53.92](#)(3)).

Leave and Vacation Conflict

If an employee is on compassionate care leave on the day by which his or her vacation must be used, any unused part of the vacation must be used immediately after the leave expires or, if the employer and employee agree to a later date, by that later date (ESC, s. [53.94](#)).

Employee Protections

No Termination of Employment

An employer cannot terminate or lay off an employee who has started compassionate care leave, unless the employer suspends or discontinues the business in whole or in part (ESC, s. [53.91](#)). If the business has been suspended or discontinued, but starts up again within 52 weeks of the end of the employee's leave period, the employer must reinstate the employee in the position he or she previously occupied or in an alternate position (ESC, s. [53.93](#)). In addition, the employer must provide the employee with at least the same wages and benefits that he or she had accrued the time the leave began.

Right to Reinstatement

At the end of the compassionate care leave, the employer must reinstate the employee to the position occupied before the leave (or in a comparable position), at not less than the earnings and other benefits that had accrued to the employee when the leave started (ESC, s. [53.92](#)(2)).

Compassionate Care Leave

Right to Benefits

The ESC does not require an employer to make any payments to the employee or continue to pay for any benefits during a statutory leave of absence.

British Columbia

Entitlement

Under the *Employment Standards Act*, R.S.B.C. 1996, c. 113 ("ESA"), an employee can take up to 27 weeks of unpaid leave within a 52-week period to care for or support a gravely ill family member (ESA, s. [52.1](#)(2) and (5)). To be entitled to this leave, an employee must obtain and provide to the employer as soon as possible a medical certificate which states that the family member has a serious medical condition with a significant risk of death within 26 weeks after the date the certificate is issued or if the leave began before the date the certificate is issued, the date the leave began (ESA, s. [52.1](#)(2) and (3)).

An employee need not have worked a minimum period of time to qualify for compassionate care leave.

Who Is a Family Member?

"Family member" means someone who is

- a member of an employee's immediate family, including the spouse, child, parent, guardian, sibling, grandchild or grandparent of an employee;
- the child or parent of an employee's spouse;
- any person who lives with an employee as a member of the employee's family; and
- any other individual who is a member of a prescribed class. (ESA, ss. [52.1](#)(1) and [1](#)(1)).

Timing of Leave

An employee may begin a compassionate care leave no earlier than the first day of the week in which the medical certificate is issued and the leave must be taken in units of 1 or more weeks (ESA, s. [52.1](#)(4) and (6)). The leave ends on the last day of the week in which the earlier of the following occurs:

- the family member dies; or
- the expiration of 52 weeks or other prescribed period from the date the leave began (ESA, s. [52.1](#)(5)).

If an employee takes a compassionate care leave and the family member does not die within the 26-week period, the employee may take a further leave after obtaining a new medical certificate (ESA, s. [52.1](#)(7)).

Employee Protections

Conditions of Employment Remain the Same

Compassionate Care Leave

An employer may not terminate an employee, or change a condition of employment, because of a leave or jury duty without the employee's written consent (ESA, ss. [54\(2\)](#) and [55](#)).

An employee who is absent from work on a statutory leave of absence (except for reservists' leave) continues to participate in pension, medical or other plans of benefit to an employee, if:

- the employer pays the total cost of the plan; or
- both the employer and the employee pay the cost of the plan and the employee chooses to continue to pay his or her share of the cost (ESA, s. [56\(2\)](#) and (5)).

All employees absent from work on a statutory leave of absence are entitled to all increases in wages and benefits the employee would have been entitled to had they not been on leave or jury duty (ESA, s. [56\(3\)](#)).

Length of Employment

If an employee is on a statutory leave of absence or jury duty, employment is considered continuous for the purposes of calculating:

- annual vacation;
- termination entitlements; and
- pension, medical or other plans of benefit to the employee (ESA, s. [56\(1\)](#)).

Right to Reinstatement

As soon as the leave ends, the employer must place the employee in the position the employee held before taking the leave or in a comparable position. If the employer's operations are suspended or discontinued when the leave ends, the employer must similarly reinstate the employee, subject to the seniority provisions in a collective agreement, as soon as operations resume (ESA, s. [54\(3\)](#) and (4)).

Ontario

Family Caregiver Leave

Entitlement

Pursuant to the *Ontario Employment Standards Act, 2000*, S.O. 2000, c. 41 ("ESA, 2000"), an employee is entitled to a family caregiver leave, without pay, for up to 8 weeks per year to provide care and support to a family member with a serious medical condition diagnosed by a qualified health practitioner (ESA, 2000, s. [49.3\(4\)](#)). There is no minimum service requirement for eligibility to take a family caregiver leave. An employee may take a family caregiver leave if caring for or supporting the following specified relatives:

- the employee's spouse;
- a parent, step-parent or foster parent of the employee or the employee's spouse;
- a child, step-child or foster child of the employee or the employee's spouse;

Compassionate Care Leave

- a grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse;
- the spouse of a child of the employee;
- the employee's brother or sister; and
- a relative of the employee who is dependent on the employee for care or assistance (ESA, 2000, s. [49.3\(5\)](#)).

The 8 weeks of leave will apply to each family member (ESA, 2000, s. [49.3\(4\)](#)). If an employee takes any part of a week as a leave, the employer may deem the employee to have taken one week of leave (ESA, 2000, s. [49.3\(7.1\)](#)).

This leave is separate from family medical leave, which is available when a family member has a serious medical condition, critical illness leave, child death leave, crime-related child disappearance leave, domestic or sexual violence leave, and the personal emergency leave (ESA, 2000, s. [49.3\(9\)](#)).

Notice Requirements

The employee is required to provide the employer with written notice that he or she will be taking a family caregiver leave, prior to taking the leave or as soon as possible after beginning the leave, and must provide a copy of a medical certificate from a qualified health practitioner if requested by the employer (ESA, 2000, s. [49.3\(7\)](#) and (8)).

Family Medical Leave

Entitlement

Additionally, an employee is entitled to a family medical leave, without pay, for up to 28 weeks to provide care or support to a terminally ill family member.

For a detailed list of who qualifies as a family member, see the table: Employment Standards: Family Members for Purposes of Leave Table (ON).

The family medical leave must be taken in periods of entire weeks (ESA, 2000, s. [49.1\(7\)](#)). Where two employees request a leave in regard to the same relative, they are entitled to a total of 28 weeks during the 52-week period starting on the first day of the week in which the 26-week period identified on the first medical certificate issued begins (ESA, 2000, s. [49.1\(6\)](#)).

This leave is separate from family caregiver leave, critical illness leave, child death leave, crime-related child disappearance leave, domestic or sexual violence leave and the personal emergency leave (ESA, 2000, s. [49.1\(12\)](#)).

Timing of Leave

The earliest an employee may start a family leave is the first day of the week in which the 26-week period identified on the medical certificate begins (ESA, 2000, s. [49.1\(4\)](#)). The last day an employee can remain on leave is the earlier of:

Compassionate Care Leave

- the last day of the week in which the family member dies; or
- the last day of the 52-week period starting on the first day of the week in which the 26-week period identified on the medical certificate begins (ESA, 2000, s. [49.1](#)(5)).

Notice Requirements

The employee is required to provide the employer with written notice that he or she will be taking a family medical leave, prior to taking the leave or as soon as possible after beginning the leave (ESA, 2000, s. [49.1](#)(8) and (9)). An employer may request that an employee provide as soon as possible a medical certificate from a qualified health practitioner stating that the family member has a serious medical condition with a significant risk of death within a 26-week period (ESA, 2000, s. [49.1](#)(2)).

Employee Protections for Both Leaves

Continuation of Benefits

Pursuant to the ESA, 2000, an employee who is absent from work on a statutory leave of absence (except for a reservist leave) continues to participate in:

- pension plans;
- life insurance plans;
- accidental death plans;
- extended health plans;
- dental plans; and
- any other prescribed plans.

During a statutory leave of absence, an employer must continue to make its contributions with respect to such types of plans unless the employee gives the employer written notice that he or she does not want to pay his or her contributions, if any (ESA, 2000, s. [51](#)).

Length of Employment

The period that an employee is absent from work during a statutory leave of absence must be included for the purposes of calculating his or her length of employment, his or her length of service and his or her seniority. The period is not counted for the purposes of determining whether or not an employee has completed a probationary period (ESA, 2000, s. [52](#)).

Right to Reinstatement

An employee is entitled to be reinstated to the position he or she most recently held if it still exists or to a comparable position if it does not at the end of a statutory leave of absence. An employee returning from a reservist leave may have his or her reinstatement postponed by the employer by two weeks or until the first pay day that falls after the day that the reservist leave ends. The reinstated employee must be paid the greater of the most recent wage rate he or she earned with the employer, or the rate that the employee would have earned had he or she worked throughout the leave. Where an employer does not reinstate an employee after

Compassionate Care Leave

his or her leave, the employer must be prepared to establish that the reasons for the failure to reinstate are unrelated to the employee's leave (ESA, 2000, s. [53](#)).

Vacation Entitlements

Employees may defer taking any vacation time until the end of their statutory leave of absence. Vacation pay is still calculated based on actual wages, which in the case of an unpaid leave, may amount to zero. The employer and employee can agree to waive some or all of the time off owing or to reschedule when it will be taken, however entitlement to any vacation pay owing cannot be waived (ESA, 2000, s. [51.1](#)).

For more information on family caregiver leave, see the [Family Caregiver Leave Guide \(Ontario Ministry of Labour\)](#).

For more information on family medical leave, see the [Family Medical Leave Guide \(Ontario Ministry of Labour\)](#).

End of Document

Personal and Family Responsibility Leave

Practical Guidance (Federal, Alberta and Ontario jurisdictions) and [Kacey Krenn](#), [Harris & Company LLP](#)
(British Columbia jurisdiction)

Updated on: **12/10/2019**

This practice note discusses employees' entitlement to a leave of absence to deal with personal and/or family responsibilities, pursuant to employment standards legislation in federal, Alberta, British Columbia and Ontario jurisdictions. Specifically, it discusses whether the employee must be employed for a period of time prior to entitlement to this leave and, if applicable, the length of this qualifying period; the length of entitlement to the leave of absence; who is considered to be a family member under this leave; when the leave can be taken; notice requirements; including whether documentation may be required to support the leave of absence; and employee protections, including the prohibition on termination, right to benefit continuation, reinstatement and continuity of employment.

Federal

Entitlement

Under the *Canada Labour Code*, [R.S.C. 1985, c. L-2](#) ("Code"), every employee is entitled to 5 days in a calendar year for personal leave. If the employee has worked for 3 consecutive months with the employer, the first 3 days of personal leave are to be paid (Code, s. [206.6](#)(1) and (2)). Employees may use their personal leave for any of the following purposes:

- treating personal illness or injury;
- carrying out responsibilities related to the health or care of any of their family members;
- carrying out responsibilities related to the education of any of their family members who are under 18 years of age;
- addressing any urgent matter concerning themselves or their family members;
- attending their citizenship ceremony under the *Citizenship Act*, R.S.C., 1985, c. C-29; and
- any other reason prescribed by regulation (Code, s. [206.6](#)(1)).

The leave of absence may be taken in one or more periods and the employer may require that each period of leave be not less than 1 day's duration (Code, s. [206.6](#)(3)).

The employer may request supporting documentation no later than 15 days after an employee returns to work and the employee must provide it if reasonably practicable (Code, s. [206.6](#)(4)).

Personal and Family Responsibility Leave

Notice Requirements

An employee must, as soon as possible, provide the employer with a notice in writing of the reasons for the leave and the length of the leave that they intend to take, as well as notice of any change in the length of the leave (Code, s. [207.3](#)(1), (2)).

Employee Protections

As a general rule, the employee must be reinstated in his or her former position or be given a comparable position in the same location, and with the same wages and benefits (Code, s. [209.1](#)(1)). The pension, health and disability benefits and the seniority of the employee accumulates during the period of leave (Code, s. [209.2](#)(1)). Where the employee contributes to a benefit plan, the employee must continue to pay his/her contributions and the employer must continue to pay the employer's contributions to the benefit plan during the leave of absence (Code, s. [209.2](#)(2) and (2.1)). Employment is deemed continuous with employment before the leave of absence (Code, s. [209.2](#)(4)).

The employer cannot dismiss, suspend, lay off, demote or discipline an employee because the employee has applied for a person leave of absence (Code, s. [209.3](#)).

Alberta

Entitlement

Under the *Employment Standards Code*, [RSA 2000, c. E-9](#) ("ESC"), an employee who has been employed for at least 90 days with the same employer is entitled to up to 5 days of unpaid leave in a calendar year for:

- the health of the employee; or
- the employee to meet his or her family responsibilities in relation to a family member (ESC, s. [53.982](#)(1)).

Employers and employees may agree that the employee may take the leave in part-days.

"Family Member" Defined

The following table sets out who is defined as a "family member" for the purposes of personal and family responsibility leave (Employment Standards Regulation, Alta. Reg. 14/97 ("Regulations"), s. [54.1](#)(3)):

Personal and Family Responsibility Leave

Family Member	Employee	Employee's Partner
Spouse, common-law partner or adult interdependent partner	X	—
Child	X	X
Parent	X	
Brother and sister	X	
Grandchild	X	
Current or former foster parent	X	
Current or former foster child	X	
Current or former ward	X	
Current or former guardian	X	
Any other person living with the employee as a member of the family	X	

“Employee’s partner” is defined as a spouse, common-law partner or adult interdependent partner (Regulations, s. [54.1](#)(1)(c)).

Notice Requirements

An employee must give the employer as much notice as is reasonable and practicable in the circumstances before taking a personal and family responsibility leave (ESC, s. [53.982](#)(2)). A medical certificate or other documentation is not required by the ESC legislation in order to take personal and family responsibility leave; however, employers can establish their own policies for documentation.

Employee Protections

An employer cannot terminate or lay off an employee who is on a personal and family responsibility leave (ESC, s. [53.985](#)). Employers are not required to pay wages or benefits during leave, unless stated in an employment contract or collective agreement.

British Columbia

Under the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (“ESA”), an employee is entitled to up to 5 days unpaid leave during each employment year to meet responsibilities related to the care, health or education of a child in the employee's care, or the care or health of any other member of the employee's immediate family (ESA, s. [52](#)).

An employee need not have worked a minimum period of time to qualify for family responsibility leave and family responsibility days do not accumulate from year to year.

Personal and Family Responsibility Leave

Employee Protections

Conditions of Employment Remain the Same

An employer may not terminate an employee, or change a condition of employment, because of a leave or jury duty without the employee's written consent (ESA, ss. [54\(2\)](#) and [55](#)).

An employee who is absent from work on a statutory leave of absence (except for reservists' leave) continues to participate in pension, medical or other plans of benefit to an employee, if:

- the employer pays the total cost of the plan; or
- both the employer and the employee pay the cost of the plan and the employee chooses to continue to pay his or her share of the cost (ESA, s. [56\(2\)](#) and (5)).

All employees absent from work on a statutory leave of absence are entitled to all increases in wages and benefits the employee would have been entitled to had they not been on leave or jury duty (ESA, s. [56\(3\)](#)).

Length of Employment

If an employee is on a statutory leave of absence or jury duty, employment is considered continuous for the purposes of calculating:

- annual vacation;
- termination entitlements; and
- pension, medical or other plans of benefit to the employee (ESA, s. [56\(1\)](#)).

Right to Reinstatement

As soon as the leave ends, the employer must place the employee in the position the employee held before taking the leave or in a comparable position. If the employer's operations are suspended or discontinued when the leave ends, the employer must similarly reinstate the employee, subject to the seniority provisions in a collective agreement, as soon as operations resume (ESA, s. [54\(3\)](#) and (4)).

Ontario

Entitlement

Under the *Ontario Employment Standards Act, 2000*, S.O. 2000, c. 41 ("ESA, 2000"), every employee who has been employed for at least 2 consecutive weeks is entitled to 3 days of unpaid leave in a calendar year in the event of a family member's illness, injury or medical emergency or any other urgent matter concerning a family member (ESA, 2000, s. [50.0.1\(1\)](#) and (2)).

Who Is a "Family Member"?

An employee may take bereavement leave on the death of the following family members:

Personal and Family Responsibility Leave

- the employee's spouse;
- a parent, step-parent or foster parent of the employee or the employee's spouse;
- a child, step-child or foster child of the employee or the employee's spouse;
- a grandparent, step-grandparent, grandchild or step-grandchild of the employee or of the employee's spouse;
- the spouse of a child of the employee;
- the employee's brother or sister; and
- a relative of the employee who is dependent on the employee for care or assistance (ESA, 2000, s. [50.0.1](#)(3)).

Notice Requirements

An employee who wishes to take family responsibility leave must advise his/her employer as soon as possible that he/she will be doing so (ESA, 2000, s. [50.0.1](#)(4) and (5)). An employer may require an employee to provide evidence reasonable in the circumstances that the employee is entitled to the leave (ESA, 2000, s. [50.0.1](#)(7)).

Employee Protections

Continuation of Benefits

An employee who is absent from work on a statutory leave of absence (except for a reservist leave) continues to participate in:

- pension plans;
- life insurance plans;
- accidental death plans;
- extended health plans;
- dental plans; and
- dental plans; and

During a statutory leave of absence, an employer must continue to make its contributions with respect to such types of plans unless the employee gives the employer written notice that he or she does not want to pay his or her contributions, if any (ESA, 2000, s. [51](#)).

Length of Employment

The period that an employee is absent from work during a statutory leave of absence must be included for the purposes of calculating his or her length of employment, his or her length of service and his or her seniority. The period is not counted for the purposes of determining whether or not an employee has completed a probationary period (ESA, 2000, s. [52](#)).

Right to Reinstatement

An employee is entitled to be reinstated to the position he or she most recently held if it still exists or to a

Personal and Family Responsibility Leave

comparable position if it does not at the end of a statutory leave of absence. An employee returning from a reservist leave may have his or her reinstatement postponed by the employer by two weeks or until the first pay day that falls after the day that the reservist leave ends. The reinstated employee must be paid the greater of the most recent wage rate he or she earned with the employer, or the rate that the employee would have earned had he or she worked throughout the leave. Where an employer does not reinstate an employee after his or her leave, the employer must be prepared to establish that the reasons for the failure to reinstate are unrelated to the employee's leave (ESA, 2000, s. [53](#)).

Vacation Entitlements

Employees may defer taking any vacation time until the end of their statutory leave of absence. Vacation pay is still calculated based on actual wages, which in the case of an unpaid leave, may amount to zero. The employer and employee can agree to waive some or all of the time off owing or to reschedule when it will be taken, however entitlement to any vacation pay owing cannot be waived (ESA, 2000, s. [51.1](#)).

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Leaves of Absence by Jurisdiction

Practical Guidance

Current as of: 05/05/2020

The following table provides an overview of the leaves of absence provisions in each Canadian jurisdiction.

Jurisdiction	Leaves of Absence			
Federal	Maternity	Parental	Compassionate Care	Sick
	17 weeks unpaid (<i>Canada Labour Code</i> , R.S.C. 1985, c. L-2 ("CLC"), s. 206(1))	63 weeks unpaid (61 weeks if pregnancy leave taken) (CLC, ss. 206.1(1) , 206.2)	28 weeks unpaid (CLC, s. 206.3(2))	17 weeks unpaid (referred to as medical leave and includes illness or injury, organ or tissue donation, or medical appointments (CLC, s. 239(1)))
	Bereavement	Reservist	Court or Jury	Other
	5 days (first 3 days paid if 3+ months employment) (CLC, ss. 210(1) and (2))	As needed and unpaid for designated operation or called out for service Up to 15 days for annual training (paid if 63+ months employment) (CLC, s. 247.5(1))	Unlimited, in order to act as a witness or juror in a proceeding or to participate in a jury selection process (CLC, s. 206.9)	<i>Maternity-Related</i> — as needed (CLC, ss. 205(6) and 205.1) <i>Critical Illness</i> — 37 weeks unpaid (child) or 17 weeks unpaid (adult) (CLC, s. 206.4) <i>Death or Disappearance</i> — 52 weeks unpaid (disappearance); 104 weeks unpaid (death) (CLC, s. 206.5) <i>Work-Related Illness and Injury</i> —

Leaves of Absence by Jurisdiction

Jurisdiction	Leaves of Absence			
				<p>as needed (CLC, s. 239.1)</p> <p><i>Personal Leave</i> – 5 days (first 3 paid if employed for 3+ months) (CLC, s. 206.6(1), (2))</p> <p><i>Family Violence Leave</i> – 10 days (first 5 paid if employed for 3+ months) (CLC, s. 206.7(2), (2.1))</p> <p><i>Traditional Aboriginal Practices Leave</i> – 5 days (CLC, s. 206.8)</p> <p>Leave Related to COVID-19 – 16 weeks or more, if fixed by regulation, if the employee is unable or unavailable to work for reasons related to COVID-19 (CLC, s. 239.01(1))</p>
Alberta	<p>Maternity</p> <p>16 weeks unpaid (<i>Employment Standards Code</i>, R.S.A. 2000, c. E-9 (“ESC”), ss. 45 and 46(1)), <i>Employment Standards Regulation</i>, Alta. Reg. 14/97 (“ESR”), s. 54.3(a))</p>	<p>Parental</p> <p>62 weeks unpaid (ESC, s. 50(1) ESR, s. 54.3(b))</p>	<p>Compassionate Care</p> <p>27 weeks unpaid (ESC, s. 53.9(2))</p>	<p>Sick</p> <p>16 weeks unpaid per year (ESC, s. 53.97(2))</p>
	<p>Bereavement</p>	<p>Reservist</p> <p>Unrestricted and unpaid when</p>	<p>Court or Jury</p>	<p>Other</p> <p><i>Personal and Family</i></p>

Leaves of Absence by Jurisdiction

Jurisdiction	Leaves of Absence			
	3 days per year unpaid (ESC, s. 53.983 (1))	deployed to an operation outside of Canada or inside Canada to assist with an emergency and up to 20 days unpaid per calendar year for annual training (ESC, ss. 53.2 (1) and (3))	As required (<i>Jury Act</i> , R.S.A. 2000 c. J-3, s. 24(1))	<p><i>Responsibility</i> — 5 days/year unpaid (ESC, s. 53.982(1))</p> <p><i>Citizenship Ceremony</i> — half day unpaid (ESC, s. 53.984(1))</p> <p><i>Critical Illness</i> — 36 weeks unpaid (child) or 16 weeks unpaid (adult) (ESC, s. 53.96(2);</p> <p>Employment Standards Regulation, Alta. Reg. 14/1997, s. 54.3(1)(c) and Sched. 3)</p> <p><i>Death or Disappearance</i> — 52 weeks unpaid (disappearance) or 104 weeks unpaid (death) (ESC, s. 53.95(2))</p> <p><i>Domestic Violence Leave</i> — 10 days/year unpaid (ESC, s. 53.981(3))</p> <p><i>COVID-19 Leave</i> — 14 days unpaid leave for employees who are either themselves sick/quarantining or caring for a family member who is sick/quarantining.</p>
British Columbia	Maternity 17 weeks unpaid (<i>Employment</i>	Parental 62 weeks unpaid (61 weeks if	Compassionate Care 27 weeks unpaid (ESA, s. 52.1 (2))	Sick 3 days unpaid (ESA, s. 49.1(1))

Leaves of Absence by Jurisdiction

Jurisdiction	Leaves of Absence			
	<p><i>Standards Act</i>, R.S.B.C. 1996, c. 113 ("ESA"), s. 50(1)) pregnancy leave is taken) (ESA, s. 51(1))</p>			
	<p>Bereavement</p> <p>3 days unpaid (ESA, s. 53)</p>	<p>Reservist</p> <p>As needed and unpaid (ESA, s. 52.2(3))</p>	<p>Court or Jury</p> <p>As required and unpaid (ESA, s. 55)</p>	<p>Other</p> <p><i>Family Responsibility Leave</i> – 5 days unpaid (ESA, s. 52)</p> <p><i>Leave Respecting Death of Child</i> – 104 weeks unpaid (ESA, s. 52.4(1))</p> <p><i>Leave Respecting Disappearance of Child</i> – 52 weeks unpaid (ESA, s. 52.3(1))</p> <p><i>Critical Illness Leave</i> – 36 weeks (child) and 16 weeks (adult) (ESA, s. 52.11(2))</p> <p><i>Domestic Violence Leave</i> – 10 days unpaid leave in a calendar year, plus an additional 15 weeks unpaid in a consecutive period (ESA, s. 52.5(4))</p> <p><i>COVID-19-Related Leave</i> – unpaid as long as the circumstances which led to the leave continue (ESA, s. 52.12(2), (3))</p>
Manitoba	Maternity	Parental	Compassionate Care	Sick

Leaves of Absence by Jurisdiction

Jurisdiction	Leaves of Absence			
	17 weeks unpaid (<i>Employment Standards Code</i> , C.C.S.M. c. E110 ("ESC"), s. 54 (1))	63 weeks unpaid (ESC, s. 58 (1))	28 weeks unpaid (ESC, s. 59.2 (2))	17 weeks unpaid (ESC, s. 59.10 (1))
	Bereavement 3 days unpaid (ESC, s. 59.4 (1))	Reservist As needed and unpaid (ESC, s. 59.5 (2) and (3))	Court or Jury As required with or without pay (<i>The Jury Act</i> , C.C.S.M., c. J30, s. 24.1 (1))	Other <i>Family</i> – 3 days/year unpaid (ESC, s. 59.3 (1)) <i>Organ Donor</i> – 13 weeks (ESC s. 59.6 (2)) <i>Citizenship Ceremony</i> – 4 hours unpaid (ESC, s. 59.7 (1)) <i>Critical Illness</i> – 37 weeks unpaid (child) or 17 weeks unpaid (adult) (ESC, s. 59.8 (2) and (3)) <i>Death or Disappearance</i> – 52 weeks unpaid (disappearance) or 104 weeks unpaid (death) (ESC, ss. 59.9 (2) and (3)) <i>Domestic Violence Leave</i> – 10 days (consecutive or intermittent) and 17 weeks (consecutive) (5 days are paid) (ESC, s. 59.11 <i>Public Health Emergency Leave</i> – for as long as they are unable to perform work because of COVID-19 (ESC, ss. 59.12 (2) and (3))

Leaves of Absence by Jurisdiction

Jurisdiction	Leaves of Absence			
New Brunswick	Maternity	Parental	Compassionate Care	Sick
	17 weeks unpaid (<i>Employment Standards Act</i> , S.N.B. 1982, c. E-7.2 ("ESA"), s. 43(1))	62 weeks unpaid (61 if employee took maternity leave) (ESA, s. 44.02(2))	28 weeks unpaid (ESA, s. 44.024(2))	5 days unpaid within 12-month period (ESA, s. 44.021(1))
	Bereavement	Reservist	Court or Jury	Other
	5 consecutive days unpaid (ESA, s. 44.03(2))	30 continuous calendar days unpaid for training	As required and unpaid (ESA, s. 44.023(1))	<i>Family Responsibility</i> — 3 days/year unpaid (ESA, s. 44.022(1))
		18 months unpaid for purposes other than annual training (ESA, ss. 44.031(3) and (4))		<i>Critical Illness</i> — 37 weeks unpaid (child) or 16 weeks unpaid (adult) (ESA, ss. 44.025(2) and 44.0251(2))
				<i>Death or Disappearance</i> — 37 weeks unpaid (ESA, s. 44.026(2))
				<i>Domestic Violence, Intimate Partner Violence, or Sexual Violence Leave</i> — 10 days (5 of which are paid), which may be taken intermittently or in one continuous period, and up to 16 weeks in one continuous period (ESA, s. 44.027(1) ; and Domestic Violence, Intimate Partner Violence or Sexual Violence Leave Regulation, N.B.

Leaves of Absence by Jurisdiction

Jurisdiction	Leaves of Absence			
				<p>Reg. 2018-91, s. 3(2) and 5(1)).</p> <p><i>COVID-19 Emergency Leave</i> – unpaid, until the employer and employee agree the emergency leave shall end, or on the date the purpose for taking the emergency no longer exists (ESA, s. 44.028(1), (8)).</p>
Newfoundland and Labrador	<p>Maternity</p> <p>17 weeks unpaid employment (<i>Labour Standards Act</i>, R.S.N.L. 1990, c. L-2 (“LSA”), s. 42(1))</p>	<p>Parental</p> <p>61 weeks unpaid (LSA, s. 43.5)</p>	<p>Compassionate Care</p> <p>28 weeks unpaid (LSA, s. 43.14(1))</p>	<p>Sick</p> <p>7 days per year unpaid (LSA, s. 43.11(1))*</p>
	<p>Bereavement</p> <p>3 days, 1 paid, 2 unpaid (must be employed 30+ days) or 2 days unpaid if employed less than 30 days (LSA, s. 43.10(1) and (3))</p>	<p>Reservist</p> <p>As needed and unpaid (LSA, s. 43.18(1) and (3))</p>	<p>Court or Jury</p> <p>As required and paid (<i>Jury Act</i>, S.N.L. 1991, c. 16, s. 42)</p>	<p>Other</p> <p><i>Adoption</i> – 17 weeks unpaid (LSA, s. 43.2)</p> <p><i>Death or Disappearance</i> – 52 weeks unpaid (disappearance) or 104 weeks unpaid (death) (LSA, ss. 43.24(1) and (2))</p> <p><i>Critically Ill</i> – 37 weeks unpaid (child) or 17 weeks unpaid (adult) (LSA, s. 43.29(1) and (2))</p> <p><i>Family Responsibility</i> – 7 days per year</p>

Leaves of Absence by Jurisdiction

Jurisdiction	Leaves of Absence			
	<p>unpaid* (LSA, s. 43.11(1))</p> <p>Communicable Disease Emergency Leave – unpaid for as long as the designate communicable disease is designated pursuant to the regulations (LSA, s. 43.39(1)-(3))</p>			
Nova Scotia	Maternity	Parental	Compassionate Care	Sick
	<p>16 weeks unpaid (<i>Labour Standards Code</i>, R.S.N.S. 1989, c. 246 (“LSC”), s. 59(1))</p>	<p>77 weeks unpaid, if no pregnancy leave</p> <p>61 weeks unpaid if pregnancy leave taken (LSC, s. 59B(1) and (2))</p>	<p>28 weeks unpaid (LSC, s. 60E(2))</p>	<p>3 days/year unpaid (LSC, s. 60G(1))</p>
	Bereavement	Reservist	Court or Jury	Other
	<p>5 consecutive unpaid days upon death of certain family members (LSC, s. 60A)</p>	<p>18 months unpaid within 3 years:</p> <p>20 days unpaid per year for annual training (LSC, s. 60H(2); and General Labour Standards Code Regulations, N.S. Reg. 298/90, s. 7B(2) and (3))</p>	<p>Unpaid as required (LSC, s. 60B)</p>	<p><i>Emergency Leave</i> – as needed and unpaid (LSC, s. 60I(3))</p> <p><i>Critical Ill Child Care</i> – 37 weeks unpaid over 52 weeks (LSC, s. 60L(2))</p> <p><i>Critically Ill Adult Care</i> – 16 weeks unpaid (LSC, s. 60SB(2))</p> <p><i>Crime-Related Child Death or Disappearance</i> – 52 weeks unpaid (disappearance) or 104 weeks unpaid (death) (LSC, ss. 60U(1) and 60V(1))</p>

Leaves of Absence by Jurisdiction

Jurisdiction	Leaves of Absence			
				<p><i>Citizenship Ceremony</i> – up to 1 day unpaid (LSC, s. 60J(1))</p> <p><i>Domestic Violence</i> – 10 days intermittently or continuously, and 16 weeks in one continuous period (LSC, s. 60Z(2))</p>
Ontario	Maternity 17 weeks unpaid (<i>Employment Standards Act</i> , 2000, S.O. 2000, c. 41 (“ESA”), s. 47 (1))	Parental 61 weeks unpaid if pregnancy leave taken 63 weeks unpaid if no pregnancy leave taken (ESA, s. 49 (1))	Compassionate Care 28 weeks unpaid (referred to as family medical leave) (ESA, s. 49.1 (2))	Sick 2 days paid, 8 days unpaid per year (ESA, s. 50 (5))
	Bereavement 2 days unpaid per year (ESA, s. 50.0.2 (1) and (2))	Reservist As needed and unpaid (ESA, s. 50.2 (1) and (4))	Court or Jury As required and paid or unpaid (<i>Juries Act</i> , R.S.O. 1990, c. J.3, s. 41)	Other <i>Organ Donor</i> – up to 13 weeks unpaid (ESA, s. 49.2 (3) and (5)) <i>Declared Emergency and Infectious Disease Emergency</i> – unpaid as long as emergency condition applies (ESA, s. 50.1 and (1) and (5)) <i>Family Caregiver Leave</i> – 8 weeks/year (ESA, s. 49.3 (4)) <i>Critical Illness Leave</i> – 37 weeks unpaid in a 52-week period (child) or 17

Leaves of Absence by Jurisdiction

Jurisdiction	Leaves of Absence			
				<p>weeks unpaid in a 52-week period (adult) (ESA, ss. 49.4(3), (6))</p> <p><i>Child Death</i> – 104 weeks unpaid (ESA, s. 49.5(2))</p> <p><i>Crime-Related Child Disappearance</i> – 104 weeks unpaid (ESA, s. 49.6(2))</p> <p><i>Domestic or Sexual Violence</i> – 10 days/year (5 paid) plus 15 weeks/year (ESA, ss. 49.7(2), (4) and (5))</p> <p><i>Family Responsibility Leave</i> – 3 days unpaid per year (ESA, s. 50.0.1(1) and (2))</p>
Prince Edward Island	Maternity	Parental	Compassionate Care	Sick
	17 weeks unpaid (<i>Employment Standards Act</i> , R.S.P.E.I. 1988, c. E-6.2 ("ESA"), s. 19 (1) and 20 (1))	62 weeks unpaid (61 if employee took maternity leave) (ESA, s. 22 (1))	28 weeks unpaid (ESA, s. 22.3 (2))	3 days/year 1 paid day and two unpaid days after 5 years with employer (ESA, ss. 22.2 (1) and (4))
	Bereavement	Reservist	Court or Jury	Other
	1 paid day and 2 unpaid days for immediate family	As needed and unpaid (ESA, s. 23.1 (3))	As required and unpaid (ESA, s. 23.2)	<i>Adoptive</i> – 52 weeks unpaid (ESA, s. 22 (2))

Leaves of Absence by Jurisdiction

Jurisdiction	Leaves of Absence			
	<p>3 unpaid days for extended family (ESA, s. 23(1))</p> <p>Family – 3 days/year unpaid (ESA, s. 22.1(1))</p> <p>Crime Related Child Death or Disappearance— 52 weeks unpaid (disappearance); 104 weeks unpaid (death) (ESA, s. 22.12(2) and (4))</p> <p>Critically Ill Child— 37 weeks unpaid (ESA, s. 22.11)</p> <p>Domestic Violence, Intimate Partner Violence and Sexual Violence Leave – 3 days paid, 7 days unpaid (ESA, s. 22.4)</p>			
Quebec	<p>Maternity</p> <p>18 weeks unpaid (<i>Act respecting labour standards</i>, CQLR c. N-1.1 (“LSA”), s. 81.4)</p>	<p>Parental</p> <p>52 weeks unpaid (can be added to paternity leave) (LSA, s. 81.10)</p>	<p>Compassionate Care</p> <p>N/A</p>	<p>Sick</p> <p>26 weeks over a period of 52-weeks (2 first days paid if employee has 3 months of continuous service)** (LSA, s. 79.1, 79.7, 79.16)</p>
	<p>Bereavement</p> <p>5 days (2 paid if immediate family member dies) (LSA, s. 80)</p> <p>1 day unpaid for extended family (LSA, s. 80.1)</p>	<p>Reservist</p> <p>15 days unpaid for annual training</p> <p>18 months unpaid for other deployment (LSA, 81.17.1)</p>	<p>Court or Jury</p> <p><i>Jurors Act</i>, CQLR, c. J-2, s. 47</p>	<p>Other</p> <p><i>Birth/Adoption/Termination of Pregnancy</i> – 5 days (first 2 days paid) (LSA, s. 81.1)</p> <p><i>Paternity Leave</i> – five consecutive weeks without pay upon birth of child (LSA, s. 81.2)</p>

Leaves of Absence by Jurisdiction

Jurisdiction	Leaves of Absence
	<p><i>Family Care</i> – 10 days/year unpaid (2 first days paid if employee has 3 months of continuous service) (LSA, s. 79.7)</p> <p><i>Serious Illness/Accident for prescribed family</i> – 16 weeks (relative or 36 weeks (minor child) unpaid over 12 months (extended to a total of 104 weeks unpaid if minor child has serious or potential mortal illness or suffered serious bodily injury as result of crime); 27 weeks unpaid over 12 months for relative (other than minor child) for serious or potentially mortal illness (LSA, ss. 79.8, 79.8.1 and 79.9)</p> <p><i>Disappearance of Child</i> – 104 weeks unpaid (if child is found, 11 days after finding) (LSA, s. 79.10)</p> <p><i>Death of Minor Child</i> – 104 weeks unpaid (LSA, s. 79.10.1)</p> <p><i>Death of Spouse or Child as a result of crime</i> – 104</p>

Leaves of Absence by Jurisdiction

Jurisdiction	Leaves of Absence
	<p>weeks unpaid (LSA, s. 79.12)</p> <p><i>Suicide</i> — 104 weeks unpaid (2 first days paid if employee has 3 months of continuous service) (LSA, 79.11)</p> <p><i>Organ/Tissue Donation</i> ** — 26 weeks unpaid over 12 months (2 first days paid if employee has 3 months of continuous service) (LSA, s. 79.179.7 and 79.16)</p> <p><i>Accident, Criminal Offence</i> ** — 26 weeks unpaid over 12 months (104 weeks unpaid if employee suffers serious bodily injury as a result of crime) (2 first days paid if employee has 3 months of continuous service) (LSA, s. 79.179.7 and 17.16))</p> <p><i>Domestic Violence, Sexual Violence</i> ** — 26 weeks unpaid over 12 months (2 first days paid if employee has 3 months of</p>

Leaves of Absence by Jurisdiction

Jurisdiction	Leaves of Absence			
				<p>continuous service) (LSA, 79.1, 79.7 and 79.16)</p> <p><i>Wedding or Civil Union</i> — 1 day paid if employee's wedding; 1 day unpaid for prescribed family member's wedding (LSA, s. 81)</p>
Saskatchewan	Maternity 19 weeks unpaid (<i>The Saskatchewan Employment Act</i> , S.S. 2013, c. S-15.1 ("SEA"), s. 2-49(1))	Parental 63 weeks unpaid (59 weeks if employee took maternity leave) (SEA, s. 2-51(1))	Compassionate Care 28 weeks unpaid within a 52-week period (SEA, s. 2-56(2) and (3))	Sick N/A
	Bereavement 5 days unpaid (SEA, s. 2-55(1))	Reservist As needed and unpaid (SEA s. 2-53(2))	Court or Jury <i>The Jury Act</i> , 1998, S.S. 1998, c. J-4.2, s. 36	Other <i>Adoption</i> — 19 weeks unpaid (SEA, s. 2-50) <i>Critically Ill Child</i> — 37 weeks unpaid (SEA, s. 2-57(2)(a)) <i>Critically Ill Adult</i> — 17 weeks unpaid (SEA, s. 2-57(2)(b)) <i>Crime Related Child Death or Disappearance</i> — 52 weeks unpaid (disappearance) 104 weeks unpaid (death) (SEA, ss. 2-58(2) and (3)) <i>Citizenship Ceremony</i> — 1 day

Leaves of Absence by Jurisdiction

Jurisdiction	Leaves of Absence			
				<p>unpaid (SEA, s. 2-59)</p> <p><i>Organ Donation</i> — as required up to maximum of 26 weeks unpaid (SEA, ss. 2-52(2) and (3))</p> <p><i>Domestic Violence Leave</i> — 10 days/year (5 paid) (SEA, s. 2-56.1(2) and (8))</p> <p><i>Nomination, Candidate and Public Office</i> — for a reasonable period, unpaid (s. SEA, s. 2-54(1))</p> <p><i>Public Health Emergencies</i> — for as long as the public health emergency continues. The leave will be paid if the employee is authorized by the employer to work at home during that period, the employee complies with measures set out in the order of the chief medical health officer, and the employee complies with any additional requirements set out in the order (SEA, s. 2-59.1)</p>
Northwest Territories	Maternity	Parental	Compassionate Care	Sick

Leaves of Absence by Jurisdiction

Jurisdiction	Leaves of Absence			
	17 weeks unpaid (<i>Employment Standards Act</i> , S.N.W.T. 2007, c. 13 ("ESA"), s. 26 (1))	37 weeks unpaid (ESA, 28 (1))	8 weeks (ESA, s. 30(3))	5 days per year unpaid (ESA, s. 29 (1))
	Bereavement 3 days unpaid (if funeral or memorial service takes place in community in which employee resides) or 7 days unpaid (if it takes place outside the employee's community) (ESA, s. 31)	Reservist As required and unpaid (ESA, s. 32.1 (2))	Court or Jury As required and unpaid (ESA, s. 32 (2))	Other Family Caregiver Leave: 37 weeks unpaid (critically ill child) and 17 weeks unpaid (critically ill adult) (ESA, s. 30.1(2), (3)) Family Violence Leave – 10 days, the first 5 of which are paid and the balance are unpaid, and up to 15 weeks unpaid (ESA, s. 30.2(4))
Nunavut	Maternity 17 weeks unpaid (<i>Labour Standards Act</i> , R.S.N.W.T. (Nu.) 1988, c. L-1 ("LSA"), s. 31(1) and (2))	Parental 37 weeks unpaid (LSA, s. 34(1))	Compassionate Care 8 weeks unpaid (LSA, s. 39.1(2))	Sick N/A
	Bereavement N/A	Reservist As needed, unpaid (LSA, s. 39.10(1))	Court or Jury N/A	Other N/A
Yukon	Maternity 17 weeks unpaid (<i>Employment Standards Act</i> , R.S.Y. 2002, c. 72 ("ESA"), s. 36 (2))	Parental 63 weeks unpaid (ESA, s. 38 (1))	Compassionate Care 28 weeks unpaid (ESA, s. 60.01 (2))	Sick 1 day per month employed up to 12 days/year unpaid (ESA, s. 59 (2))
	Bereavement 1 week unpaid (ESA, s. 60 (2))	Reservist As needed and unpaid for deployment and	Court or Jury As required and paid or unpaid (<i>Jury Act</i> , R.S.Y.	Other <i>Critically Ill Child</i> – up to 37 weeks

Leaves of Absence by Jurisdiction

Jurisdiction	Leaves of Absence
	<p>other prescribed activities</p> <p>2002, c. 129, s. 8(1))</p> <p>unpaid (ESA, s. 60.02(2))</p> <p><i>Critically Ill Adult</i> – up to 17 weeks unpaid (ESA, s. 60.02.01)(2))</p> <p>15 days unpaid per year for annual training (ESA, s. 60.05(1))</p> <p><i>Disappearance or Death of Child</i> – 52 weeks unpaid (disappearance) or 104 weeks unpaid (death) (ESA, ss. 60.03(2) and (3))</p> <p><i>Leave related to COVID-19</i> – 14 days unpaid (Leave (COVID-19) Regulation, O.I.C. 2020/58, s. 2)</p>

* In Newfoundland & Labrador, the leaves of absence for sick and family responsibility are all covered under s. 43.11 as one leave of absence for 7 days.

****** In Quebec, the leaves of absence for sickness, organ or tissue donation/transplant, accident, domestic violence and sexual assault are all covered under s. [79.1](#) as one leave of absence for 26 weeks (104 weeks unpaid if employee suffers serious bodily injury as a result of crime). The 2 paid days per apply to the total 26 weeks, regardless of the types of leaves that are taken (ARLS, s. [79.7](#) and [79.16](#)).

End of Document

Declared Emergencies and Infectious Disease Emergencies Leave (ON)

Practical Guidance

Updated on: *03/23/2020*

Eligibility

An employee is entitled to an emergency leave of absence without pay, pursuant to s. [50.1](#) of the *Ontario Employment Standards Act, 2000*, [S.O. 2000, c. 41](#) (the “ESA”), if the employee cannot work because of various reasons related to a designated infectious disease. Specifically, the ESA provides that employees are entitled to leave for any of the following reasons:

- a because of an emergency declared under s. [7.0.1](#) of the *Emergency Management and Civil Protection Act*, [R.S.O. 1990, c. E.9](#) (“EMCPA”), and,
 - i. because of an order that applies to him or her made under s. [7.0.2](#) of the EMCPA (e.g., flood, forest fire or major disease outbreak);
 - ii. because of an order that applies to him or her made under the *Health Protection and Promotion Act*, [R.S.O. 1990, c. H.7](#) (“HPPA”);
 - iii. because he or she is needed to provide care or assistance to a designated individual (see below for the list of individuals covered); or
 - iv. because of such other reasons as may be prescribed; or
- because of one or more of the following reasons related to a designated infectious disease:
 - i. The employee is under individual medical investigation, supervision or treatment related to the designated infectious disease.
 - ii. The employee is acting in accordance with an order under s. 22 or 35 of the HPPA that relates to the designated infectious disease.
 - iii. The employee is in quarantine or isolation or is subject to a control measure (which may include, but is not limited to, self-isolation), and the quarantine, isolation or control measure was implemented as a result of information or directions related to the designated infectious disease issued to the public, in whole or in part, or to one or more individuals, by a public health official, a qualified health practitioner, Telehealth Ontario, the Government of Ontario, the Government of Canada, a municipal council or a board of health, whether through print, electronic, broadcast or other means.
 - iv. The employee is under a direction given by his or her employer in response to a concern of the employer that the employee may expose other individuals in the workplace to the designated infectious disease.

Declared Emergencies and Infectious Disease Emergencies Leave (ON)

- v. The employee is providing care or support to a designated individual (as set out below) because of a matter related to the designated infectious disease that concerns that individual, including, but not limited to, school or day care closures.
- vi. The employee is directly affected by travel restrictions related to the designated infectious disease and, under the circumstances, cannot reasonably be expected to travel back to Ontario.
- vii. Such other reasons as may be prescribed.

The individuals included under this leave of absence are:

- The employee's spouse.
- A parent, step-parent or foster parent of the employee or the employee's spouse.
- A child, step-child or foster child of the employee or the employee's spouse.
- A child who is under legal guardianship of the employee or the employee's spouse.
- A brother, step-brother, sister or step-sister of the employee.
- A grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse.
- A brother-in-law, step-brother-in-law, sister-in-law or step-sister-in-law of the employee.
- A son-in-law or daughter-in-law of the employee or the employee's spouse.
- An uncle or aunt of the employee or the employee's spouse.
- A nephew or niece of the employee or the employee's spouse.
- The spouse of the employee's grandchild, uncle, aunt, nephew or niece.
- A person who considers the employee to be like a family member, provided the prescribed conditions, if any, are met.
- Any individual prescribed as a family member for the purposes of this section (ESA, s. [50.1](#)(8)).

Notice Requirements

An employee is required to advise their employer when they begin the leave, or as soon as possible after beginning it. (ESA, s. [50.1](#)(2) and (3)).

An employer may require an employee to provide evidence reasonable in the circumstances, at a time that is reasonable in the circumstances, that the employee is entitled to the leave. Where the leave is taken as a result of an infectious disease emergency, the employer may similarly require such evidence, but the employer may not require that the employee provide a certificate from a qualified health practitioner as evidence (ESA, s. [50.1](#)(4) and (4.1)).

Length of Leave

Where the leave is taken as a result of a declared emergency, the length of this leave is for as long as the emergency is declared by an order under the relevant statute (ESA, s. [50.1](#)(5)).

Where the leave is taken as a result of an infectious disease emergency, the length of this leave is for as long

Declared Emergencies and Infectious Disease Emergencies Leave (ON)

as the employee is not performing the duties of his/her position because of the reasons listed in s. [50.1](#)(1.1)(b)(i)–(vi) and the infectious disease is designated by the regulations for the purposes of this section (ESA, s. [50.1](#)(5.1)).

Declared emergency leave is in addition to any entitlement to a personal emergency leave.

End of Document

Accommodation

Created on: 05/02/2019

Adapted from Teddy Opie, "On-the-Job Accommodation", *Ultimate HR Manual*, loose-leaf (Toronto: Wolters Kluwer, 2015). **Updating Author:** Lexis Practice Advisor Canada.

Human rights law provides the right to be free from discrimination. There is a corresponding duty to protect that right: the duty to accommodate. The duty to accommodate arises when a person's right to equal treatment conflicts with a workplace requirement, qualification or practice. Human rights legislation imposes a duty to accommodate based on the individual needs of the employee, as well as the needs of the group of which the person making the request is a member. Accommodation may modify a rule or make an exception to all or part of it for the person requesting accommodation.

Bona Fide Occupational Requirement

As noted above, the duty to accommodate arises when a person's right to equal treatment conflicts with a workplace requirement, qualification or practice. However, if the requirement, qualification or practice is a *bona fide* occupational requirement, there is no longer a distinction between direct or constructive discrimination. In *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [\[1999\] S.C.J. No. 46](#), the Supreme Court of Canada developed a unified approach to determining whether an employment practice, requirement, qualification, or factor is a *bona fide* occupational requirement (at para. 54):

- 1 Is there a policy or standard that discriminates either directly or by adverse effect based on a prohibited ground?
 - Did the employer adopt the policy or standard for a purpose rationally connected to the performance of the job?
 - Did the employer adopt the particular policy or standard in an honest and good-faith belief that it was necessary to the fulfillment of that legitimate work-related purpose?
 - Is the policy or standard reasonably necessary to the accomplishment of that legitimate work-related purpose?

The last element requires the employer to show that the policy or standard adopted is the least discriminatory way to achieve the purpose or goal in relation to the particular job(s) to which the policy or standard applies. It includes the requirement of demonstrating that it is impossible to accommodate individual employees without imposing undue hardship on the employer.

Accommodation

Undue Hardship

There is one limit on an employer's duty to accommodate: an employer's duty to accommodate exists up to the point of undue hardship. Specifically, the employer must prove that the financial costs or health and safety risks associated with accommodation would create an undue hardship for the employer.

Human rights legislation establishes that factors may be considered in deciding whether an accommodation would create an undue hardship on the employer. For example, under the *Canadian Human Rights Act*, [R.S.C. 1985, c. H-6](#), the factors that may be considered are health, safety and cost (*Human Rights Act*, s. [15\(2\)](#)). In contrast, under the *Ontario Human Rights Code*, [R.S.O. 1990, c. H.19](#) ("Code"), the factors are cost, outside sources of funding, if any, and health and safety requirements (Code, s. [17\(2\)](#)).

No other factors can be considered. The following factors **cannot** be used to justify undue hardship:

- business inconvenience;
- employee morale;
- customer preference;
- collective agreement terms; and
- threatened grievances.

Cost of Accommodation

Costs will amount to undue hardship if they are:

- quantifiable;
- shown to be related to the accommodation; and
- so substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect its viability.

All projected costs that can be quantified and shown to be related to the proposed accommodation will be taken into account. However, mere speculation, for example, about monetary losses that may follow the accommodation of the person with a disability will not generally be persuasive.

The financial costs of the accommodation may include:

- capital costs, such as the installation of a ramp or the purchase of screen magnification or software;
- operating costs, such as sign language interpreters, personal attendances, or additional staff time;
- costs incurred as a result of restructuring that are necessitated by the accommodation; and
- any other quantifiable costs incurred directly as a result of the accommodation.

In determining costs, the availability of outside funding must also be taken into account. Sources of outside funding would include grants, subsidies, low-cost government loans, and tax incentives, such as reduced tax rates, incentives and credits.

Accommodation

Other business considerations and practices that might help alleviate costs associated with accommodation will also be considered. Business considerations include:

- the ability to amortize the costs or to mitigate the hardship in some other way;
- the number of people the accommodation may benefit;
- the possibility of phasing-in major accommodations; and
- the availability of special budgets, reserve funds, or external sources of funding, such as government funding or tax incentives.

Finally, the size of an organization will also be a factor in assessing undue hardship. Larger employers/operations would have greater difficulty proving undue hardship on the basis of cost than would a small company. Larger companies usually have greater financial resources and larger numbers of employees, giving them the flexibility to accommodate special needs at relatively little cost.

Health and Safety Risks

Health and safety requirements in organizations may result from a number of sources:

- a requirement of health and safety legislation;
- industry standards; or
- specific employer rules, practices or procedures that have been established independently.

For the most part, health and safety standards would be established in good faith. However, where the health and safety standard creates a barrier for an employee, the employer has a duty to accommodate the employee up to the point of undue hardship.

When considering the impact of an accommodation on health and safety, an employer should look at the extent of the risk and identify anyone who would bear that risk. However, the risk must be balanced against the right of an employee to fully participate in the workplace. The goal is not absolute safety, but reasonable safety. When assessing the risk that might arise by modifying health and safety requirements, the employer should ask the following questions:

- What is the nature of the risk?
- How serious would the potential harm be?
- How likely and frequently is the risk likely to be?
- Who would be affected by the risk: only the employee, other employees, and/or customers and the general public?
- What is the nature of the employer's business (e.g., office environment, steel mill, mine)?
- What other risks are being taken by that organization?
- What are the general risks tolerated in society as a whole?

Accommodation

Health and safety risks will amount to undue hardship if the degree of risk that remains after the accommodation has been made outweighs the benefits of enhancing equality for persons with disabilities.

If the risk is borne entirely by the employee asking for the accommodation, then a higher degree of risk is acceptable. However, even where the risk is entirely the employee's, the employer must fully inform the employee of the nature of the risk, so that the employee can decide whether to accept that risk. For example, an employee who wears a turban may be excused from wearing a hard hat in the workplace. In this case, the employee has a higher risk of injury, but the risk is the employee's alone.

Where the risk affects other employees or customers, much less risk is acceptable. The employer must assess the risk to others caused by accommodation and may then decide that this risk would cause undue hardship. If so, the employer should be prepared to provide objective evidence that it honestly believes that an unreasonable risk exists.

Finally, if waiving or modifying a health and safety requirement is likely to result in a violation of occupational health and safety legislation, the employer should consult with the appropriate health and safety agency. For example, the Ontario *Occupational Health and Safety Act*, [R.S.O. 1990, c. O.1](#), and regulations have equivalency clauses that allow for the use of alternative measures to those specified in its regulations, provided the alternative measures afford equal or better protection to workers.

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Accommodating Disability

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Adapted from Teddy Opie, "On-the-Job Accommodation", *Ultimate HR Manual*, loose-leaf (Toronto: Wolters Kluwer, 2015). **Updating Author:** Lexis Practice Advisor Canada.

The first thing to remember about accommodation with respect to disability is the importance of inclusiveness, universal job design and barrier removal. When purchasing new office equipment or furniture, designing work stations or looking at access to the workplace, employers should consider the needs of many different types of employees, customers, etc., and include those considerations up front.

Examples:

- access ramps and automatic doors;
- increased space between cubicles and space within a cubicle to allow wheelchair access;
- work stations with adjustable desk heights;
- desk chairs with specialized back and arm supports;
- specialized computer equipment, such as an ergonomic keyboard/mouse, monitors with settings for large-print reading, and software for blind or visually impaired people that reads computerized text; and
- voice amplification/enhancement technology for phone systems/call centres.

Unless there is no alternative, parallel systems for those with disabilities are to be avoided.

The second thing is to ensure that the process of accommodation is dignified, effective and cooperative. In other words, the means or method of accommodation should be one that best meets the needs and respects the dignity of the individual while removing barriers.

Example:

Providing disabled employees with a wheelchair accessible entrance over the loading dock does not remove the barriers to your general entrance, does not provide universal access, and does not respect the dignity of such employees. Instead, your organization should provide ramps to the front entrance and install automatic doors. That way, all employees and other members of the public are able to access your business with dignity and without impediment.

The third thing is to understand the essential duties of the job. Treating a person differently (e.g., not hiring them, not transferring them or even not firing them) is not discrimination if the person is incapable of

Accommodating Disability

performing or fulfilling the essential duties or requirements because of disability. Therefore, it is vital that the essential duties of each job be defined so that employers are able to accommodate with respect to those duties (e.g., remove them or reassign him/her).

Example:

An employee who works in a photo print shop has limited arm movement due to a shoulder injury. The employee is required to operate the photo equipment in order to fill customers' orders. Various types of photo grade paper and developing fluids are delivered by truck every week and need to be stacked and stored after delivery. Operating the photo equipment to fill orders would be an essential duty. Lifting, stacking and storing the weekly paper/developing fluid order is less likely to be an essential duty, since the delivery could be moved to a different time in the week and/or the stacking duties could be assigned to a co-worker.

Note, however, that the employer must still accommodate the employee with respect to the essential duties of the job up to the point of undue hardship.

Physical Disability – Not Evident Disabilities

Some disabilities will be obvious (e.g., an employee requires a wheelchair or uses braces and a cane to walk). Other disabilities, however, are not immediately obvious and these are known as non-evident disabilities.

In general, an employer's obligation to accommodate an employee with a disability would only be triggered where an employer knows of the employee's needs. Employers are not expected to be mind readers or diagnose an employee's disability or needs.

On the other hand, an employer may perceive that an employee is unwell and needs assistance. The employer's perception of an existing condition/disability will trigger the employer's obligation to accommodate the employee.

Example:

John's work habits have taken a sudden turn for the worse. He arrives at work late, takes longer-than-permitted breaks, leaves early and often does not report for work at all. Although not certain, the employer suspects that John has a substance abuse problem. The employer engages John in confidential discussions in an attempt to get John into the company employee assistance program rather than take immediate disciplinary action.

Mental Disability

Accommodating mental disabilities continues to present larger challenges to employers, partly because of persistent stereotypes and misconceptions about mental illnesses, the reluctance of many persons with mental illnesses to ask for help, and the largely invisible nature of the illness. As such, mental disability often manifests in performance issues. Even if an employer has not been formally advised of a mental disability, the perception of such a disability will engage the protection of human rights legislation. As well, you should note that some mental illnesses may render the employee incapable of identifying his/her needs.

Accommodating Disability

As part of your workplace policies, you should consider employee assistance programs, more frequent performance appraisals (*i.e.*, mini-quarterly appraisals instead of once a year), and progressive discipline before imposing sanctions or termination.

Example:

Mary, an employee with a good work history, begins to show up late for work, misses assignment deadlines, and seems agitated. You perceive that Mary may have a disability and that employment sanctions may be premature. You offer Mary an opportunity to explain and discover that Mary is suffering from anxiety and depression due to a family crisis. Upon learning of the situation, you offer Mary assistance and accommodation through a revised work schedule and fewer assignments until the crisis is resolved.

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Accommodation Checklist

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How do your accommodation policies measure up? Do you:

- Know what the duty to accommodate is?
- Understand the concepts of *bona fide* occupational requirements and undue hardship?
- Know what the three factors are that can be considered when assessing undue hardship?
- Know which grounds of prohibited discrimination are most likely to require accommodation?
- Have a corporate policy statement with respect to on-the-job accommodation?
- Communicate your policy to all current employees?
- Know how to deal with a request for accommodation in the workplace?
- Review existing corporate practices/policies regularly and devise new practices with a view to inclusive design?
- Train all your managers and current employees on the duty to accommodate?
- Provide copies of human rights legislation and any literature from the Human Rights Commission to your management, employees and HR departments?
- Monitor human rights legislation/case law for changes to existing rules surrounding the duty to accommodate?

Accommodation: Duties and Responsibilities in the Accommodation Process Checklist

Created on: 05/03/2019

Adapted from Teddy Opie, "On-the-Job Accommodation", *Ultimate HR Manual*, loose-leaf (Toronto: Wolters Kluwer, 2015). **Updating Author:** Lexis Practice Advisor Canada.

While the employer bears the ultimate responsibility for accommodation in the workplace, the process is a shared responsibility. Employees seeking accommodation, employers, and unions/professional associations each have specific duties and responsibilities.

Employee Seeking Accommodation

- Are you dealing in good faith?
- Did you make a request for accommodation and allow a reasonable time for reply?
- Have you explained why accommodation is needed to the best of your ability, so that your needs are known?
- Was the request made in writing, as that is preferable (although the request does not have to be in writing)?
- Have you answered questions or provided information regarding relevant restrictions or limitations, including information from health care professionals, where appropriate, and as needed (e.g., information about a disability)?
- Are you flexible and realistic?
- Are you participating in discussions regarding possible accommodation solutions?
- Are you cooperating with any experts whose assistance is required?
- Have you met agreed-upon performance and job standards once accommodation is provided?
- Do you work with the employer/union on an ongoing basis to manage the accommodation process?
- Do you discuss your needs (i.e., disability) only with persons who need to know (this may include the supervisor, a union representative or human rights staff)?

Employer

- Are you dealing in good faith?
- Did you accept the employee's request for accommodation and reply to the request within a reasonable time?
- Have you obtained expert opinion or advice where needed?
- Have you taken an active role in ensuring that alternative approaches and possible accommodation solutions are investigated?

Accommodation: Duties and Responsibilities in the Accommodation Process Checklist

- Has a record of the accommodation request and action taken been kept?
- Do you grant accommodation requests in a timely manner, to the point of undue hardship, even when the request for accommodation does not use any specific formal language?
- Did you bear the cost of any required medical information or documentation (e.g., doctors' notes and letters setting out accommodation needs should be paid for by the employer)?
- Have you limited requests for information to those reasonably related to the nature of the limitation or restriction, so as to be able to respond to the accommodation request?
- Do you maintain confidentiality with respect to the request and the individual making the request?
- Where accommodation is not possible due to hardship, did you explain this clearly to the person concerned, and are you prepared to demonstrate why?

Unions and Professional Associations

- Are you dealing in good faith?
- Are you taking an active role as a partner for the accommodation process?
- Are you sharing joint responsibility with the employer to facilitate accommodation, including actively suggesting and testing alternative solutions?
- Do you support accommodation measures regardless of collective agreements, unless to do so would create undue hardship?
- Do you maintain confidentiality with respect to the request and the individual making the request?

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The COVID-19 Crisis and Franchisors

Edward (Ned) Levitt^{*}, Dickinson Wright LLP

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This practice note examines the consequences of the coronavirus pandemic on franchises and looks at how the crisis has affected both franchisors and franchisees. In particular, it discusses what franchisors should be considering during this time and the changes they should be making to their systems. Finally, the practice note provides some of the tools that are available to the franchisor and franchisees to restructure and get ready for the turnaround including informal settlements with suppliers; negotiations with customers to settle/defer accounts; robust and fully integrated financial modelling to determine cash flow requirements; and formal proposals to creditors.

For more information on franchising, see practice notes [Franchise Agreements: Key Provisions and Documentation](#) and [Franchising Disclosure Fundamentals](#). For information on bankruptcy, see [Bankruptcy Fundamentals and Effects](#). See also [Commercial Leasing](#).

Introduction

The enormity of the economic downturn from the sudden and profound economic dislocation following the rapid spread of COVID-19 cannot be overstated. Almost everyone has been affected negatively, many significantly and some irretrievably. However, sooner or later, the economy will revive and a new "normal" will immerge. Besides coping with the economic impact on their franchisees and themselves, franchisors will have to come to terms with a new normal and adjust their systems accordingly. This could include how products and services are provided to consumers, what products and services are rendered obsolete, what new products and services are in demand, a retooling of their supply chain and a revamping of their marketing programs, to name a few. Franchising has always been firmly anchored in the past, in the sense that franchisees buy into a predictable future by following what worked before — the "proven" concept. Now, more than ever, franchisors are going to have to become master innovators and expert change agents.

The future is bleak for franchisors who, during this time, merely react to events as they unfold, hold on to entrenched beliefs and hope that they survive. For others, who make the tough decisions and explore the opportunities that will inevitably arise, the future is bright and full of possibilities. The starting point is the realization that a lot has changed, with more change coming, and that to be successful, a new "normal" has to be established.

Franchisee Audits

It has always been essential for franchisors to be aware of the financial performance of their franchisees and

The COVID-19 Crisis and Franchisors

many franchisors have effective mechanisms to ascertain this. However, during this pandemic and to get ready for its ultimate end, franchisors need a great deal more information.

Most importantly, franchisors need to know which of their franchisees have the resources to survive the economic hit thus far and for what could be a very long, slow recovery. Equally, franchisors need to know which of their franchisees have the will to make the personal sacrifices necessary to reach the post-COVID land of opportunity.

Additionally, each location needs to be examined and a determination made whether or not it is likely to be successful when things turnaround, just mediocre or likely to fail in time. As part of this investigation, each lease should be examined closely and some assessment made about its appropriateness for the new normal and what, if any, possibilities exist to renegotiate a problematic lease.

Concept Audits

Successful retail franchise systems are constructed inevitably upon a business concept that appeals to a broad base of consumers. It is reasonable to expect, with some exceptions, that such appeal will still be there after the pandemic subsides. In fact, many people talk about the boom that will arise when the pent-up demand of consumers is unleashed. However, doing business after the pandemic subsides will be different in many ways, the impact of which may be small for some concepts and extreme for others. Franchisors will need to adapt their concepts for these changes and ensure that their franchisees adopt the changes as fully as possible.

Possible areas of change include:

- increased need for higher levels of sanitation for workers and customers;
- introduction of protective gear and installation of protective barriers for employees;
- diminished capacity for serving customers at any one time;
- increase in the volume of e-commerce and off premises consumption;
- increase in the labour pool and possible reduction in labour costs;
- increased need for business continuity plans and insurance; and
- establishing more secure and predictable supply chains.

Making Changes

Once a franchisor has a clear picture of its franchisees and their respective strengths, weaknesses, abilities and willingness to survive, what's next? The starting point is the financial viability of each franchisee, including an assessment of the desirability of the location and/or the territory. At a time of finite resources, franchisors have to triage their franchisees and let some go and support the others as fully as possible.

Even in normal times, franchisees look to their franchisors for guidance and help. During this pandemic and beyond, franchisors should, however, also be open to listening to their franchisees for constructive idea sharing and support, which may make the difference between survival and closure. Support could be financial, help in obtaining government money, suspension of royalty payments, assistance in negotiating supplier terms of payment and renegotiating leases.

In some cases, franchisors may be able to facilitate acquisitions of weak franchisees by stronger franchisees. This may result in a leaner, but stronger system, with the acquiring franchisee benefitting with the economies

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of scale. Whatever assistance a franchisor provides, though, should be given only with an appropriate "buy-in" for the changes that are required to get through the pandemic and beyond.

Usually, the franchise agreement has provisions which allow the franchisor to make changes to the concept. However, the changes that are necessary or desirable at this time may be too extensive for such provisions and an additional "bargain" needs to be struck. This may even be an opportune time for a franchisor to make some fundamental changes to its concept for reasons other than the pandemic.

The Tools

The various tools that are available to the franchisor to bring about change and to support its franchisees through this pandemic apply to both the franchisor and its franchisees. It should also be kept in mind that each situation is unique to the particular franchisor and its franchisees, and there is no "one size fits all" solution. No matter which tool is utilized, it will benefit the franchisor to conduct a robust and fully integrated financial modelling exercise to determine cash flow requirements, for their lenders, themselves and their franchisees. The financial model will allow the franchisor to make the best, most informed decisions and also provide the creditors, landlords, etc., with evidence that any proposed plan is viable.

Informal Negotiations and Settlements with Creditors

Negotiation and settlement is the usual first resort tool to restructure a business. The COVID-19 crisis presents a franchisor with an unusual opportunity to negotiate with its own creditors and the creditors of its franchisees. For this to be workable, there must be a viable plan to ride out the pandemic and reach profitability and positive cash flow post-pandemic. Creditors will want to know, with reasonable certainty, that they are likely to receive the reduced amount of their debt.

Lease Restructuring

Landlords are notoriously reluctant to reduce rents on a permanent basis. Today, however, faced with the reality that new tenants are very, very hard to come by, they should be more inclined to consider options to maintain a tenant. Many tenants are ignoring the legal approach to rent issues such as *force majeure* and *frustration of contract* and opting instead to appeal to the landlord's need for tenants today and into the future, when businesses are continuing to fail at an accelerating rate. The nature and scope of the negotiations with landlords are limited only by one's imagination and can include rewards for the landlord if and when a return to profitability is achieved.

Formal Proposals and Plans of Arrangement

Procedures exist for more formalized proposals under Canada's *Bankruptcy and Insolvency Act*, [R.S.C., 1985, c. B-3](#) (the "BIA"), and plans of arrangement under the *Canadian Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 ("CCAA"). By merely filling a notice of intention to make a proposal under the BIA, the debtor has a 30-day stay on all liabilities, claims and actions against it, which can be extended by a court up to a maximum of 6 months. However, during the stay, the debtor has to continue to honour its ongoing obligations, i.e., paying rent as provided by a lease. However, the debtor is also entitled to disclaim any contracts that are not financially viable. Once a proposal is submitted, creditors would vote on the proposal for acceptance; however, if the proposal is rejected, the debtor will be declared bankrupt. A debtor can instead apply to court for a stay against creditors under the CCAA to enable it to file a plan of arrangement, which will ultimately be voted on by the creditors and approved by the court. To apply for protection under the CCAA, a debtor has to owe in excess of \$5 million to its creditors, which is not the case under the BIA.

Bankruptcy

Where there is no possibility of making a proposal that will keep the franchisor or a franchisee viable as a going concern, the debtor can resort to an assignment in bankruptcy and the resulting liquidation of its assets. A creditor could, alternatively, petition a debtor into bankruptcy. While this ends the existence of the franchisee or the franchisor, as the case may be, it could present an opportunity for interested parties (read shareholders of a bankrupt franchisor or the franchisor of a bankrupt franchisee) to acquire key assets, including leases, for a very low amount, free of creditors' claims.

Mergers

Prior to the onset of the COVID-19 pandemic, mergers and acquisitions of entire franchise systems was on the rise. The drivers of this were the increasing number of boomer-franchisors heading for retirement, the amazing growth of the franchise sector, the acceptance of franchising as a viable business model, a great deal of under-deployed capital waiting on the side lines for good targets and more and more examples of successful franchise system growth. Adding to these factors was the growth of private equity pools of money and the realization by these funds that franchising presents an excellent investment because of predictable and steady cash flow through royalties, great leverage from deployed capital and existing assets and almost unlimited possibilities for rapid growth (domestic and internationally). For now, while those factors are still relevant, they take a back seat to the need simply to survive.

As a survival strategy, merging with the right competitor or approaching a private equity group for a sale of the entire system may be the best strategy. Remember that the value of the system resides primarily in its brand, franchise agreements with franchisees and the relationship between the franchisor and the franchisees. It is reasonable to argue that the value of these assets, and thus, the system will return in time as long as the franchisor and franchisees are able to adapt to the world post COVID-19.

If the franchisor has taken some or all of the steps outlined above, the future for the system is more predictable, which should include greater profitability when the turnaround comes. With a good survival plan, the franchisor strengthens its argument for financial terms closer to fair market value and further from a fire sale value. Negotiating a sale price based less on cash on closing and more on a percentage of the performance of the system post pandemic is another way of achieving a greater value for the franchisor, particularly where the private equity purchaser will provide the extra working capital to weather the storm.

Working (Survival) Capital

The phrase, "cash is king", is often thrown around during difficult economic times like this. Certainly, there is a lot of truth to this saying, but it is not really restricted to actual money. Another way of phrasing this might be, that needed resources are king during these times. With this in mind, it might be a good strategy to "deal in" the system landlords, lenders and/or needed suppliers.

All of these parties have a stake in the survival of the system. A well-structured deal, where they have some upside for what they contribute to the successful survival of the franchise system could be attractive, especially as the markets for their capital, premises and supplies has shrunk dramatically.

Coronavirus and Force Majeure Checklist

Practical Guidance

Created on: 03/19/2020

This checklist provides guidance on issues and measures counsel should consider when determining the applicability of the coronavirus with respect to force majeure clauses in your clients' commercial contracts.

The impact that the expanding outbreak of the novel coronavirus (aka COVID-19) is having on commercial transactions has become readily apparent. Large scale events are being cancelled or postponed, parties in the supply chain are unable to secure necessary materials and supplies, distribution and shipping channels have been disrupted, and there are shortages in the labour force, among other negative consequences. The ability to invoke a force majeure clause in a client's contract based on the coronavirus will naturally be fact-specific, focusing on the specific terms of the client's agreement and the unique facts and circumstances germane to the client's transaction. Relevant factors will include the existence of and particular language contained in a force majeure clause, whether and how the coronavirus has impacted the contracting party's capability to reasonably perform the contract, and whether the coronavirus has rendered performance impossible or impracticable.

For additional information on force majeure and sample clauses, see [Force Majeure Clauses Explained](#) and [Force Majeure Clause](#).

When determining whether the coronavirus might constitute a force majeure event in your clients' agreements, you should consider the following:

1. Determine if your client's agreement includes a force majeure clause.

You should review your clients' agreements and ascertain if they include a force majeure clause or similar provision. A force majeure clause generally states that the occurrence of certain unforeseen events or circumstances beyond a party's reasonable control will excuse that party from its performance obligations. The provision usually lists a series of force majeure events or circumstances, the occurrence of which will excuse performance for the duration of that force majeure event (and sometimes for a reasonable period thereafter) and relieve that party from liability caused by such nonperformance. A force majeure clause may also set forth obligations on the party claiming a force majeure event, such as providing notice of its occurrence, advising of its anticipated effect on performance and likely duration, and taking reasonable measures to diminish the impact or shorten the duration of the force majeure event. If there is no force majeure clause in the client's agreement, relief may still be available on other grounds. See, for example, [Exclusion or Exemption Clauses Explained](#).

2. Does the force majeure clause include language that would encompass the coronavirus?

Examine the specific language in the force majeure provision to determine whether the coronavirus

Coronavirus and Force Majeure Checklist

constitutes a force majeure event. See if the clause expressly includes a pandemic, epidemic, public health emergency, outbreak of communicable disease or other similar occurrence as a force majeure event, which would increase the likelihood of enforceability. If such language is not included, consider whether the coronavirus outbreak would fall under another part of the force majeure clause, including general force majeure language (such as acts of God or events beyond the control of a party), governmental or administrative action, disruption to the labour force, unavailability of materials, etc. The party invoking force majeure must be able to establish that the coronavirus falls within the scope of the provision. While a force majeure event must usually have been unforeseeable at the time of contracting, this will not likely be an issue for contracts entered into before the coronavirus outbreak.

3. Is the coronavirus the reason the party is unable to perform the agreement?

Establishing causation between the coronavirus and the client's inability to perform its contractual obligations is required to invoke force majeure. Such a determination will be fact-sensitive. Even if the client's agreement includes a provision that encompasses the coronavirus, this will not automatically excuse performance or relieve it from liability resulting from nonperformance, as you must still meet the other force majeure requirements. The coronavirus must be the true reason your client cannot satisfy its contractual obligations. For example, the coronavirus may have impacted its distribution and supply chain channels, precluded it from securing necessary materials, prevented the timely transportation of goods or resulted in an insufficient workforce. However, if the party asserting force majeure would not have been able to perform notwithstanding the coronavirus, it will not find relief in force majeure. The standard for force majeure may also be a critical factor. The relevant language may require that performance be "impossible," as opposed to a lesser standard such as requiring performance be "impeded", "impracticable" or "hindered." Depending on the relevant standard, a party may not be excused simply because the ability to perform has become more difficult or expensive. If the client can still perform in an alternate manner (such as by obtaining materials or labour from another, more expensive source), it may not be released from its obligations.

4. Are there any exceptions or exclusions that would prevent application of force majeure?

Ascertain whether there is any language in the force majeure provision that might serve as an exception or otherwise exclude its applicability. For example, some agreements may exclude force majeure from events that could have been foreseen by a party or that are a result of a change in market conditions. Additionally, the provision may include carve-outs to its application, such as for a party's payment obligations.

5. Weigh the risks of declaring force majeure.

Before invoking the coronavirus as a force majeure event, confer with the client and carefully consider the potential ramifications that such action may trigger. If performance by the client has been rendered impossible or economically unfeasible, there may be no other viable alternative. Invoking force majeure will, however, be accompanied by business and legal perils. While declaring force majeure may advance the client's immediate business interests, there could be unintended and unwanted consequences that the client should contemplate. For example, the client's reputation in its industry could be impaired, relationships with critical customers could be jeopardized and the terms of the contract may permit the other party to terminate the agreement. The other party may also dispute the applicability of force majeure and initiate litigation and/or exercise other remedies available in the event of the client's nonperformance. If a force majeure declaration results in litigation, there is the possibility the presiding court or tribunal will interpret the provision narrowly and rule against the client. In light of the possibility of litigation, ensure the client documents all relevant facts and circumstances that will support its force majeure declaration.

6. Provide timely notice of the force majeure event.

Ensure your client meets all notice requirement contained in the force majeure provision or as may otherwise be required by the contract. Many force majeure provisions establish specific procedures that must be adhered to in order to effectively obtain relief. Some provisions will require a party to furnish notice of a force majeure event immediately or within a few days after it experiences the event. The clause may also state what information must be included in the notice, such as the specific event giving rise to the claim, its anticipated effect on performance and the expected duration. Even if the agreement does not expressly mandate notice within a specific time period, best practices call for prompt written notice to the other party or parties to the agreement.

7. Determine how force majeure will apply to the client's performance obligations.

How a force majeure event such as coronavirus will impact the client's contractual obligations will largely depend on the controlling language in the parties' agreement and the particular circumstances resulting in invocation of force majeure. Generally, if applicable, the client should be relieved of those performance obligations that have been prevented by the event without being in breach of contract—the time for performance will be delayed for the duration of the force majeure event. However, the client may still be able to perform certain aspects of the agreement, as the force majeure event may only influence some of its contractual responsibilities. For example, a supplier may not be able to provide certain goods that it receives from China but still be able to furnish other goods as required by the contract. The declaration of force majeure may also trigger termination rights, as discussed below. The client may also be required to take available and reasonable measures that would lessen the impact and/or duration of the force majeure event.

8. Ascertain whether a party can terminate the agreement.

For certain agreements, the force majeure provision may permit a party to terminate the agreement if there is a force majeure event. Termination rights often require that the force majeure event must delay performance for a specified period of time. Review the agreement and determine whether contract termination might be or become an available option and, if so, under what circumstances. If termination may be the outcome, ensure the client is aware of this fact and has taken it into consideration before making a final decision on whether to declare force majeure. In such transactions, the client may be able to take measures and/or engage in communications with the other party at an early juncture to try and stave off termination. See also [Defence: Frustration of Contract](#).

9. Determine the client's duty to mitigate the impact of the force majeure event.

Parties to commercial agreements will often have a duty to engage in reasonable measures to mitigate the adverse consequences of a force majeure event. Ensure the client satisfies mitigation obligations after declaring a force majeure event, such as taking action that will serve to reduce the period of delay. Measures such as seeking alternate locations to perform the contract, securing new suppliers or allowing personnel to work remotely, may be required by the contract or warranted under the circumstances. Any mitigation efforts by the client should be well-documented, as the client may need to demonstrate its mitigation efforts in potential litigation resulting from its nonperformance due to force majeure, even if the efforts prove to be unsuccessful. See, for example, [Exclusion or Exemption Clauses Explained](#) and [Penalty Clauses \(Stipulated Remedy Clauses Specifying Damages\) Explained](#).

Coronavirus and Force Majeure Checklist

10. Require substantiation if your client receives notice claiming force majeure based on the coronavirus.

If your client received notice from a party it has contracted with alleging force majeure due to the coronavirus, request the other party provide relevant information and/or documentation that substantiates the force majeure claim. Also review the subject agreement and verify that the force majeure provision applies to the prevailing circumstances. As discussed above, the mere existence of the provision will not necessarily mean that it can be properly invoked by a party. Ascertain the rights and remedies available to the client, including possible termination of the agreement.

11. Review and revise (as necessary) your clients' force majeure provisions.

In light of the coronavirus pandemic and the possibility that similar events may occur in the future, you should review the existing language contained in your clients' force majeure provisions and update their contracts as may be necessary and prudent. If not already existing, you can add language expressly including events such as pandemics, epidemics, local disease outbreaks, public health emergencies, communicable diseases and quarantines to the list of force majeure events. Also revisit the standard for invoking force majeure, such as if the event must render performance impossible or whether a lower threshold is preferable.

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Force Majeure Clauses Explained

Reviewed on: 01/03/2019

[Geoff R. Hall](#), McCarthy Tétrault LLP

Introduction to *Force Majeure* Clauses

Force majeure clauses are often included in contracts to specify events which excuse performance or absolve a party from liability for non-performance. They typically refer to circumstances beyond the parties' control such as strikes, acts of God, acts of public enemies and riots. An example of a *force majeure* clause is: "The carrier shall not be liable for the loss, damage or delay to any of the goods described in the Bill of Lading caused by an act of God, the Queen's or public enemies, riots, strikes..." (*Fishery Products International Ltd. v. Midland Transport Ltd.*, [1994] N.J. No. 65 (C.A.)). The "common thread" running through all *force majeure* clauses is the notion that they excuse performance for unexpected events beyond the parties' control (see: [Force Majeure Clause](#)).

Force majeure clauses may be thought of as a mechanism by which the parties broaden the doctrine of frustration, defining events which excuse performance but which otherwise would not constitute frustration.

General Interpretation of *Force Majeure* Clauses

The interpretation of *force majeure* clauses occurs against the backdrop of their purpose which is to protect parties from liability for breaches of contract caused by events which are outside the scope of their control. As a result, *force majeure* clauses tend to be interpreted narrowly to exclude circumstances which do not clearly fall within the clause in question and to exclude events which are not truly beyond the parties' control. This approach is quite consistent with the courts' usual approach to the interpretation of contracts, in that interpretation reflects the context and purpose of the provision in question. This leads to two implications:

- first, a party relying on a *force majeure* clause must bring itself squarely within the clause; and
- second, a party is generally not able to rely upon a *force majeure* clause to excuse its own acts or to make the contract one which it can terminate unilaterally.

In interpreting *force majeure* clauses, courts have considered the meaning of the phrases "acts of God" and "acts of the Queen's or public enemies", as well as the word "strike". Cases considering the first two phrases are few but those which do exist tend to interpret the phrases narrowly, consistent with the goal of ensuring that *force majeure* clauses are limited to circumstances truly beyond the parties' control. As discussed further below, cases considering the word "strike" are less consistent.

Force Majeure Caused by an "Act of God"

While the phrase "act of God" is often used in *force majeure* clauses, it has received little judicial consideration. What little consideration exists defines the phrase narrowly to exclude circumstances which could have been

Force Majeure Clauses Explained

avoided by a party taking reasonable and prudent steps, reinforcing the notion that a *force majeure* clause is to be reserved for events which are truly beyond a party's control.

For example, where a train was derailed by a mudslide, the circumstance was found not to be an act of God for purposes of a *force majeure* clause because the railway company had failed to take reasonable steps to protect against loss due to mudslides (*Canada v. Canadian Pacific Railway Co.*, [1965] 2 Ex.C.R. 222 at para. 106 (Ex. Ct.), quoting *Halsbury's Laws of England*, Vol. 8, 3d ed. (London: Butterworths, 1954) at 183, para. 317). Similarly, where a tent was destroyed in a rainstorm, the circumstance was found not to be an act of God because the defendant had failed to take reasonable precautionary steps to prevent damage to the tent in the storm (*Falk Enterprises Ltd. (c.o.b. Things to Rent) v. McLean*, [1994] P.E.I.J. No. 75 (T.D.) — while this case did not in fact involve a *force majeure* clause, it relied upon *force majeure* authority in determining the meaning of “act of God”, so it is instructive in the context of *force majeure* clauses).

***Force Majeure* Caused by “Acts of the Queen’s or Public Enemies”**

While the phrase “act of the Queen’s or public enemies” is also often used in *force majeure* clauses, it too has received little judicial consideration. In one of the few cases to have considered the phrase, it was held that the phrase applies only to acts directed against the state, not to political protests within the state (*Fishery Products International Ltd. v. Midland Transport Ltd.*).

In a democratic society, those who engage in a political protest are hardly regarded as “public enemies”. Thus even if a political protest makes contractual performance difficult or impossible, it would be too much of a stretch of the words chosen by the parties to govern their relationship to conclude that the difficulty or impossibility is caused by enemies of the Queen or the public.

***Force Majeure* Caused by a “Strike”**

Several cases have considered the breadth of *force majeure* clauses which excuse performance due to strikes. The cases have not been entirely consistent with “strike” sometimes being given a broad meaning and other times being given a narrow one.

Nevertheless, it seems clear that the word “strike” in a *force majeure* clause is not limited to the narrow technical sense used in labour relations legislation. As such, it can include a strike which is illegal under labour law and it can also include political protest which is not directed at the employer provided that the protest is undertaken by employees acting in concert. This is consistent with a contextual approach to interpretation — a *force majeure* clause in a commercial contract is a very different context than labour relations legislation and it is not surprising that a word used in one context would have a different meaning in another. Contractual interpretation always depends on the specific words used by the parties and the specific context of the contract in question.

However, the courts have not been consistent as to whether the word “strike” should be limited to work stoppages directed at a contracting party or whether it is sufficient that the work stoppage affect a contracting party even if directed at someone else. This inconsistency is explained by the fact that interpretation always depends on the specific contract language and the context in which the agreement has arisen, such that interpretations can differ depending on these factors.

Force Majeure Clause

Obligations Excused if No Reasonable Control, Notice, Reasonable Endeavours

1 If either Party can provide evidence to the satisfaction of the other that its performance of any of its obligations under this Agreement is prevented by reason of any event or combination of events beyond its reasonable control, it shall be entitled to relief from performing each such obligation under this Agreement for such period as the event or combination of events continues to prevent performance.

2 Neither Party shall be entitled to claim relief in respect of any period during which it could have complied with any obligation (or any part thereof) by using its best endeavours to avoid, overcome or minimize wholly or partly the effects of the said event or combination of events.

3 The Party prevented from performing any obligation under this Agreement in the circumstances contemplated in para. [1] shall notify the other as soon as it becomes aware of the event. Each of the Parties shall use all reasonable endeavours to avoid, overcome or minimize wholly or partly the effect of any event referred to in para. [1] upon the performance of its obligations under this Agreement.

Periodic Reports, Reasonable Diligence

1 No party will be liable for nonperformance of any of its obligations under the agreement if its nonperformance was due to a Force Majeure Event as defined in para. [1] of this Article, on condition that such party complies with the conditions in para. [3] of this Article.

2 A Force Majeure Event shall mean any act of God; war; riot; civil strife; act of terrorism, domestic or foreign; embargo; governmental rule, regulation or decree; flood, fire, hurricane, tornado, or other casualty; earthquake; strike, lockout, or other labour disturbance; the unavailability of labour or materials to the extent beyond the control of the party affected; or any other events or circumstances not within the reasonable control of the party affected, whether similar or dissimilar to any of the foregoing.

3 Upon occurrence of a Force Majeure Event, the non-performing party shall promptly notify the other party that a Force Majeure Event has occurred, its anticipated effect on performance, including its expected duration. The non-performing party shall furnish the other party periodic reports regarding the progress of the Force Majeure Event. The non-performing party shall use reasonable diligence to minimize damages and to resume performance.

Payment Obligations Not Excused, Notice, Ability to Terminate if Performance is Delayed Certain Length of Time

Neither Party shall be liable hereunder for any failure or delay in the performance of its obligations under this Agreement, except for the payment of money, if such failure or delay is on account of causes beyond its control, including labour disputes, civil commotion, war, fires, floods, inclement weather, governmental

Force Majeure Clause

regulations or controls, casualty, government authority, strikes, or acts of God, in which event the non-performing party shall be excused from its obligations for the period of the delay and for a reasonable time thereafter. Each party shall use reasonable efforts to notify the other party of the occurrence of such an event within [number] business days of its occurrence.

If performance is delayed over [number] days, the party not experiencing the delay may terminate this Agreement.

OR

Notwithstanding anything in this Agreement, if either party is bona fide delayed or hindered in or prevented from the performance of any term, covenant or act required hereunder by reason of strikes, labour troubles; inability to procure materials or services; power failure; restrictive governmental laws or regulations; riots; insurrection; sabotage; rebellion; war; act of God; act of terrorism; or other reason whether of a like nature or not which is not the fault of the party delayed in performing work or doing acts required under the terms of this Agreement, then the performance of that term, covenant or act is excused for the period of the delay and the party delayed will be entitled to perform that term, covenant or act within the appropriate time period after the expiration of the period of the delay. However, the provisions of this paragraph do not operate to excuse either party from the prompt payment of amounts owing hereunder, nor will a lack of financial resources or ability on the part of either party be considered force majeure, including any party bankruptcy, insolvency or other creditor protection.

Excessive Delay, Failure to Cure

Neither Party will be held liable for failure to fulfill its obligations hereunder if such failure is due to a Force Majeure Event. A "Force Majeure Event" means, but is not limited to, an act of war; domestic and/or international terrorism; civil riots or rebellions; quarantines, embargoes and other similar unusual governmental actions; or extraordinary elements of nature or acts of God; provided that such Force Majeure Event is beyond the excused Party's reasonable control, occurs without the excused Party's fault or negligence, is not caused directly or indirectly by the excused Party and could not have been prevented or avoided by the excused Party's reasonable diligence. [Notwithstanding the foregoing, unless agreed to in writing by Customer, any delay that Customer, in its sole discretion, deems excessive will be grounds for termination by Customer if such delay is not cured after [number] calendar days written notice of Customer's intent to terminate. [or]] In the event a Force Majeure Event continues for more than [number] consecutive days or more than [number] days in any [length of time] period, then Customer may terminate this Agreement upon written notice.]

Resulting Loss Apportioned

If the performance by [name of party] of any of [his/her/its] obligations or undertakings under this contract is delayed or prevented by an act of God or by any other occurrence that is beyond the control of the parties to this contract, then the resulting loss shall be [specify how loss will be apportioned].

Preventative Measures

Vendor shall have in place disaster recovery plans to deal with a loss of electric power or telecommunication services. In the event of a power failure, Vendor shall have adequate backup power sources to immediately continue its operations for at least [number] more hours (the "Back Up Power Period"). The failure of electric

Force Majeure Clause

power or Vendor's backup power source shall not be considered a Force Majeure Event until after the Back Up Power Period.

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Amendments Clauses Explained

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Reviewed on: *01/28/2020*

An amendments clause is intended to eliminate oral agreements to amend, thereby reducing the uncertainty that may arise from such amendments. The courts have upheld these clauses, finding that no amendment can be effective absent compliance with the clause. To determine whether a subsequent amendment is enforceable, courts will consider whether there is an amendments clause. The lack of such clause may be an indication to the courts that oral amendments are permissible to amend the agreement (see: [Amendment Clause](#)).

An amendments clause could include additional details such as restrictions on amendments and who has the authority to make amendments. In any event, changes to the agreement must comply with the amendment process expressly set by the parties.

In some cases, a court may look beyond the clause and look at the circumstances and conduct of the parties. For example, it may be possible for a court to conclude that the clause was waived and the agreement was amended by the conduct of the parties.

Sample Amendments Clause

This Agreement may only be amended, supplemented or otherwise modified by written agreement of the parties.

"Best Efforts" Clauses Explained

Reviewed on: 01/03/2019

[Geoff R. Hall](#), McCarthy Tétrault LLP

Purpose and Definition of a "Best Efforts" Obligation

Contracts often require a party to use "best efforts" to undertake an obligation. There is a large body of case law specifying exactly what "best efforts" means. This body of law was distilled into seven propositions in *Atmospheric Diving Systems Inc. v. International Hard Suits Inc.*, [\[1994\] B.C.J. No. 493](#) at para. 71 (S.C.):

- 1 "Best efforts" imposes a higher obligation than a "reasonable effort".
- "Best efforts" means taking, in good faith, all reasonable steps to achieve the objective, carrying the process to its logical conclusion and leaving no stone unturned.
- "Best efforts" includes doing everything known to be usual, necessary and proper for insuring the success of the endeavour.
- The meaning of "best efforts" is, however, not boundless. It must be approached in light of the particular contract, the parties to it and the contract's overall purpose as reflected in its language.
- While "best efforts" of the defendant must be subject to such overriding obligations as honesty and fair dealing, it is not necessary for the plaintiff to prove that the defendant acted in bad faith.
- Evidence of "inevitable failure" is relevant to the issue of causation of damage but not the issue of liability. The onus to show that the failure was inevitable regardless of whether the defendant made "best efforts" rests on the defendant.
- Evidence that the defendant, had it acted diligently, could have satisfied the "best efforts" test is relevant evidence that the defendant did not use its best efforts.

Measuring "Best Efforts"

In addition to the above propositions it is well established that a best efforts clause is to be measured by an objective rather than subjective standard. This approach makes sense for two reasons. First, from a practical perspective, allowing a subjective belief to fulfill a best efforts obligation could easily render the obligation meaningless. Second, since the law of contractual interpretation is objective rather than subjective, it makes perfect sense to subject a best of efforts obligation to an objective standard (see: [Best Efforts / Reasonable Efforts Clause](#)).

Interpreting "Best Efforts" Clauses

As is always the case in matters of contractual interpretation, context is critical; "best efforts" is determined looking at both the context of the agreement and the state of the business when the agreement was signed

"Best Efforts" Clauses Explained

(*Amonson v. Martin Goldstein Professional Corp.*, [\[1994\] A.J. No. 970](#) at para. 26 (Q.B.)). The meaning of "best efforts" may vary with the circumstances. Thus, a best efforts commitment by a governmental entity may be quite different from a similar commitment given by an individual in an ordinary commercial transaction.

Assessing proper context also entails understanding the obligation from the perspective of the contracting parties at the time of their obligation and not with the benefit of hindsight at the time of litigation after a contract has come to an end. Thus, a logical and appropriate sequencing of efforts by the party at the time of contractual performance will suffice to fulfill a best efforts obligation, even if with hindsight it becomes apparent that there might have been some better way of proceeding than the path actually followed.

The "No Stone Left Unturned" Rule

The obligation to use best efforts requires a party to leave no stone unturned: "[B]est efforts means taking, in good faith, all reasonable steps to achieve the objective, carrying the process to its logical conclusion and leaving 'no stone unturned'" (*Bruce v. Region of Waterloo Swim Club*, [\[1990\] O.J. No. 1191](#) (H.C.J.)).

However, the "no stone unturned" rule is tempered by the fact that if the ultimate goal is achieved, there are no damages even if best efforts are not made. Additionally, the obligation to leave "no stone unturned" is not unlimited: if the obligation would be too onerous, it is not required. While best efforts means more than reasonable efforts, there is a balancing that is undertaken in determining whether an obligation goes beyond what best efforts requires and reasonableness is the standard by which that balancing occurs.

Although somewhat ill-defined in the case law, the concept that there is a limit on a best efforts obligation is crucial to the integrity of the interpretive process since a best efforts obligation would otherwise become an absolute obligation (see: *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.*, [\[1990\] O.J. No. 564](#) at 670 (H.C.J.), rev'd on other grounds [\[1993\] O.J. No. 676](#) (C.A.), leave to appeal to S.C.C. refused [\[1993\] S.C.C.A. No. 225](#); and *Eastern Canadian Coal Gas Venture Ltd. v. Cape Breton Development Corp.*, [\[2001\] N.S.J. No. 535](#) at paras. 292–97 (S.C.)). The words "best efforts" would become meaningless, thereby violating one of the cardinal rules of contractual interpretation that all parts of a contract must be given meaning if it is possible to do so.

A Best Efforts Obligation May Be Implied

Courts have shown some considerable readiness to imply best efforts obligations into contracts where doing so appears necessary to achieve commercial efficacy. There seem to be two main contexts in which best efforts obligations tend to be implied:

- The first and most common is real estate transactions (see: *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [\[1978\] S.C.J. No. 52](#)), including real estate conveyancing transactions (see: *Marleau v. Savage*, [\[2000\] O.J. No. 2399](#) (S.C.J.)) and landlord-tenant agreements (see: *Feischl v. Delbin Holdings Ltd.*, [\[1993\] B.C.J. No. 3023](#) (C.A.)).
- The second most common context in which best efforts obligations are implied is in employment contracts (see: *Bruce v. Region of Waterloo Swim Club*, [\[1990\] O.J. No. 1191](#) (H.C.J.)).

However, implication of best efforts obligations is by no means limited to the real estate and employment contexts. For example, the Supreme Court of Canada has applied the *Dynamic Transport v. O.K. Detailing Ltd.* principle in the context of an option to purchase a helicopter at fair market value at the end of a lease term (see: *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada*, [\[1995\] S.C.J. No. 37](#)).

"Best Efforts" Clauses Explained

Best Efforts Obligation of Government Entities

When a government entity has a best efforts obligation, the duty is subject to the government's paramount duty to act in the public interest (see: *Canada v. CAE Industries Ltd.*, [\[1985\] F.C.J. No. 171](#) (C.A.)).

However, government bodies are not required to take a best efforts obligation to the point of interfering with their public interest duties. Thus, where a government actor is subject to a best efforts obligation, the public interest can serve to limit the obligation such that the governmental entity must place the public interest first, even if doing so impairs the "best efforts" it can use to fulfill its contractual obligation.

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Commercially Reasonable Efforts Clauses Explained

Reviewed on: *01/03/2019*

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Meaning of “Commercially Reasonable Efforts”

Sometimes, parties make contractual obligations subject to “commercially reasonable efforts” as opposed to “best efforts” (see: [“Best Efforts” Clauses Explained](#) and [Best Efforts / Reasonable Efforts Clause](#)). There is very little case law on the meaning of “commercially reasonable efforts”. Nonetheless, a few principles can be discerned from the scant case law that does exist.

The trial and appeal decisions in *364511 Ontario Ltd. v. Darena Holdings Ltd.*, [\[1998\] O.J. No. 603](#) (Gen. Div.), *var* [\[1999\] O.J. No. 1784](#) (C.A.) (“*Darena*”) established three main points:

- “Reasonable commercial efforts” imports a standard which is lower than “best efforts” (*Darena*, at para. 60).
- The standard can be defined in the following terms: “Reasonable implies sound judgment, a sensible view, a view that is not absurd. Commercial means having profit or financial gain as opposed to loss as a primary aim or objective” (*Darena*, at para. 59).
 - The “commercial” aspect allows the party with the obligation to have regard for its own economic perspective in deciding when to cease further performance efforts.
 - The “reasonable” aspect constrains that party’s ability to place its own interests above that of the party to whom the obligation is owed.
- The standard does not change a true condition precedent into an option to be exercised at the discretion of the party obligated to use commercially reasonable efforts. Thus a party obligated to use commercially reasonable efforts cannot use its own acts to preclude achieving the requirement in question (*Darena*, at para. 61).

Interpreting “Commercially Reasonable Efforts”

The Standard Imposed

The standard imposed by the phrase “commercially reasonable efforts” is highly contextual, dependent upon the relevant circumstances and facts of the case. The standard of commercially reasonable efforts does not oblige a party to exhaust all possible means of fulfilling the condition, nor to undertake steps which are expensive, time consuming or commercially irresponsible.

Commercially Reasonable Efforts Clauses Explained

“Best Effort” vs. “Commercially Reasonable Efforts”

It is clear that “commercially reasonable efforts” imposes a standard which is less onerous than the leave-no-stone-unturned standard of “best efforts”. In addition, unlike the best efforts standard, which in large measure subordinates a party’s own economic interests to that of the contracting counterparty, the commercially reasonable efforts standard allows the party undertaking the effort in question to cease its effort when the economics of doing so, from its own perspective, cease to make sense. For example, when a contract requires commercially reasonable efforts to obtain certain regulatory approvals and it becomes readily apparent, based on both discussions with the regulatory bodies and professional advice, that such approvals will not be forthcoming and that further efforts to seek them would be fruitless, the requirement to use commercially reasonable efforts has been fulfilled (see: *GC Parking Ltd. v. New West Ventures Ltd.*, [\[2004\] B.C.J. No. 1106](#) at paras. 77-78 (S.C.)).

At the same time, the party with the obligation cannot simply walk away when performance becomes difficult – doubt as to whether it is commercially reasonable to proceed is not enough. At least some level of certainty that performance is not commercially feasible is required (see: *Darena*, at para. 5).

“Commercially Reasonable Efforts” does not Create an Option as to Whether to Perform

While the “commercial” aspect of “commercially reasonable efforts” gives the party with the obligation significant latitude to determine the scope of its own performance, the “reasonable” aspect and the general law applicable to the exercise of a contractual discretion impose a significant constraint on this latitude. The standard does not give the party with the obligation an option as to whether to perform.



Best Efforts / Reasonable Efforts Clause

The parties agree to use commercially reasonable efforts to obtain all required consents prior to the Closing Date.

OR

The [vendor/purchaser] shall take all such actions as are within its power to control and to use its [best efforts/commercially reasonable efforts] to cause other actions to be taken which are not within its power to control, so as to ensure compliance with all of the conditions set forth in para. [specify].

OR

The [vendor/purchaser] will use its [best efforts/commercially reasonable efforts] to obtain, prior to Closing, all consents, approvals and waivers that are required in order to assign the contracts by the terms of the Contracts [or by applicable laws governing privacy and protection of personal information, including the *Personal Information Protection and Electronic Documents Act*, [S.C. 2000, c. 5](#)].

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Exclusion or Exemption Clauses Explained

Reviewed on: *01/03/2019*

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Exclusion or exemption clauses serve to limit or exclude the liability a party would otherwise face for breach of contract (see: [Exclusion or Exemption Clause](#)).

Exclusion Clauses

Exclusion clauses raise three interpretive issues:

- the first is when they are enforceable; and
- the second is what language is needed to exclude liability for one's own negligence; and
- the third is what constitutes gross negligence in the common situation, in which a limitation of liability provision excludes liability for negligence but not for gross negligence.

All three issues have been complicated by a history of judicial hostility to exclusion clauses. In the past, this hostility has led to the creation of certain special interpretive rules that were problematic because they were not consistent with the law of contractual interpretation generally.

However, it now appears that as a result of the Supreme Court of Canada's decision in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [\[2010\] S.C.J. No. 4](#) ("*Tercon*"), at least the question of enforceability of exclusion clauses has been rationalized in a manner that is consistent with general interpretive principles. Moreover, *Tercon* has expressed a clear and workable test.

Interpreting Exclusion Clauses

The Test of Enforceability for Exclusion Clauses: the *Tercon* Test

In *Tercon*, the Supreme Court of Canada unanimously held that whether an exclusion clause applies requires three analytical steps:

- As a matter of ordinary contractual interpretation, does the exclusion clause apply to the circumstances established in the evidence?
- If yes, was the exclusion clause unconscionable at the time the contract was made? This issue has to do with contract formation, not breach.
- If no, should the court decline to enforce the exclusion clause because of an overriding public policy concern which outweighs the very strong public interest in the enforcement of contracts? The court's

Exclusion or Exemption Clauses Explained

ability to refuse to enforce an exclusion clause on this third branch of the test is a “narrow” and “residual” power which, in the interest of certainty and stability of contractual relations, will rarely be exercised (*Tercon*, at paras. 130-34 *per* Binnie J., dissenting).

Since the *Tercon* test starts with an application of the usual principles of contractual interpretation, it is easily reconcilable with those general principles. The test also has the benefit of being analytically clear, although the second and third branches of the test might sometimes be difficult to apply in practice.

The law of contractual interpretation in Canada is centred on the words chosen by the contracting parties to govern their relationship. There are many valid reasons for contracting parties to use exclusion clauses. The *Tercon* test gives effect to the parties’ words in most circumstances, while also giving the court the power not to enforce those words in circumstances where exclusion clauses are abusive rather than legitimate, either because of defects in contract formation (unconscionability) or in the application of such provisions (public policy).

The question of the enforceability of exclusion clauses has been complicated by the doctrine of fundamental breach which sometimes has the effect of interfering with the parties’ intentions by rendering exclusion provisions invalid even when from a policy perspective they were perfectly unobjectionable. By invalidating an exclusion clause, the doctrine of fundamental breach could easily give a contracting party a right to damages that it had not paid for and could allocate risks differently from what the parties had agreed. *Tercon* decisively rejected the doctrine of fundamental breach.

Exemption Clauses

Interpreting Exemption Clauses

An exemption clause may seek to absolve a contracting party of liability for its own negligence. The interpretation of such provisions is governed by a specific rule, set out by the Judicial Committee of the Privy Council in *Canada Steamship Lines Ltd. v. The King*, [1952] A.C. 192 (P.C.) (“*Canada Steamship*”) and then adopted by the Supreme Court of Canada in *ITO – International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] S.C.J. No. 38 (“*ITO*”).

The *Canada Steamship* rule rests somewhat uneasily with the law of contractual interpretation generally and with the first branch of the *Tercon* test discussed above (which considers the interpretive analysis to be one involving regular principles of contractual interpretation). However, *Canada Steamship* has never been overruled and it is generally consistent with Cromwell J.’s actual application of the first branch of the *Tercon* test so it should not be disregarded.

The *Canada Steamship* Test for Interpreting Exemption Clauses

Although *Canada Steamship* was decided under Québec civil law, its adoption in *ITO* (a common law case) and the subsequent wide application of *ITO* in common law provinces leaves no doubt that the *Canada Steamship* test applies in common law Canada. The *Canada Steamship* test contains three parts:

- an exemption clause expressly excusing a party from liability for its own negligence will be given effect;
- if there is no express reference to negligence in an exemption clause, it must be determined whether the words used are broad enough to exclude liability for negligence; and

Exclusion or Exemption Clauses Explained

- if the words are broad enough to exclude negligence, it must be considered whether there is also another cause of action other than negligence which is not fanciful and to which the exemption clause might apply, in which case the exemption clause will be interpreted to cover liability for that cause of action and not to cover liability for negligence.

As the *Canada Steamship* test makes clear and as numerous other cases have subsequently reiterated, explicit reference to “negligence” is not required for an exemption clause to apply to liability in negligence. However, there is authority suggesting that absolving a party of its own negligence can only be achieved by language which is in “the clearest terms” (see: *Consumers’ Gas Co. v. Peterborough (City)*, [\[1981\] S.C.J. No. 106](#) at 616).

Discerning the Intention of the Contracting Parties

The *Canada Steamship* test is formally based on the intentions of the parties and to that extent is well reconcilable with the general approach to interpretation. However, it turns on a presumption about the parties’ intentions which may or may not apply in any particular case and which is rooted in the courts’ former hostility towards exemption clauses — it is presumed that a party is not likely to want to exempt another contracting party from the latter’s own negligence. Unlike most other aspects of contractual interpretation which diverge from the usual approach, in the case of the *Canada Steamship* test there is no overriding policy concern that trumps the policy of achieving interpretive accuracy. Moreover, there may well be very good reasons for contracting parties, especially sophisticated ones, to allocate risks by excluding liability for negligence, meaning that the presumption about the parties’ intentions may well be wrong.

Accordingly, unless it is borne in mind that the *Canada Steamship* test is a guide that is used to give effect to the parties’ intentions rather than a directive to be applied regardless of those intentions, there is a serious risk that a court will interpret an exemption clause in a manner that not only does not accord with the parties’ intentions but that also does not further any other policy goal.

Application of the *Canada Steamship* Test

The *Canada Steamship* test has been applied numerous times including in *ITO* itself. Since it depends on the intentions of the parties as demonstrated by the language of the particular exemption clause, in some cases exemption clauses have been held to cover negligence while in other cases they have been held not to.

Below is an example of situations in which an exemption clause was found to cover negligence:

- An exemption clause applying to damage “howsoever caused” is sufficiently broad to cover negligence (*MacKay v. Scott Packaging and Warehousing Co. (Canada) Ltd.*, [\[1995\] F.C.J. No. 1749](#) (C.A.)).
- Words such as “at sole risk”, “at customers’ sole risk”, “at owner’s risk” and “at their own risk” will normally cover negligence (*St. Lawrence Cement Inc. v. Wakeham & Sons Ltd.*, [\[1995\] O.J. No. 3230](#) (C.A.), leave to appeal to S.C.C. refused [\[1995\] S.C.C.A. No. 553](#)).

Below are examples of situations in which an exemption clause was found *not* to apply to liability for negligence, usually on the basis of the third branch of the *Canada Steamship* test:

- Exemption clause did not apply to a claim arising from the loss of goods on an ocean voyage because a carrier by sea is subject at common law to a strict liability for an implied undertaking of

Exclusion or Exemption Clauses Explained

seaworthiness (*Canada Pacific Forest Products Ltd. v. Belships (Far East) Shipping (Pte.) Ltd.*, [\[1999\] F.C.J. No. 938](#) (C.A.), leave to appeal to S.C.C. refused [\[1999\] S.C.C.A. No. 421](#)).

- Exemption clause did not apply to negligence because it could also apply to claims arising out of disputes over the ownership of cargo being sorted (*Upper Lakes Shipping Ltd. v. St. Lawrence Cement Inc.*, [\[1992\] O.J. No. 446](#) (C.A.)).

The Meaning of Gross Negligence in an Exclusion or Exemption Clause

The courts have made a number of abstract statements to define gross negligence but there is no single accepted definition. The determination of whether conduct rises to the level of gross negligence is highly fact and context specific. Given how common it is for limitation of liability clauses to exclude gross negligence from their scope, the lack of clarity of the meaning of gross negligence is surprising. However, the issue has only been considered by the appellate courts on a few occasions and further appellate clarification might offer more certainty to the concept.

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Exclusion or Exemption Clause

In no event shall [name of company]'s liability, in the aggregate, for damages arising out of [the use or licensing of the licensed product or arising under] this Agreement or the exhibits hereto, whether in tort, contract or otherwise, to customer or any other person or entity exceed [the license fees actually paid by customer] [\${amount}].

OR

1 Limitations on Indemnity

The obligations of the Vendor to the Purchaser in respect of Claims shall be subject to the following:

- (a) notice of any Claim must be made within [specify] months from the Effective Date; and
- (b) the Vendor shall only be liable to the Purchaser if the total damages suffered by the Purchaser in respect of breaches of representations and warranties or breach of any covenant as herein contained exceed \${specify}, any single claim of which must be greater than \${specify} and only the excess over such \${specify} shall be recoverable by the Purchaser and the maximum liability of the Vendor to the Purchaser shall not exceed \${specify} in the aggregate.

End of Document

[Further Assurances Clauses Explained](#)

Founding Author: [Nick Kangles](#), Associate General Counsel (retired).

Updating Author: [Crispin Arthur](#), Lawson Lundell LLP.

Reviewed on: *01/28/2020*

A further assurance clause is commonly used in purchase and sale agreements and many other types of commercial agreements to cure defects or cover matters that may not have been expressly dealt with in the agreement (see: [Further Assurances Clause](#)).

The further assurances clause does not necessarily create obligations. Whether the clause obligates a party to take a certain action depends on whether such obligation to act is supported by the intent of the agreement. The intent of the agreement may be determined by a consideration of the entire agreement, including the recitals.

It is important in some agreements that this clause survive termination.

Sample Further Assurances Clause

Each party will, at the request of the other party, execute and deliver such additional documents and other assurances and perform or cause to be performed such further and other acts or things as may be reasonably required to give effect to and carry out the intent of this agreement.



Further Assurances Clause

Each party will, at the request of the other party, execute and deliver such additional documents and other assurances and perform or cause to be performed such further and other acts or things as may be reasonably required to give effect to and carry out the intent of this agreement.

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Penalty Clauses (Stipulated Remedy Clauses Specifying Damages) Explained

Reviewed on: 01/03/2019

Geoff R. Hall, McCarthy Tétrault LLP

Parties to a contract may, at the time of contracting, turn their minds to the appropriate remedy in the event of breach and specify that remedy in their contract through a penalty clause.

Historical Approach to Interpretation of Penalty Clauses

Where the stipulated remedy is a specific quantum of damages, the courts were historically reluctant to enforce the parties' intentions. A "venerable common law rule" classified such provisions as penalty clauses and distinguished between:

- a penalty clause which is the payment of a stipulated sum on breach of contract, irrespective of the damage sustained and which was unenforceable; and
- a liquidated damages clause which is a genuine covenanted pre-estimate of damage and is enforceable.

Non-enforcement was based on notions of fairness and reasonableness, with a concern that a penalty clause would act "*in terrorem* of the offending party" and coerce that party to perform for fear of being exposed to damages in excess of what was reasonable to compensate the innocent party for its loss of bargain.

The entire process was an interpretive one, as the court had to construe the stipulated remedy clause by reference to the words selected by the parties and the relevant context to determine whether it was a penalty or a genuine pre-estimate of damages. In undertaking this interpretive exercise, the parties' use of the words "penalty" or "liquidated damages" was not conclusive. Instead, the court had to determine substantively whether the provision in question matched the label placed on it by the parties.

In determining whether a provision was a penalty, the court would consider whether the recovery under the stipulated remedy clause would be "extravagant" as compared with the actual probable loss in the event of breach. Where recovery would be "grossly excessive", "punitive" or "disproportionate and unreasonable when compared with damages sustained or which would be recoverable through an action in the Courts for breach of the covenant in question", the clause would be labelled a penalty.

Once the clause in question was found to be a penalty, the court would strike it down and consciously enforce a contract which did not reflect the parties' intentions. Thus penalty clauses represented one of several instances in which the principle of interpretive accuracy gave way to another policy goal, in this case the goal of protecting contracting parties from provisions deemed to be unfair and unreasonable.

Modern Approach to the Interpretation of Penalty Clauses

Since the mid-1990s, the courts' approach to penalty clauses has changed as a result of a series of decisions by four provincial appellate courts (*Fern Investments Ltd. v. Golden Nugget Restaurant (1987) Ltd.*, [\[1994\] A.J. No. 400](#) (C.A.); *Prudential Insurance Co. of America v. Cedar Hills Properties Ltd.*, [\[1994\] B.C.J. No. 3055](#) (C.A.); *Lee v. Occo Developments Ltd.*, [\[1996\] N.B.J. No. 438](#) (C.A.); and *Peachtree II Associates – Dallas L.P. v. 857486 Ontario Ltd.*, [\[2005\] O.J. No. 2749](#) (C.A.)), leave to appeal to S.C.C. refused [\[2005\] S.C.C.A. No. 420](#)). In general, the courts have moved away from a categorical rule rendering penalty clauses unenforceable. Instead the courts now enforce stipulated remedy clauses unless the result would be unconscionability at the time of enforcement. Put somewhat more technically, the issue is now approached from the perspective of relief from forfeiture with:

- the stipulated remedy being considered a forfeiture; and
- relief being granted if the forfeiture would be unconscionable.

Adoption of the new rule has been driven by a recognition that the former categorical rule was a huge intrusion on the parties' freedom of contract which was not justifiable in the absence of oppression. However, some vestiges of the venerable common law rule remain. Not all courts that have looked at the issue have been willing to eschew the venerable rule. Moreover, while the framework for the analysis is completely different (focused on unconscionability and whether it is appropriate to grant relief from forfeiture, rather than on the question of whether the clause constituted a genuine pre-estimate of damages at the time of contracting), much of the former law of penalty clauses survives, as unconscionability is often assessed by reference to what formerly would have been considered to be a penalty clause.

Although the new approach to penalty clauses has not been universally adopted, it is much easier to reconcile with the courts' usual approach to the interpretation of contracts. The primary issue is interpretive accuracy which is driven by giving meaning to the words selected by the parties in the context in which those words would have been reasonably understood at the time of contracting. Divergence from the result dictated by interpretive accuracy is the exception, occurring only in circumstances of unconscionability. Interpretation and enforcement of penalty clauses has therefore been aligned with the law of contract generally, such that the intention of the parties as expressed in the words they have selected is enforced unless, as with any other contractual provision, unconscionability mandates the opposite result.

Waiver Clauses Explained

Founding Author: [Nick Kangles](#), Associate General Counsel (retired).

Updating Author: [Crispin Arthur](#), Lawson Lundell LLP.

Reviewed on: 01/28/2020

A waiver clause involves the intentional and voluntary relinquishment by a party of a right or a remedy. The purpose of a waiver clause is to ensure that a party's failure to strictly enforce contractual rights, whether intentionally or by oversight, does not constitute a waiver of those rights or remedies. There is some risk that a waiver clause may be overcome by an argument of promissory estoppel, but Canadian courts have not yet clarified this issue (see: [Waiver Clause](#)).

Sample Waiver Clause

The failure or delay by a party in enforcing, or insisting upon strict performance of, any provision of this agreement does not constitute a waiver of such provision or in any way affect the enforceability of this agreement (or any of its provisions) or deprive a party of the right, at any time or from time to time, to enforce or insist upon strict performance of that provision or any other provision of this agreement. Any waiver by a party of any provision of this agreement is effective only if in writing and signed by a duly authorized representative of such party.

End of Document



Waiver Clause

The failure or delay by a party in enforcing, or insisting upon strict performance of, any provision of this agreement does not constitute a waiver of such provision or in any way affect the enforceability of this agreement (or any of its provisions) or deprive a party of the right, at any time or from time to time, to enforce or insist upon strict performance of that provision or any other provision of this agreement. Any waiver by a party of any provision of this agreement is effective only if in writing and signed by a duly authorized representative of such party.

End of Document

Survival Clause

Comprehensive Clause

The provisions of this Agreement relating to confidentiality, non-competition, indemnification, exclusions and limitations of damages and liability, payment, warranty and representations, and exclusions of warranty, including but not limited to Sections [set forth the specific numbered paragraphs], and the provisions stated in Sections [any other provisions] shall survive any termination or expiration of this Agreement for any reason, [except Sections [set forth the specific numbered paragraphs]] shall survive for only [time period] years after termination or expiration. Notwithstanding the foregoing, any lawsuit, action, arbitration or claim may be brought at any time during the applicable statutory limitations period.

Simple Clause

Sections [set forth the specific numbered paragraphs] shall survive any termination or expiration of this Agreement.

Representations and Warranties in the Sale of a Business

The representations, warranties, obligations, covenants, agreements, undertakings, confidentiality obligations and indemnifications of the parties contained herein shall survive the closing for a period of one (1) year.

Confidentiality Survival Clause

The obligations and liabilities between the Parties which, by their nature, are intended to survive the expiration or the earlier termination of the Agreement shall remain in effect for [number] years from the effective date (the "Term"). Either party may terminate the agreement at any time with [number] days prior written notice. The Parties' obligations with respect to Confidential Information contained within this agreement will continue for [number] years after this Agreement expires or is terminated. Early termination of this agreement does not relieve either party of its obligations with respect to Confidential Information exchanged before the effective date of termination.

Termination Clause

1 Termination for Breach or Nonperformance.

(a) If either party commits a breach of its obligations under this Agreement, the other party may terminate this Agreement by giving the breaching party at least 10 days' prior notice, except that any such notice will not result in termination if the breaching party cures that breach before the 10-day period elapses.

A breach of this Agreement includes, but is not limited to, the following: customer's failure to pay any amount hereunder which is more than 30 days past due, vendor's failure to timely deliver any goods or services, vendor's failure to repair or replace any defective item within 10 days of notice from customer, [...]

(b) Either party may terminate this Agreement at any time in the event of a breach by the other party that remains uncured after: (i) in the event of a monetary breach, [number] calendar days following written notice thereof; and (ii) in the event of a non-monetary breach, [number] days following written notice thereof. Such termination shall be effective immediately and automatically upon the expiration of the applicable notice period, without further notice or action by either party. Termination shall be in addition to any other remedies that may be available to the non-breaching party.

(c) The non-breaching party shall be entitled to treat this Agreement as terminated (without limiting any other rights or remedies it may have) and shall be relieved of all obligations under this Agreement; provided that the non-breaching party is not then in breach of this Agreement and any act or omission of the non-breaching party is not the reason why the [conditions in Section [specify] have not been satisfied OR breaching party is in breach of this Agreement].

2 Termination on Change of Control.

In the event that, at any time during the Executive's employment under this Agreement, the Company experiences a Change of Control (as hereinafter defined) and, within either six (6) months before the Change of Control or six (6) months after the Change of Control, Executive's employment is terminated without Cause, then, provided that Executive shall have executed a release in the form and substance acceptable to the Company, and subject to the other terms and conditions contained in this Agreement, the Executive shall be entitled to receive the severance benefits described above in Section [number] above.

For purposes of this Agreement, a "Change of Control" shall mean, and be deemed to have occurred upon: (i) a sale or transfer of substantially all of the assets of the Company in any transaction or series of related transactions (other than sales in the ordinary course of business); (ii) any amalgamation, consolidation or reorganization to which the Company is a party, except for amalgamation, consolidation

Termination Clause

or reorganization in which the Company is the surviving corporation and, after giving effect to such amalgamation, consolidation or reorganization, the holders of the Company's outstanding Common Shares (on a fully-diluted basis) immediately prior to the amalgamation, consolidations or reorganization, continue to hold a majority of the voting power of the Company; (iii) any sale or series of sales of shares of the Company's common share capital by the holders thereof which results in any person or group of affiliated persons owning common share capital representing a majority of the voting power of the Company; or (iv) any circumstance by which the persons who constitute the Company's Board of Directors as of the date hereof cease for any reason to constitute a majority of the directors of the Company.

3 Termination for Convenience.

(a) [Client] may terminate this agreement for any reason or no reason at all by giving the Vendor at least [number, e.g., 30] days' prior notice.

(b) Either party to this Agreement shall have the absolute right at any time to terminate this Agreement by giving at least [number, e.g., 60] days advance written notice.

4 Termination – Long Form.

This Agreement shall be terminated:

Upon the expiration of [number, e.g., 30] days after either party hereto shall give written notice to the other party of its intention to terminate.

At the option of either party hereto in the event that the other party:

(a) breaches any obligation hereunder and fails to remedy such breach within the [number, e.g., 30] calendar days after being given written notice to that effect; or

(b) makes an assignment for the benefit of creditors, or shall admit in writing to its inability to pay its debts as they become due, or shall file any petition or answer seeking for itself any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any present or future statute, law or regulation, or shall file any answer admitting or not contesting the material allegations of a petition filed against such party in any such proceeding, or shall seek or consent to or acquiesce in the appointment of any trustee, receiver or liquidator of such party or of all or any substantial part of the properties of such party, or such party or its directors or majority shareholders shall take any action looking to the dissolution or liquidation of such party.

Either party may also terminate this Agreement in the event that a law, decree or regulation is enacted or adopted by any governmental authority which would impair or restrict in any manner whatsoever the right of such party to terminate or elect not to renew this Agreement; provided, however, that such termination shall not take effect until the day prior to the effective date of the aforementioned law, decree or regulation.

Termination Clause

5 Termination of Agreement with Indefinite Term.

This Agreement is perpetual but may be terminated as to any party, for or without cause, upon [number, e.g., 30] days' written notice to the other.

6 Termination to Be Effective after Specified Term.

Either party may terminate this Agreement at any time after [insert time period after which agreement can be terminated, e.g., 1 year], with or without cause, by written notice to the other, such termination to become effective [number, e.g., 60] days after receipt of such notice.

7 Termination of Agreement Subject to Specified Limitations.

Either party may terminate this Agreement, upon not less than [number, e.g., 30] days' prior written notice, subject, however, to the limitations set forth in Section [insert applicable sections] hereof.

8 Certain Obligations Survive upon Termination.

Either party may terminate this Agreement upon not less than [number, e.g., 30] days' prior written notice, subject, however, to the provisions of Section [insert applicable sections] hereof, which shall survive the termination of this Agreement.

[OR]

[Notwithstanding any other provisions of this Agreement, if this Agreement is terminated, the provisions of subsections [subsection number for any other provisions which should survive] shall survive such termination and remain in full force and effect.]

9 Obligations upon Termination.

(a) Destruction of Confidential Information, Return of Property, Cleanup/Safety.

At the disclosing party's request, all confidential information, whether in written form, electronically stored or otherwise, and all copies thereof, that is in the possession of the receiving party, including its agents, employees, subcontractors or representatives, shall [promptly/immediately/within 5 or some other number of days] be returned to the disclosing party or destroyed.

If so requested by the disclosing party, the receiving party shall deliver to the disclosing party a certificate executed by one of its duly authorized officers confirming compliance with the obligation to return or destroy all such information. The contractor shall [promptly/immediately/within 5 or some other number of days] return to the owner all property and equipment belonging to or furnished or paid for by the owner.

The contractor shall take all necessary action to protect and preserve the property, to clean up the site, to remove hazards, and to take all other action necessary to leave a safe and healthful site. After those obligations have been accomplished, the contractor shall immediately vacate the site and return all means of access to the site (keys, etc.) to the owner.

Termination Clause

(b) Pay All Charges Owed, Allow Access for Equipment Removal, Cease Use of Services.

Promptly upon termination of this Agreement for any reason, Subscriber will: (a) pay all fees, taxes and other charges owed through the time of termination; (b) allow the Company or its nominees access to the Installation Site to remove the Company Equipment and Software; and (c) immediately cease any and all use of the Services, tangible media on which Software is recorded, documentation, and information, and shall promptly return (or destroy upon the written request of the Company) all such material, and shall destroy all stored content as required pursuant to Section [number]. Subscriber shall pay the Company a disconnection and removal charge equal to seventy-five per cent (75%) of the then current Company installation charges when the Company Equipment is removed by the Company. Such disconnection and removal charge shall be payable by Subscriber upon receipt of invoice from the Company upon termination of this Agreement (howsoever occasioned). The foregoing obligations shall also apply as applicable upon termination of the Services at a Site.

(c) Co-Operation in the Transfer of Services.

Company may elect to receive services similar to the Services from other organizations in place of, or with a view to replacing, the Services in which case the Consultant agrees at no charge to Company to co-operate fully in the transfer as reasonably directed by Company to effect an orderly and successful transition to the new contractor(s) and the same shall include the provision of any information or documentation to Company and/or the new contractor(s) as reasonably required by Company.



Termination and Reverse Break Fee Clause

1 In the event this Agreement:

(a) is terminated by the Vendor for any reason (other than a failure to obtain regulatory approval for the Transaction), the Vendor shall, within 5 Business Days following the termination date pay the Purchaser an amount equal to \$1,000,000 (the "Termination Fee") by wire transfer in immediately available funds; or

(b) is terminated by the Purchaser for any reason (other than a failure to obtain regulatory approval for the Transaction), the Purchaser shall pay the Vendor within 5 Business Days of the termination date the Termination Fee to the Vendor by wire transfer in immediately available funds.

End of Document

COVID-19: Business Considerations Checklist

Practical Guidance

Current as of: *05/12/2020*

This checklist reviews key considerations for businesses addressing the COVID-19 pandemic. Items covered include business emergency and continuity plans, director duties, meetings and other corporate requirements, occupational health and safety, force majeure, M&A, commercial leasing, existing credit facilities, IT and cybersecurity, privacy and immigration. For more details with respect to employment considerations see: [COVID-19: Employment-Related Considerations](#). For more details with respect to public companies, see: [COVID-19: Public Company Considerations Checklist](#).

Please note that this situation is very dynamic and information changes frequently.

Business Emergency and Continuity Plans

- Businesses should prepare/review their business continuity plan.
- Issues to consider include the following:
 - What business operations are critical? Consider the impact of employee absences.
 - What is the status of the organization's suppliers and customers? Can the organization procure and store additional supplies in anticipation of shortages? Review key agreements to determine how they are impacted by the pandemic. Do any of the agreements with suppliers contain exclusivity clauses that may impede the ability to source alternate suppliers?
 - What is the impact of the pandemic on revenue and cash flow?
 - Who should be on the response team?
 - How does the response team keep the board informed?
 - Who are the spokespeople for the organization? This applies to all communications, including to employees, suppliers, customers and the media.
 - What are the key organizational messages? Who are the organization's stakeholders? Should the organization develop internally or externally facing FAQ'S?
 - Is corporate property/records safeguarded?
 - Are internal controls being maintained?
 - What insurance is in place which may address the impacts of the pandemic? Business interruption insurance may not cover all losses or perils, and generally addresses physical property damage; however, a recent Ontario court decision (*MDS Inc. v. Factory Mutual Insurance Co.*, [\[2020\] O.J. No. 1524](#) (S.C.J.)) provides support for the position that physical damage is not necessary to make a claim.

COVID-19: Business Considerations Checklist

- Note that a number of provinces have ordered non-essential businesses to close. The definition of “non-essential” is fluid and varies by province.
 - For more information about the closure of non-essential businesses in Ontario, see [O. Reg. 82/20](#) and [O. Reg. 119/20](#) as well as the [Ontario government website](#). See also the [announcement](#) from May 1, 2020, regarding the opening of certain businesses.
 - For more information about the closure of non-essential businesses in Alberta, see the [Record of Decision – CMOH Order 07-2020](#), as well as Alberta’s [relaunch strategy](#).
 - With respect to British Columbia, see the [government website](#) for a list of essential services which are permitted to operate.
- Review the [Risk Informed Decision Making Guidelines for Workplaces and Businesses](#), prepared by the government of Canada, which provides a framework for business operations.
- Depending on the industry, organizations should be prepared for a large decrease or even a large increase in business.
- Organizations will need to be flexible. Policies may have to be adjusted. The business continuity plan should be assessed regularly to determine its ongoing applicability. Conduct a best and worst case analysis to determine the impact of the pandemic on your business.
- Public companies will need to consider disclosure requirements.
- Engage in candid conversations with stakeholders about deadlines. Document any waivers in writing. Communicate with regulators. Speak to lenders if necessary.
- Plan for the recovery and consider the long-term impact of all decisions. Business will get back to normal, and it is important to identify steps which will need to be taken to get things up and running again.

See: [Business Continuity Plan](#).

Director Duties

- The duties of directors continue to apply. Directors are required to act in the best interests of the corporation, taking into account the interests of various stakeholders.
- The business judgment rule also continues to apply. Directors’ decisions need not be perfect, as long as they are sound.
- The board should do the following:
 - Set the tone that the organization is prepared to manage the crisis. Ensure that the organization is maintaining its core values and culture. Each organization is unique, and there is no set approach.
 - Put health and safety first and monitor management’s efforts in this regard.
 - Keep in mind that management remains responsible for day to day operations but ask questions and stay well-informed.
 - Consider the impact if members of senior management are stricken with the virus. Have a succession plan in place.
 - Oversee the organization’s response to the crisis, including its communication strategy. This may require more frequent meetings.
 - Consider which key indicators the board should be reviewing.

COVID-19: Business Considerations Checklist

- Consider the adequacy of the organization's liquidity and capital resources. This may require an examination of the corporation's dividend policy or program. Note that declared dividends cannot easily be reversed.
- Be mindful of personal liability of directors for occupational health and safety matters (see [Director's Obligations to Employees – Occupational Health and Safety](#), below). Other potential areas of concern include liability with respect to unpaid wages, pension plan management and environmental issues. Directors should also ensure that any payments made by the organization are appropriate if there is a risk of insolvency. It would also be prudent to review the terms of any directors and officers liability insurance.
- Ensure that the board receives timely and ongoing communication with respect to risk, including supply chain risk, IT risk, and legal and regulatory risk. Consider bringing in outside experts if required.
- Consider forming a committee to address COVID-19. The committee members should be prepared to devote a significant amount of time to addressing the crisis.
- Look at compensation. Some executives are taking pay cuts in order to help their business remain sustainable.
- Be prepared for shareholder disputes:
 - Unhappy shareholders may challenge corporate leadership.
 - Reduced dividends and loss of share value may trigger oppression claims.
 - The inability of a corporation to fund litigation may result in derivative actions.
 - Strategic decisions may trigger dissent rights and disputes over share valuations.
 - Shareholders may see this as an opportunity to trigger shotgun clauses or other similar rights.
- Be apprised with respect to government assistance programs and tax breaks/filing delays for businesses.
 - Note that even though taxpayers may be able to defer the remittance of certain taxes, once GST/HST/QST are collected, they are considered to be held in trust, and must be eventually remitted; otherwise the directors may be liable for amounts not remitted (see *Excise Tax Act* (Canada), [R.S.C. 1985, c. E-15](#), s. [323\(1\)](#), *Tax Administration Act* (Quebec), [CQLR, c. A-6.002](#), s. [24.0.1](#) and *Ahmar v. Canada*, [\[2020\] F.C.J. No. 382](#) (C.A.)).
 - Check out [Canada's COVID-19 Economic Response Plan: Support for Canadians and Businesses](#), as well as any provincial or local guidance.
 - Check out the website for the [Canada Revenue Agency](#) for more details with respect to tax measures and benefits.
- Plan for the recovery. Set up a meeting after the crisis to discuss lessons learned.

See [Director and Officer Duties and Powers](#).

COVID-19: Business Considerations Checklist

Meetings and other Corporate Requirements

- Consider whether ongoing business can be conducted by means of written resolutions.
- If holding an in-person meeting, be mindful of laws which limit the size of gatherings and ensure proper safety precautions are taken. Attendance should be limited to those required. Limit the business to what is necessary. Food or drinks should not be provided.
- It may be necessary to hold virtual/hybrid meetings, to allow electronic participation.
- The requirements with respect to electronic communications during meetings vary by statute. Consider, in particular the following:
 - Whether the statute permits participants through electronic means to be counted in a quorum.
 - Companies incorporated in Ontario can satisfy quorum requirements through electronic means (Ontario *Business Corporations Act*, [R.S.O. 1990, c. B.16](#) ("OBCA"), s. [94](#)(2)).
 - The *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("CBCA"), s. [132](#)(4); Alberta *Business Corporations Act*, [RSA 2000, c. B-9](#) ("ABCA"), s. [131](#)(3); and British Columbia *Business Corporations Act*, S.B.C. 2002, c. 57 ("BCBCA"), s. [174](#)(3), also provide that shareholders participating electronically are counted toward quorum requirements. Note, however, that under s. [132](#)(4) and (5) of the CBCA, electronic participation is only permitted if the participants can communicate adequately with each other during the meeting. This may pose a technological challenge. The ABCA and the BCBCA are similar in this regard.
 - Whether the organization's constating documents must permit fully virtual meetings.
 - Entities incorporated under the CBCA or the ABCA must generally be authorized by their articles or by-laws to hold fully virtual meetings. Note that Corporations Canada has [recommended](#) that a hybrid meeting (which allows both in person and electronic attendance) may be more appropriate when the by-laws do not expressly permit virtual meetings or are silent. See also the [ministerial order](#), issued by the Alberta government on April 9, 2020, which provides some flexibility in this regard.
 - The BCBCA permits electronic communications for the purpose of a meeting, unless the constating documents provide otherwise, but it is noteworthy that the statute does not specifically provide for entirely virtual meetings. This may raise issues as to whether such a meeting is valid. Note, however, that on April 21, 2020, the British Columbia government has issued [Ministerial Order No. M116](#), which provides greater flexibility to companies to hold virtual meetings.
 - Ontario has recently addressed this issue directly. On March 30 (and retroactive to March 17), the Ontario government made an [order](#) under the *Emergency Management and Civil Protection Act*, [R.S.O. 1990, c. E.9](#), which states the following:
- If applicable, review the constating documents to confirm if there are any other requirements which apply, such as a requirement to hold meetings in a specific location. Consider amending the articles or by-laws if needed.
- Determine whether there is a risk of a proxy content. Electronic meetings may not be suitable to the complexity of a proxy content.
- If proceeding with an electronic meeting, ensure that the circulated meeting materials explain why the meeting is being held virtually and provide clear instructions about the means of voting and asking questions. Consider simplifying the typical formal scripts which are used for an in-person meeting.

COVID-19: Business Considerations Checklist

- Engage the organization's transfer agent to assist with the process.
- Procure third-party resources as required to assist with the technology. Act quickly in light of the high demand for such services at this time.
- Consider whether a hybrid meeting may work better than a fully virtual meeting, especially if there are complex issues to be raised at the meeting.
- Consider whether a court order may be required to hold a virtual meeting. Telus Corporation obtained such an order on March 11, 2020. Canada's major banks also [announced](#) that they have received an applicable court order. If going this route, be prepared for court closures. Note that the federal government has announced that to defer an annual general meeting under the CBCA, court approval is required (see [Annual Meetings of Federal Corporations During the COVID-19 Outbreak](#) for more information about Corporation Canada's approach to meeting requirements).
- On March 30, 2020 (and retroactive to March 17), the Ontario government made an [order](#) under the *Emergency Management and Civil Protection Act*, which permits corporations under the OBCA to delay their annual shareholder meeting in certain circumstances.
 - If the last day on which the meeting is required to be held falls within the period of declared emergency, the meeting may be held up to 90 days after the emergency is terminated.
 - If the last day on which the meeting is required to be held is within a 30-day period after the emergency is terminated, the meeting may be held up to 120 days after the emergency is terminated.
 - The original order did not address how the delay in holding the meeting would impact the statutory requirement in the OBCA to produce audited financial statements within a certain time frame (where applicable). However, an [amended order](#) published April 24, 2020 temporarily permits corporations to place before the annual meeting statements which pertain to a period ending more than 6 months before the meetings. The order also clarifies notice requirements if changes are made to the date, time or place of a shareholder meeting in order to hold a virtual meeting.

Similar rules apply to corporations incorporated under the *Ontario Corporations Act*.

- CBCA corporations are required to obtain court approval to delay their annual general meeting. See the decision of the British Columbia Supreme Court in *Glacier Media Inc. (Re)*, [\[2020\] B.C.J. No. 648](#), where the court approved a delay.
- Note the [ministerial order](#) issued by Alberta which suspends the obligation to hold in-person meetings under various statutes. In addition, B.C. Registries and Online Services [announced](#) that 6-month extensions may be requested if a corporation wishes to delay their annual meeting.
- Note as well that federal non-profit corporations can apply to delay the calling of their annual general meeting when it would be detrimental to call the meeting at the usual time. The corporation must apply by e-mail to IC.corporationscanada.IC@canada.ca at least 30 days before sending the notice calling the meeting. For more details about non-profits and annual general meetings, see "[Show of hands: Virtual annual general meetings](#)" from the Lawyer's Daily. For a summary of the requirements with respect to virtual meetings for non-profit corporations, see [Virtual and Hybrid Meetings \(Non-profit Corporations\): Jurisdictional Comparison Table \(Canada, AB, BC, ON\)](#).
- The Canadian government has announced that the deadline for filing annual returns for federally incorporated companies whose anniversary is between February 1 to June 30 has been extended

COVID-19: Business Considerations Checklist

until September 30, 2020. This applies to business corporations, non-profit corporations and cooperatives. The Alberta government has issued a [ministerial order](#) suspending the obligation for entities under the ABCA, to file annual returns. Alberta partnerships, cooperatives and non-profit corporations are also entitled to suspend the filing of annual returns.

- The British Columbia government has delayed the requirement under the BCBCA for a significant individual transparency register until October 1, 2020.
- On March 20, 2020, Canada Revenue Agency [announced](#) that the Charities Directorate had been closed and operations suspended. Applications for registration of a new charity will be delayed. Note that some operations have since [resumed](#).

See [Annual General Meeting](#), [Member Meetings \(CNCA\)](#) and [Director Meetings \(CNCA\)](#). See also [Virtual Shareholder Meetings: Jurisdictional Comparison Table](#) and [Electronic Notification Requirements \(CNCA\)](#).

Occupational Health and Safety

- Review the specific occupational health and safety standards which cover your organization.
- Keep informed and follow the guidelines of the health authorities.
- Assess any risk specific to your workplace, determine which workers are most susceptible, communicate regularly with employees and work to contain the risks.
- Consider if the organization has legal obligations under occupational health and safety laws even if employees work remotely.
- Take work refusals seriously and be prepared to justify decisions made.
- Consider the need to report under workers' compensation laws.
- Focus on acting reasonably.

For more details with respect to employment issues, see: [COVID-19: Employment-Related Considerations](#) and [Director's Obligations to Employees – Occupational Health and Safety](#).

Force Majeure

- Many contracts include a force majeure clause, which is intended to protect a party when a significant unforeseeable event occurs which is outside a party's control and makes performance of the contract essentially impossible. A force majeure clause may enable a party to be excused from performance without the non-performance constituting a breach.
- There is no specific doctrine of force majeure at common law. However, note that the "force majeure" defense is included in the *Civil Code of Quebec* (C.C.Q.-1991, s. 1470). If the laws of Quebec apply, it may be possible for a party to claim force majeure even if it is not referenced in the contract.
- When invoking a force majeure clause, consider the following:
 - Does the contract have a force majeure clause and if so, what does it cover? There may be specific language with respect to pandemics, changes in law or supply chain disruption. Sometimes, there is a general catch-all phrase which will cover a broad range of occurrences.
 - Is performance of the contract truly impossible or illegal? Business challenges are not usually sufficient to permit a party to be excused from performance. Parties are still expected to act in a commercially reasonable manner and the reason for non-performance must be tied to the triggering event.

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- Are there specific consequences for a force majeure event? Are there other remedies in the contract which may apply? For example, does the contract permit performance to be delayed rather than excused?
- Is there a way to mitigate the impact of the event by completing the contract in a different way? Often, the force majeure clause will include a specific duty to mitigate.
- If relying on a force majeure clause, have the notice provisions under the contract been complied with?
- How far will the force majeure clause go to protect the organization? The pandemic will continue to have a ripple effect for the business and there will likely be future breaches; for example, organizations may be unable to pay their landlords or suppliers. Court decisions suggest that once a party can exercise some control over an event, even if the pandemic was the original trigger, the duty to mitigate may become relevant (see, for example, *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp and Paper Co.*, [\[1975\] S.C.J. No. 46](#)).
- If the contract does not contain a force majeure clause, consider the following:
 - Is there business interruption insurance which might provide some relief?
 - Is it possible to argue that the contract has been frustrated? The doctrine of frustration “occurs whenever the law recognizes that without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract” (*Davis Contractors Ltd v. Fareham Urban District Council*, [1956] AC 696 (HL) at 160). The bar for claiming that a contract has been frustrated is very high. Note as well that frustration can result in the complete termination of the contract, which may be undesirable.
- Look at any other contract terms which might apply, such as termination clauses, limitation of liability clauses or liquidated damages clauses. Governing law and dispute resolution clauses may become important in the event of a dispute.
- Reach out to suppliers and customers before taking any drastic steps. Working together may lead to a better result for everyone.
- Ensure that going forward, any contracts entered into account for the new circumstances, since COVID-19 is no longer an unforeseen circumstance.

See: [Coronavirus and Force Majeure Checklist](#), [Termination Clause](#) and [Termination and Reverse Break Fee Clause](#).

M&A

- Review any material adverse effect (MAE) clauses in the M&A agreement:
 - Consider if the pandemic meets the materiality threshold in the clause.
 - Even if the materiality threshold is met, consider if the agreement carves out pandemics, so that the clause would not apply.
 - Note that generally, MAE clauses require that an organization prove that it has suffered a sustained decline in business due to a change specific to the business, or a broader change which has a disproportionate impact on the business.
- Even if the buyer cannot rely on the MAE clause to terminate the transaction, consider the following:

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- Lenders may refuse to provide the necessary funding to close. If part of the purchase price is being paid by means of a vendor take-back mortgage or promissory note, the vendor will also need to consider the risk of proceeding.
- Financial covenants may need to be amended.
- Working capital adjustments are likely to be impacted.
- Regulatory approvals may be delayed. The Competition Bureau has suspended all telephone services due to the pandemic. Communication must be by e-mail or via an online form.
- Obtaining consents from third parties (such as landlords and lenders) may be more difficult, as such parties will have other concerns at this time.
- Corporate registries may be closed, meaning the necessary filings may be delayed.
- Representations and warranties may no longer be true at closing. Indemnification clauses may come into play.
- Earn-out clauses may require renegotiation as milestones may no longer be achievable.
- Performance under transition services agreements may be impacted, and the expectations of performance should be discussed.
- Purchasers should be prepared to respond to questions from their insurer about the impact of the pandemic and whether there has been an MAE due to the pandemic.
- Due diligence may be harder to perform, since access to the target may be limited due to quarantines. Environmental assessments and inventory counts may be impossible to perform. Consider the following:
 - Moving deadlines to allow more time for due diligence.
 - Conducting due diligence by video conference.
 - Adjusting/adding representations and warranties where proper due diligence cannot be performed.
- Due diligence may also need to be more complete and cover areas, such as:
 - Whether the target has implemented necessary health measures in the workplace, if the business is still operating.
 - Whether the target is open to employee litigation based on terminations, and whether layoffs are likely to be temporary or permanent.
 - Whether key contracts have a force majeure clause which would permit termination or deferral of payment.
 - Whether there is a risk of default with respect to any lender commitments which will be effective after closing.
 - Whether the target's financial materials reflect all liabilities, including government loans related to the pandemic and payroll subsidies.
 - Whether the target's customers and suppliers will be able to stay in business.
 - Whether the valuation of the business based on interim results remains appropriate.
- As of writing, some provinces, including Ontario, have suspended limitation periods. Other provinces may follow suit. This could extend the survival period for representations, warranties

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and covenants and may extend the time limits for commencing litigation with respect to indemnity claims.

- Shareholders may be more or less likely to be supportive of the transaction. Hostile bid activity and shareholder activism may increase.

- It may be impossible for the vendor to continue to operate the business in the ordinary course in the interim period.

- The meaning of “efforts” clauses (as in phrases like “commercially reasonable efforts”) may need close scrutiny.

- The parties should consider closing via electronic signatures.

- Other items to consider for new transactions include the following:

- Asset purchases are more likely to occur than share purchases due to increased liability exposure. Two step transactions, where there is a waiting period between the execution of a binding agreement and closing, are likely to become more common to allow the parties to see how matters unfold.

- Purchasers may request longer exclusivity periods for negotiations and due diligence since there is so much uncertainty with respect to ongoing business operations.

- Material adverse effect clauses should address the pandemic.

- Financing conditions precedents may become a very important feature of future transactions. Banks are likely to become much more cautious. Purchasers may be more likely to seek vendor financing and to ensure that the agreement includes a financing condition.

- Representations should be reviewed carefully, particularly with respect to suppliers and receivables. Consider whether to add specific representations and warranties with respect to the pandemic.

- When obtaining representations and warranties insurance, insurers will likely propose to add COVID-19 to coverage exclusions. This may require that the parties allocate the risk among themselves, perhaps through an indemnity mechanism, a lower purchase price or a deferred payment/earnout arrangement. Insurers are also likely to take a close look at MAE clauses to see how the pandemic is addressed.

- Purchase price adjustment mechanisms may require negotiation. Working capital adjustments which are based on historical averages may not work well in time of volatility. Recent changes with respect to revenue, salaries and accounts payable may impact the numbers. Earn outs may be a good way to defer some of the purchase price to the future, after the effects of the pandemic are over. The parties may have to be open to additional escrow or holdback of proceeds, or purchase price reduction, as the risks become clearer.

- It may be advisable to ensure that the agreement contains specific limitation periods.

- Due diligence will involve consideration of:

- The impact of the pandemic on the target and its suppliers and customers, in light of the target’s location and industry.

- The effect of the pandemic on financial projections, including cash flow.

- The specifics of material contracts, especially any force majeure clauses.

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- Note that on April 18, 2020, the Minister of Innovation, Science and Industry [announced](#) that certain foreign investments will be subject to enhanced scrutiny under the *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp). The businesses at issue are “related to public health or involved in the supply of critical goods and services to Canadians or to the Government”.

See [Material Adverse Change Definitions](#).

Commercial Leasing

- Review the lease to see if there are specific provisions which apply to the impact of the pandemic. Some leases specifically address emergency situations. Most leases include a requirement for the tenant to remain open during the term of the lease. Retail leases may include a clause that allows a tenant to “go dark”. In any case, it is likely that an order by the government to close would take priority over the terms of the lease.
- See if there is a force majeure clause (discussed above). Even if there is such a clause, determine whether it excuses payments under the lease. If acting for a tenant, consider whether post-dated cheques have already been provided to the Landlord.
- In addition to their relationships with tenants, landlords must also consider whether their loan agreements address how premises are to be operated, as well as relationships with suppliers and services providers (i.e., cleaners, landscapers, security). Landlords will need to ensure they have sufficient cash flow to meet their obligations.
- Governmental orders and other requirements may also impact the terms of the lease which address the use and enjoyment of the property. Many jurisdictions have enacted rules with respect to the closure of non-essential businesses. Counsel will need to consider the requirements of individual jurisdictions when providing advice. Office tenants are more likely to be able to continue operations than retail tenants. Some retail businesses continue to do well. Consider whether the lease includes a co-tenancy clause, which may reduce rent if certain key tenants or a certain number of tenants vacate the property, or even permit the tenant to terminate the lease.
- Consider if there is any ability under the lease to obtain a rent abatement. Such rights are often tied to physical property damage. If no such right exists, tenants may need to continue to pay rent.
- Take a close look at existing insurance coverage, which may provide some relief.
- Notwithstanding the terms of the lease, landlords and tenants should work together to navigate the new reality. It may be difficult for both landlords to fulfill all of their obligations under the lease, and neither one may have anything to gain by taking a stringent position. Although litigation is bound to arise based on current circumstances, it would be best to avoid it if possible, and in light of court limitations at this time, it may not even be feasible to take this approach.
- There are a number of ways to approach rental payments:
 - a. Is there government assistance which either party could access? If so, when will this assistance be available? Landlords should request financial statements before offering any relief.
 - b. One area for negotiation may be with respect to operating costs. Many municipalities are deferring taxes, and the costs of operating the property should diminish considerably – this may allow the parties to negotiate a temporary reduction in additional rent.
 - c. Landlords could also suggest using their tenants’ last month’s rent or security deposits to pay current rent, with the proviso that the funds will be replaced in the future.
 - d. The parties can also agree to defer rent, perhaps by blending the amount into future payments.

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- e. The parties could also agree to waive rent for several months and add those same number of months to the end of the term.
 - f. For retail tenants, it might make sense to look to replacing base rent with percentage rent, subject to a minimum amount.
 - g. Landlords will want to ensure that any waiver or deferral of rent is for a specific time, such as the earlier of a set date or the date the state of emergency comes to an end. Landlords may also want to negotiate certain concessions in return for rent relief (such as the removal of a tenant's co-tenancy or termination right) but should expect resistance from tenants.
 - h. Landlords will want to ensure that they retain the right to take action if there are other defaults under the lease. Or if the tenant becomes bankrupt or insolvent.
 - i. Landlords may want to charge interest on deferred rent. Tenants may want to request that such interest not be payable as long as the tenant is not in default under its rent deferral agreement. Landlords may also want to request an additional indemnifier in return for rent deferral.
 - j. Ensure that any adjustments to the lease are documented in writing and that the terms of the deal are subject to confidentiality obligations. Original indemnifiers should be parties to the new arrangements. Any paperwork should provide for the acceptability of electronic execution. Both parties should be prepared to agree that neither party is in default under the lease. Tenants should consider asking the landlord to waive fees related to any additional paperwork. Landlords should also speak to their lenders to confirm whether lender consent is required to any concessions to tenants.
- In the event rent is deferred, landlords could find that they are liable to remit GST/HST based on the full rental amount, even if the rent is not due. Landlords should ensure that the agreement deferring rent indicates that the rent is not due until a later date.
 - Both parties should check the terms of their business operations insurance. Many policies exclude losses resulting from viruses. However, some policies may cover losses caused by a governmental order to shut down. As noted above, recent Ontario case law indicates that business interruption insurance may cover losses where the use of the property is impaired, even in the absence of physical damage.
 - Landlords generally have the right to establish rules and regulations with respect to the property, as long as the rules are reasonable and applied generally to all tenants. These rules may include access limitations. Tenants should review their lease to understand how this may impact their business. Much will depend on whether the tenant is still operating its business within the premises and requires access for staff or suppliers. Communication between landlords and tenants is critical. Both landlords and tenants may want to cooperate to establish a screening process for anyone entering into the premises (although it is important to be mindful of privacy rights). It may also be necessary to discuss access to hand sanitizer and whether signs should be posted about good hygiene practices.
 - Consider special situations:
 - a. If the tenant is on a month to month lease, it may be reasonable for a landlord to terminate the tenancy if rent is not paid; that being said, in light of the likely difficulty in renting out the space, a landlord could also reasonably determine that it is better to have a non-paying tenant than no tenant at all.
 - b. If the lease contains options in favour of the tenant, it may be reasonable for the tenant to request additional time to exercise the options, and for the parties to agree that for the purposes of exercising the options, the tenant is deemed not to be in default under the lease.

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c. For offers to lease, where the tenant is not yet occupying the premises, and the landlord may not yet have completed the work necessary for the tenant to commence occupancy, it may be best to mutually agree to suspend the arrangement, although this will likely require a reworking of applicable dates in the offer. In the event of a dispute, counsel should review the offer to determine whether it is binding.

- It may take a while after the immediate emergency ends for things to return to normal. Both landlords and tenants should be prepared for ongoing discussions.

Existing Credit Facilities

- While credit documentation may not specifically address a global outbreak, it will put pressure on certain provisions of a credit agreement.
- Borrowers should review the financial covenants in their debt documents to assess their ability to comply with certain financial thresholds. For example, a borrower with lower EBITDA may have unexpected difficulty complying with their financial covenants.
- Borrowers with revolving facilities may also question whether they can bring down their “material adverse change” representation and warranty.
- Changes in the borrower’s circumstances or the credit market, such as those triggered by COVID-19, may prompt the borrower to request relief from the terms of the credit agreement.
 - In lieu of an amendment, lenders might agree to a consent or waiver. The underlying purpose of the consent or waiver is often the same as an amendment. The level of lender approval may be the same as for amendments, and the conditions may be the same. However, certain consents may require only the approval of the administrative agent.
 - For most amendments, the vote of lenders holding greater than 66 2/3% of the sum of unused commitments and outstanding loans under a credit agreement is required.
 - In addition, borrowers should look in the “defaulting lender” section to see if their credit agreement has yank-a-bank provisions, which would allow the replacement of a lender that does not agree to certain types of amendments.
 - Finally, borrowers should check the intercreditor agreement (if applicable), as credit groups are sometimes restricted from making certain amendments without the consent of other tranches.
- In lieu of an amendment, lenders might agree to a consent or waiver. The underlying purpose of the consent or waiver is often the same as an amendment. The level of lender approval may be the same as for amendments, and the conditions may be the same. However, certain consents may require only the approval of the administrative agent.

See [*Coronavirus \(COVID-19\) Impact on Borrowers and Lenders*](#).

IT and Cybersecurity

- Take a close look at cybersecurity policies. Be prepared for more incidents as employees work remotely, and bad actors use emotional appeals in these difficult circumstances to engage in phishing attacks. Malicious insiders may also be more active with less supervision as organizations move to a remote workforce. Unauthorized access may also be harder to detect due to the shift in protocols.
- Ensure that employees are able to securely access data.
- Ensure that employees know not to disable any security mechanisms.

COVID-19: Business Considerations Checklist

- Remind employees of their confidentiality obligations.
- Review the organization's incident response plan and ensure that the provisions of the plan still apply despite the change in work protocols.
- Review the organization's cyber insurance policy to ensure adequate coverage.
- Monitor transactions closely to ensure that approvals can still be authenticated, particularly with respect to financial matters. Relying on e-mails can be risky.

See [Cybersecurity and COVID-19](#).

Privacy

- The Office of the Privacy Commissioner of Canada (OPC) has issued [guidance](#) with respect to privacy related issues. They have reiterated that privacy laws continue to apply, but that they are not a barrier to appropriate information sharing. See also the OPC [guidance](#) with respect to video conferencing.
- Privacy concerns have already arisen in many jurisdictions which are monitoring people and their movements. Know which laws apply to your organization.
- There are a number of Canadian laws which protect health information. Generally, Canadian statutes permit exceptions to the usual consent requirements in emergency situations, but notice may still be required.
- Organizations will have to balance the need to protect employee privacy and the need to maintain a safe workplace. As a general rule, organizations should only collect what is necessary and not disclose information without consent unless legally required. Fair information principles, such as accountability and transparency, still apply.
- Caution should be exercised about becoming too invasive (e.g., asking employees if they have the virus for no justifiable reason). It may be acceptable to take an employee's temperature before returning to work, but there would need to be a legitimate reason for doing so, and proper protocols should be followed (i.e., have a third party conduct the testing if possible, ensure they have proper protective equipment, conduct the testing privately). If it is determined that taking employee temperatures is acceptable, employees who refuse to consent should may have to be sent home. The rules may differ depending on the type of workplace, and it will be important to develop a plan which addresses key issues, including how employees with a fever are to be dealt with and management of test results from a privacy perspective. Organizations may also want to develop a policy which addresses disclosure by the employee, as well as protocols for self-isolation and ongoing communication with the employer. Organizations should also take note of human rights legislation, particularly with respect to testing employees with disabilities. Efforts should be made to exclude the collection of information which may identify a disability.
- If there is a risk to other employees, organizations should disclose the actual risk as needed, but limit information shared to what is required. The sick person should not be identified.
- Employees handling personal information while working at home must continue to be mindful of their obligation to safeguard the information and securely dispose of any paper materials.
- Organizations that wish to communicate by e-mail to customers or clients about COVID-19 related matters must still comply with Canada's anti-spam law if the content of the message contains any commercial messaging.

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Immigration

- The situation is very dynamic.
 - The border between Canada and the US is closed, subject to limited exceptions. Trade in goods continues. Essential travel into Canada is permitted, which excludes tourism and recreational travel. Canadian citizens and permanent residents may return.
 - Travelers by air (including domestic) and intercity passenger trains must pass a health check and anyone showing symptoms will not be able to board. A screening will also occur upon arrival.
 - All travelers must isolate themselves for at least 14 days after arrival, even if no symptoms of COVID-19 are apparent, and must demonstrate that they have a credible plan for complying with the requirements. In addition, travelers cannot isolate with vulnerable people.
 - There are some exceptions to the mandatory isolation rule for essential services and truck drivers.

There are many specific details and exemptions which may apply. As there are still a lack of clarity and the rules change frequently, reference should be made to the [Government of Canada](#) website. See also Lawyer's Daily article "[COVID-19 and Immigration Law: Difficulties and Opportunities](#)".

End of Document

[Virtual and Hybrid Meetings \(Non-profit Corporations\): Jurisdictional Comparison Table \(Canada, AB, BC, ON\)](#)

Lexis Practice Advisor Canada

Current as of: **04/30/2020**

This table sets out the statutory requirements for holding virtual and hybrid member and director meetings of non-profit corporations under Federal (Canada) jurisdiction, as well as under various statutes in Alberta, British Columbia and Ontario. It also lists potential issues that may be encountered. Key language is bolded and italicized for ease of reference. For more information on the impact of COVID-19 on business, see [COVID-19: Business Considerations Checklist](#).

Jurisdiction	Statute	Text	Potential Issues
Canada (Federal)	<i>Canada Not-for-profit Corporations Act, S.C. 2009, c. 23 and Canada Regulations SOR/2011-223</i>	<p>Members: ss. <u>159</u>(4) and (5); and <u>165</u>(4) of the Act.</p> <p>Participation in meeting by electronic means s. <u>159</u>(4) <i>Unless the by-laws otherwise provide,</i> any person entitled to attend a meeting of members may participate in the meeting, in accordance with the regulations, if any, by means of a telephonic, an electronic or other communication facility that permits all participants to <i>communicate adequately with each other</i> during the meeting, if the corporation makes available such a communication facility. A person so participating in a meeting is <i>deemed for the purposes of this Act to be present at the meeting</i>.</p>	<ul style="list-style-type: none"> • The statute requires participants to “communicate adequately”, which can raise questions as to the meeting’s validity. • Deemed presence for quorum purposes requires adequate level of communication and participation. • By-laws must expressly permit a virtual members’ meeting. • For a members’ meeting, Corporations Canada has confirmed: <ul style="list-style-type: none"> ○ A digital channel must allow participants to speak to each other during the meeting. ○ Subject to the bylaws, digital voting allowed as long as can be gathered in a way that allows them to be verified,

Virtual and Hybrid Meetings (Non-profit Corporations): Jurisdictional Comparison Table (Canada, AB, BC, ON)

		<p>Meeting held by electronic means s. 159(5) If the directors or members of a corporation call a meeting of members under this Act and if the by-laws so provide, those directors or members, as the case may be, may determine that the meeting shall be held, in accordance with the regulations, if any, <i>entirely by means of a telephonic, an electronic or other communication facility</i> that permits all participants to <i>communicate adequately with each other</i> during the meeting.</p> <p>Voting while participating electronically s. 165(4) <i>Unless the by-laws otherwise provide,</i> any person participating in a meeting of members under subsection 159(4) or (5) and entitled to vote at that meeting may vote, and that vote may be held, in accordance with the regulations, if any, <i>by means of the telephonic, electronic or other communication facility that the corporation has made available for that purpose.</i></p> <p>ss. 71(2) and 74(1) of the Regulations.</p> <p>Communication</p>	<p>tallied and presented while maintaining anonymity.</p> <p>o Where the bylaws do not expressly permit the meeting or are silent, a hybrid meeting will be appropriate. Alternatively, the by-laws can be amended.</p> <p>For information with respect to the impact of COVID-19 on members' meetings, including deferring such meetings, see Annual Meetings of Federal Corporations during the COVID-19 Outbreak.</p> <p>See also practice notes: Director Meetings (CNCA), Member Meetings (CNCA), Member Meetings (Conduct) (CNCA).</p>
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		<p>Facilities for Meeting of Members</p> <p>s. 21(2) For the purpose of subsection 165(4) of the Act, a person who is entitled to vote at a meeting of members may vote by means of a telephonic, electronic or other communication facility, if the facility</p> <p>(a) enables the vote to be gathered in a manner that <i>permits its subsequent verification; and</i></p> <p>(b) permits the tallied vote to be presented to the corporation <i>without it being possible for the corporation to identify how the person voted.</i></p> <p>Absentee Voting</p> <p>s. 24(1) For the purpose of subsection 171(1) of the Act, the prescribed methods of voting are</p> <p>...</p> <p>(c) voting by means of a telephonic, electronic or other communication facility that</p> <p>(i) enables the votes to be gathered in a manner that <i>permits their subsequent verification,</i> and</p> <p>(ii) permits the tallied votes to be presented to the corporation <i>without it being possible for the corporation to identify how each member voted.</i></p>	
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Virtual and Hybrid Meetings (Non-profit Corporations): Jurisdictional Comparison Table (Canada, AB, BC, ON)

		<p>Directors: s. 136(7) of the Act</p> <p>Participation</p> <p>s. 136(7) <i>Subject to the by-laws</i>, a director may, in accordance with the regulations, if any, and <i>if all the directors of the corporation consent</i>, participate in a meeting of directors or of a committee of directors by means of a telephonic, an electronic or other communication facility that permits all participants to <i>communicate adequately with each other</i> during the meeting. A director so participating in a meeting is <i>deemed for the purposes of this Act to be present at that meeting</i>.</p>	
Alberta	<p><i>Alberta Societies Act</i>, RSA 2000, c. S-14 and <i>Companies Act</i>, RSA 2000, c. C-21</p>	<p>Members: Silent</p> <p>Directors: Silent</p>	<ul style="list-style-type: none"> It is not clear as to whether an electronic meeting would be considered valid under the statute. It would be advisable for corporations to address the issue in their bylaws. <p>For more information with respect to the impact of COVID-19 on meetings, see blog post by Yvonne Chenier, contributor to Lexis Practice Advisor: Alberta Nonprofits, COVID-19, and AGMs: Can we Hold a Virtual AGM? See also COVID-19 Response.</p> <p>See also practice notes: Member Meetings and Resolutions (Alberta Societies Act) and</p>

Virtual and Hybrid Meetings (Non-profit Corporations): Jurisdictional Comparison Table (Canada, AB, BC, ON)

			Member Meetings (Alberta Companies Act).
British Columbia	<i>British Columbia Societies Act</i> , S.B.C. 2015, c. 18 and Societies Regulation, B.C. Reg. 216/2015	<p>Members: ss. 11(1); 83(1), (2) and (3); and 84(5) and (6) of the Act</p> <p>Bylaws</p> <p>s. 111) <i>A society must have bylaws</i> that contain provisions respecting the internal affairs of the society, including provisions respecting the following:</p> <p>...</p> <p>(c) general meetings, including</p> <p>...</p> <p>(iii) if the bylaws authorize indirect or delegate voting or voting by mail or another means of communication, including by fax, email or other electronic means, <i>the rules respecting how that voting is to occur</i>,</p> <p>Participation in general meeting by telephone or other communications medium</p> <p>s. 83(1) <i>Unless the bylaws of a society provide otherwise</i>, a person who is entitled to participate in a general meeting may do so by telephone or other communications medium if all of the persons participating in the meeting, whether by telephone, by other communications medium or in person,</p>	<ul style="list-style-type: none"> Electronic absentee voting allowed if permitted in the by-laws. <p>For more information with respect to the impact of COVID-19 on meetings, see COVID-19 - Society AGMs. See also Ministerial Order No. M116.</p> <p>See also practice note: Member Meetings (BC Societies Act).</p>

		<p><i>are able to communicate with each other.</i></p> <p>s. 83(2) Subsection (1) does not obligate a society to take any action to facilitate the use of any communications medium at a general meeting.</p> <p>s. 83(3) If one or more members of a society vote at a general meeting in a manner contemplated by this section, <i>the vote must be conducted in a manner that adequately discloses the intentions of the members.</i></p> <p>Right to Vote s. 84(5) <i>The bylaws of a society may authorize</i> (a) indirect or delegate voting, or (b) voting by mail or another means of communication, including by fax, email or other electronic means.</p> <p>s. 84(6) If the bylaws of a society authorize voting by a method referred to in subsection (5), the <i>bylaws must set out rules respecting how that voting is to occur.</i></p> <p>Directors: s. 5.4 of Schedule 1 of the Regulation Conduct of directors' meetings s. 5.4 The directors may regulate their meetings</p>	
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Virtual and Hybrid Meetings (Non-profit Corporations): Jurisdictional Comparison Table (Canada, AB, BC, ON)

		and proceedings <i>as they think fit</i> .	
Ontario	Ontario Corporations Act, R.S.O. 1990, c. C.38	<p>Members: s. 125.1(1) and (2) of the Act. s. 125.1(1) <i>Unless the by-laws of a corporation provide otherwise</i>, a meeting of the members <i>may be held by telephonic</i> or electronic means and a member who, through those means, <i>votes at the meeting or establishes a communications link to the meeting is deemed for the purposes of this Act to be present at the meeting</i>.</p> <p>Non-application of this section s. 125.1(2) This section does not apply to a corporation to which Part V applies.</p> <p>Directors: s. 283(3.1) of the Act Means of meetings s. 283(3.1) <i>Unless the by-laws otherwise provide</i>, if all the directors of a corporation present at or participating in the meeting <i>consent</i>, a meeting of directors or of a committee of directors may be held by such telephone, electronic or other communication facilities as permit all persons participating in the meeting <i>to communicate with each other simultaneously and instantaneously</i>, and a director participating in the meeting by those</p>	For more information about the impact of COVID-19 on meetings, including deferring such meetings, see O. Reg. 107/20 and Regulation Amending O. Reg. 107/20 .

Virtual and Hybrid Meetings (Non-profit Corporations): Jurisdictional Comparison Table (Canada, AB, BC, ON)

		means is <i>deemed for the purposes of this Act to be present at the meeting.</i>	
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Communications in a Crisis

Reviewed on: *08/21/2019*

Effective communication in a crisis can make the difference between survival and failure. As your company's legal representative, you are likely to be involved in any crisis team and be looked to for advice as your company plans its response, so what should you look out for and how can you prepare?

What Is Crisis Management?

Unforeseen and unwelcome events can impact on an organization at any time. In some cases, you may have some warning (e.g., an industrial dispute or a failure in your supply chain), in others you won't. Natural disasters, accidents, stakeholder activism, crime, the loss of a key partner or contract and economic pressures are just some of the things that could precipitate a crisis situation that may cause damage to your reputation and lost earnings.

Crisis management involves

- identifying a crisis;
- forming a crisis team;
- monitoring the situation;
- taking restorative action;
- communicating to stakeholders; and
- post-crisis, learning from the experience and adjusting the way you work if necessary.

Why Is Communication Important?

Communicating effectively and managing the messages you share with stakeholders, either directly or through the media, can make the difference between customers, investors and the public staying with you or turning against you. In the event of a crisis materializing, one of the first things your crisis team needs to do is to create a mission statement, agreeing the team's purpose, objectives and the top two or three messages you want to share with your audience.

You then need to define all your audiences, including

- employees;
- customers;
- members of the public;

Communications in a Crisis

- the media;
- government representatives and/or regulators;
- emergency services;
- special interest groups;
- activists; and
- analysts and investors.

For each audience, you need to agree what the message should be and who is going to deliver it, how they will do this and when.

When doing this planning, bear in mind

- Your nominated spokespeople will not be the only people approached by the media and members of the public. Make sure all employees are briefed with a short and sensible answer to any enquires and know how they should pass enquiries on. A phrase such as: "Of course we're working on X, my colleague would be more than happy to tell you more about it, can I take your details so they can give you a call?" gives a better impression than: "I've been told I can't talk about X".
- You are unlikely to get to choose when the media spotlight hits you. If you don't get your side of the story out when it does, coverage and commentary won't go away. Agree on your position promptly, be open and honest and, if the situation is severe enough or you don't feel confident, engage professional communications support at the first signs of difficulty.
- Using simple language is usually the best policy. In a severe crisis, a senior representative of the company, usually the managing director ("MD") or chief executive officer ("CEO"), should deliver key messages personally and keep it simple rather than trying to hide behind jargon or statistics.
- You should identify and share next steps and remedial actions as much as you can. Make sure you keep updating your audiences on demonstrable progress. Keep updates frequent and focused on actions you're taking.
- You need to keep the lines of communication open. Monitor media coverage. Listen to employees and other stakeholders. Ensure different teams in your business are sharing information and keeping the crisis team up to date.

What Role Does Social Media Play?

The increased use of tools such as Twitter, which are not currently bound by the same reporting constraints as traditional media, can escalate crisis situations or even in some cases, cause them. Consumer and stakeholder activists can use Twitter to generate negative publicity about your organization that is then picked up in the conventional media.

If you're dealing with a crisis and Twitter can help, then use it. For example, Twitter updates from your corporate feed could provide affected customers with regular, reliable updates in the event of a service outage.

When briefing staff, you may wish to ask them to refrain from commenting on the situation on social media.

Communications in a Crisis

Or, depending on the nature of the crisis, it may be appropriate to give them some guidelines about what they can say and encourage them to participate.

To help avoid a social media-led crisis, you may wish to consider investing in some simple online monitoring for your company name. Depending on the nature of your business, this may be best run by your marketing or customer service function and will give you an early indication of any stakeholder complaints that you may be able to address before they escalate.

Why Should the Legal Team Get Involved?

In the event of a crisis, it's likely that your company will be under greater public scrutiny and subject to more media coverage than normal. Depending on the situation, there may be legal or regulatory implications to consider in terms of what is said and what is reported. As well as advising on the content of messages from a legal perspective, you should also be monitoring what is being said about your organization by others so you can take action if necessary.

How Can I Prepare for a Crisis?

As the company's legal representative, you should be involved in contingency planning, which will allow your company to prepare for and practice responding in a crisis (see: [Crisis Management Checklist](#)). Ask to see what contingency plans have been prepared for possible eventualities such as

- a natural disaster disrupting operations;
- loss of a significant customer or partner; and
- mass customer or stakeholder action.

Also, consider any potential legal or regulatory threats, where you may be expected to lead the crisis team, such as

- bribery or corrupt practices;
- a competition investigation; and
- the discovery of fraud or other criminal activity by one of your senior leaders.

Time spent considering what could happen, how you would react and who would need to be involved will make your reactions faster and more effective if the worst does happen.

Crisis Management Checklist

Reviewed on: *08/21/2019*

- *Planning for Potential Disasters* — What could go wrong? Do you know how you'd respond? Do you have access to information (e.g., contact details for key personnel) in a disaster situation?
- *Identifying a Crisis* — What has happened? What's the likely impact on your business? What are the financial repercussions? Is this serious enough to warrant specialist communications support?
- *Forming the Crisis Team* — Who's involved? What are their skills? What are their roles in the team? Who has been media trained?
- *Putting Together a Mission Statement for the Crisis Team* — What's the team trying to achieve? What are the obstacles? What are the top two or three messages you need to get across?
- *Monitoring the Situation* — Who is doing this? Are you monitoring social media, such as Twitter, as well as the press?
- *Identifying Your Audiences* — Who do you need to talk to? What is the impact of the situation on them? How will you reach them?
- *Planning Your Messages* — What are you trying to communicate? How is this different for each of your audiences?
- *Drafting Your Messages* — Is your language simple and easy to understand? Have you checked your legal position? Are you being open and honest?
- *Briefing Employees Outside the Crisis Team* — What's your message to them? Have you given them guidelines on how to talk to people outside the company? Have you given them guidelines on talking about the situation on social media?
- *Post-Crisis* — What have you learnt? What did you do well? What would you have done differently? How can you prevent this situation arising again?

COVID-19: Public Company Considerations Checklist

Practical Guidance

Current as of: *05/12/2020*

Canadian public companies are faced with many pressing disclosure and operational questions in the face of the novel coronavirus ("COVID-19") outbreak. This checklist lists a number of key considerations for public companies in the face of the global pandemic. For additional practical guidance on COVID-19, see [Coronavirus \(COVID-19\) Guidance](#).

Disclosure Matters

- **Filing Schedule.** Determine how COVID-19 will impact your filing schedule and exemptions offered by regulators.
 - For issuers, investment funds, designated rating organizations, or certain regulated entities due to make a periodic filing on or before June 1, 2020, the Canadian Securities Administrators ("CSA") has provided a 45-day extension for periodic filings such as financial statements, management's discussion and analysis ("MD&A"), annual information forms ("AIF"), management reports of fund performance, technical reports and business acquisition reports (the "Exemptive Relief"). Note that issuers relying on this Exemptive Relief do not need to apply for management cease-trade orders. See their [March 18 Release](#) and [March 23 Release](#). Review the local blanket order on your principal regulator's website. For the Ontario general order with respect to issuers and designated rating organizations, see [Ontario Instrument 51-502](#). For the Ontario general order applying to investment funds, see [Ontario Instrument 81-503](#). Issuers relying on the 45-day extension must file a press release with certain information. For information on all the filing extensions granted to reporting issuers, see [COVID-19: Reporting Issuer Filing Extensions Table](#). The CSA also provided an FAQ under [CSA Staff Notice 51-360](#) clarifying certain aspects of the requirements.
 - For "Regulated Entities" (certain clearing agencies, exchanges and commodity future exchanges), each province and territory has temporarily granted an extension for certain filings of up to 45 days after the original deadline. For the Ontario relief, see [Ontario Instrument 25-502](#).
 - For certain registrants or unregistered capital market participants, each province and territory has temporarily granted an extension for certain filings of up to 45 days after the original deadline. It allows registered dealers, registered advisors and registered investment fund managers to file financial statements and certain other information up to 45 days after the original filing deadline and extends the deadline by 45 days for registrant firms and unregistered capital markets participants to satisfy certain fee-related requirements where they are required to be met between March 23, 2020 and June 1, 2020. For the Ontario relief, see [Ontario Instrument 31-510](#).

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- The Ontario Securities Commission (“OSC”) and British Columbia Securities Commission have stated they will not charge issuers late filing fees if the filings are made by the extended deadlines. The OSC has waived all late fees accumulating between April 17, 2020 and June 1, 2020.
- In connection with the above extensions, the Toronto Stock Exchange (“TSX”) has clarified that it is not necessary to file a Form 9 to file financial statements on a delayed basis. See the TSX’s [March 23 Staff Notice](#).
- In its [May 1 Release](#), the CSA published a temporary blanket relief from certain filing and delivery requirements in connection with annual general meetings. The relief concerns the requirement to provide annual and interim filings to shareholders and the requirement to include executive compensation disclosure in the meeting materials. See “Shareholder Meetings” and “Executive Compensation” for more information.
- If you are cross-listed, pay close attention to announcements by the U.S. Securities and Exchange Commission (“SEC”), or other foreign regulators as applicable. The SEC granted registrants a 45-day extension for almost all regulatory filings due between March 1, 2020 and April 30, 2020. See [SEC Reporting Companies: Considering the Impact of the Coronavirus on Public Disclosure and Other Obligations: First Analysis](#).
- Consider credit facilities and agreements that may include delayed filings as an event of default. Waivers may need to be requested. See [Event of Default Provisions](#) for more information.
- **Risk Factors.** Address risk-related disclosure.
 - Determine the type of disclosure required. This largely depends on the company’s operations.
 - If the nature of the issuer’s business is directly impacted by the outbreak (e.g., airlines and companies with severe supply chain disruptions), then a more detailed disclosure concerning the operational impacts of COVID-19 is merited.
 - If the issuer is impacted by COVID-19 in a general manner (i.e., in a similar manner as other companies doing business on a global scale), then adding a notation about COVID-19 to existing risk factors about market fluctuations, acts of god, pandemics, etc. may be sufficient. For sample risk factor language addressing general risks related to the outbreak, see [Risk Factor \(Pandemics, Natural Disasters, Terrorism and Unforeseen Events\)](#).
 - In determining what to include in your risk factors, ask the following question: Would a reasonable investor’s decision whether to buy, sell or hold securities in the company be influenced or changed if this information was omitted or misstated? It is advisable to be as detailed as necessary to help safeguard against future liability.
 - Review your AIF.
 - Consider what is required by the form. Section 5.2 of [Form 51-102F2](#) requires risk factors addressing, among other items, cash flow and liquidity problems, environmental and health risks, economic or political conditions, or other matters that “would be most likely to influence an investor’s decision to purchase securities of your company”.
 - Remember to disclose the risks in descending order of seriousness. As discussed above, if COVID-19 is impacting your business acutely, you may wish to feature the risks prominently. See [Annual Information Forms](#) for more information on the related disclosure requirements.
 - Review your MD&A.

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- Consider what is required by the form. Section 1(a) of [Form 51-102F1](#) requires the MD&A to describe “important trends and risks that have affected the financial statements, and trends and risks that are reasonably likely to affect them in the future”.
- Discuss risks in the context of operations, liquidity and/or capital resources. See [Management’s Discussion and Analysis](#) for more information on the related disclosure requirements.
- For issuers listed on the Canadian Securities Exchange (“CSE”), see the [April 6 Guidance](#) with information about the type of disclosure the CSE will be expecting. The CSE states that “the MD&A should provide a balanced discussion that allows a clear understanding of how the unusual circumstances created by COVID-19 has affected the company’s strategy, its ability to implement that strategy, and related risks”.

○ Consult sample risk factors and consider the following key risks that may be relevant, including others that are specific to the company’s operations. See [Market Trends: COVID-19 Virtual Shareholder Meetings and Risk Factors](#) for sample COVID-19 risk factors filed on SEDAR.

- supply chain disruptions;
- shut-down of operations to comply with mandatory government measures;
- market volatility;
- inability to raise capital;
- default under credit facilities;
- negative impact on financial performance;
- reduced workforce or decrease in capacity due to work-from-home;
- lack of consumer demand in certain industries;
- cybersecurity attacks; and
- any other business-specific risk factors that are relevant.

○ Consider other upcoming disclosures, such as prospectus filings, where risk updates should be reflected. In the context of any upcoming transactions, ensure you do everything in your power to avoid liability for misrepresentations in your offering documents.

- **Forward-Looking Information.** In conjunction with reviewing your risk factors, address forward-looking information.
 - Consider whether any updates need to be made to the forward-looking cautionary language in your disclosure documents to reflect corresponding risks. Generally, these changes conform with the risk factor updates made above.
 - Review previously published forward-looking information, such as financial guidance or outlook information. Updates or withdrawal may be required if there is no longer a reasonable basis for making those statements (see Section 4A.2 and Section 5.8 of [National Instrument 51-102](#)).
 - Consider other upcoming disclosures, such as prospectus filings, where forward-looking cautionary language should be adjusted.
- **Subsequent Events.** Review disclosure of subsequent events (*i.e.*, events after the reporting period ends for which there is required disclosure in the financial statements and MD&A). Your financial statements and MD&A will need to be updated to reflect COVID-19 and its repercussions as

COVID-19: Public Company Considerations Checklist

subsequent events, and more detail will be appropriate if you are delaying your filing by relying on the Exemptive Relief referenced above.

- **Non-GAAP Financial Measures.** Consider whether any disclosure of financial measures that are adjusted in light of COVID-19 are non-GAAP financial measures. If they are, certain disclosures may be required.
- **Timely Disclosure.** Consider whether event-driven/timely disclosure is needed.
 - Determine whether a material change has occurred necessitating a press release and material change report. See [Press Releases](#), [Material Change Reports](#) and [Materiality, Material Changes and Material Facts](#). Material Change Reports are required to be filed as soon as practicable, and in any event within 10 days of the date on which the material change occurred.
 - For TSX-listed companies, assess whether any disclosure is required. Disclosure is required forthwith when there is “material information concerning [the company’s] business and affairs upon the information becoming known to management, or in the case of information previously known, forthwith upon it becoming apparent that the information is material” (see section 408 of [TSX Company Manual](#)).
 - For issuers listed on the CSE, see the [April 6 Guidance](#) with information about the type of timely disclosure the CSE will be expecting.
 - In deciding whether disclosure is necessary, consider guidance provided by the CSA on when external developments require disclosure. See Section 4.4 of [National Policy 51-201](#).
 - In light of the approved Canada Emergency Wage Subsidy, consider whether taking advantage of this support would trigger timely disclosure obligations. For instance, [National Policy 51-201](#) lists significant increases or decreases in near-term earnings and unexpected changes in financial results as changes that constitute material information. For more information on determining materiality, see [Materiality, Material Changes and Material Facts](#).
- **Review Corporate Disclosure Trends.** Consult market trends and examples. Review a broad range of disclosure to ensure you are addressing all potential issues. For predefined searches for COVID-19 disclosure in SEDAR filings, see [Lexis® Securities Mosaic® SEDAR Sample Searches](#). For predefined searches for COVID-19 disclosure in EDGAR filings, see [Capital Markets and M&A: Transactions Search Sample Searches](#). For market trends in risk factors filed on SEDAR, see [Market Trends: COVID-19 Virtual Shareholder Meetings and Risk Factors](#).
- **Consider Disclosure Principles.** In addition to guidance like [National Policy 51-201](#), keep in mind disclosure best practices when determining the best approach. For instance, while it was not issued by the CSA, the [SEC statement](#) on the importance of COVID-19 disclosure may be helpful in guiding your approach. Also consider what proxy advisory firms have said about disclosure requirements in connection with shareholder meetings (discussed further below) and general matters. In the [COVID-19 update](#) of Institutional Shareholder Services Inc. (“ISS”) and the [COVID-19 update](#) of Glass, Lewis & Co. LLC (“Glass Lewis”), they have indicated that they are taking a more flexible approach in light of the crisis but adequate disclosure will be an essential part of being able to benefit from that flexibility. Note also that the OSC is offering a [webinar](#) on disclosure considerations for small businesses on May 6, 2020 at 2:00 pm EST.

Shareholder Meetings

- **Is a Virtual Meeting Possible?** Think about any upcoming shareholder meetings. If not delaying the meeting, adopting an online/virtual meeting or a hybrid meeting (i.e., online with a physical location where a subset of shareholders can meet) may be the only option due to public health restrictions.

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○ Consider the nature of the meeting. If there are particularly contentious issues that may arise, a virtual meeting will not be suitable. For instance, it is generally not advisable to hold a meeting with a proxy contest virtually.

○ Determine if the relevant corporate statute allows for virtual meetings and if it will pose any issues. For detailed information on what each Canadian corporate statute says about virtual meetings, see [Virtual Shareholder Meetings: Jurisdictional Comparison Table](#).

— For instance, the Ontario *Business Corporations Act*, [R.S.O. 1990, c. B.16](#) (“OBCA”), allows for shareholder meetings by “telephonic or electronic means” and votes made by shareholders who vote through those means are deemed to be present at the meeting for the purposes of the act, unless the company’s articles or by-laws provide otherwise (OBCA, s. [93\(2\)](#)). See [Shareholder Meetings and Resolutions \(OBCA\)](#). Also, an [order](#) was made under the *Emergency Management and Civil Protection Act*, [R.S.O. 1990, c. E.9](#) (“Emergency Management and Civil Protection Act”), that states that despite any provision in the articles or by-laws of a corporation that provide otherwise, a meeting may be held by electronic or telephonic means and a shareholder who votes at the meeting or establishes a communications link to the meeting shall be deemed under the OBCA to be present at the meeting. Note that Ontario further [amended](#) the order on April 24, 2020 to clarify how voting should be conducted at a virtual meeting. The amendment states that the chair of a virtual meeting needs to conduct the vote by a show of hands or by ballot, if possible. If not possible, voting may be directed by alternate means.

— For instance, the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (“CBCA”), allows for shareholder meetings by “telephonic, electronic or other communication facility” if the by-laws so provide and if shareholders are permitted to participate and communicate properly during the meeting and shareholders participating by such means are deemed to be present at the meeting for the purposes of the act (CBCA, s. [132\(4\)](#) and (5)). Corporations Canada confirmed that where the corporation’s by-laws do not expressly permit virtual meetings or are silent, a hybrid meeting is more appropriate. See [Shareholder Meetings and Resolutions \(CBCA\)](#).

○ Consider securities law requirements. According to the CSA’s [March 20 Release](#):

— If the company is considering a change to the date, time or location of an in-person meeting and has already distributed its meeting materials, it can notify shareholders of the change without sending additional soliciting materials or updating its circular, as long as it issues a news release announcing such change, files the release on SEDAR and takes all steps necessary to inform all parties involved in the “proxy voting infrastructure” (i.e., intermediaries, transfer agents, proxy service providers) of the change. The CSA urges companies to do so promptly and well in advance of the meeting.

— If the company is considering a change to the date, time or location of an in-person meeting and has not yet distributed its materials, the reporting issuer should consider including disclosures in its meeting materials about changes (including possible changes) due to COVID-19.

— If sending a notice of adjournment, consider the requirements under [National Instrument 54-101](#). The CSA has stated that no exemptive relief will be provided from the requirement to concurrently send the notice to beneficial holders as long as registered and beneficial holders are treated equally and get the same information.

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- In its [May 1 Release](#), the CSA published a temporary blanket relief from certain filing and delivery requirements in connection with annual general meetings. The CSA is providing an extension until December 31, 2020 for companies to file their executive compensation disclosure with the annual meeting materials. See “Executive Compensation” below for more detail. The CSA is also providing companies with temporary relief from the requirement to send copies of their annual financial statements and MD&A within 140 days of year end. It is also providing temporary relief from the requirement to send copies of their annual and interim financial statements and MD&A to investors upon request. This means that if a company sends its annual financial statements and MD&A to investors before December 31, 2020 in accordance with [National Instrument 54-101](#), it will not be required to send an “annual request form” to shareholders. Also, with respect to “upon request” delivery of such materials made before December 31, 2020, a company can send such materials as soon as reasonably practicable after the deadline in [National Instrument 51-102](#). These changes are being implemented through local blanket orders. For the Ontario general order, see [Ontario Instrument 51-504](#).
- Consult the filings of other issuers to find examples of how companies are addressing disclosure requirements. For market trends in recent proxy materials filed on SEDAR, see [Market Trends: COVID-19 Virtual Shareholder Meetings and Risk Factors](#).
- Consider stock exchange requirements. According to the TSX's [March 23 Staff Notice](#):
 - The TSX is providing temporary relief from their requirement to hold annual meetings within 6 months of an issuer's fiscal year end (or at such earlier time required by legislation). The TSX is allowing issuers required to hold meetings in 2020 to hold them any time up to December 31, 2020, regardless of that issuer's fiscal year end.
 - The TSX has clarified that issuers need not submit a Form 9 to claim this relief.
 - TSX Venture Exchange (“TSXV”) issuers have also been granted a similar relief. See the TSXV's [March 23 Bulletin](#).
 - However, note that even though stock exchanges have said this, corporate statutory requirements must still be observed. See the note below about deferrals under the corporate statutes.
- Determine if your constating documents pose any restrictions on virtual meetings. If they do, consider amending your articles or by-laws to allow for virtual or hybrid meetings and ratifying the amendment at the shareholder meeting.
- Consider whether involving the courts is necessary and feasible at the time. For instance, in early March 2020, Telus Corporation was granted approval to hold its annual shareholder meeting virtually under the British Columbia *Business Corporations Act*, S.B.C. 2002, c. 57 (“BCBCA”).
- Consider the possibility of obtaining a deferral until restrictions have been lifted if it is not feasible to hold your shareholder meeting. Consider any corporate statutory requirements related to deferrals. For instance:
 - Under the CBCA, Corporations Canada has [clarified](#) that court approval is required to defer a meeting and recommends using a virtual one if it's not possible to obtain an extension. Meetings are normally required to be held not later than 18 months after the corporation comes into existence and, afterwards, not later than 15 months after holding the last preceding meeting and within 6 months of the corporation's previous financial year. In *Glacier Media Inc. (Re)*, [\[2020\] B.C.J. No. 648](#), the Supreme Court of British Columbia decided on the

COVID-19: Public Company Considerations Checklist

petition of two CBCA companies to extend the deadline for holding their annual general meeting to December 31, 2020. The court allowed the extension in light of the fact that management was “not currently in a position to advise as to how the Companies’ operations should be conducted into the future and what proposals should be put to the shareholders in that respect”, along with other factors.

— In Ontario, an [order](#) was made under the *Emergency Management and Civil Protection Act*. Temporary provisions were put in place affecting s. [24](#) of the OBCA, which states that the directors must call an annual shareholders meeting not later than 18 months after the corporation comes into existence and, afterwards, not later than 15 months after holding the last preceding meeting. Temporary provisions state that despite this requirement, if the deadline falls within the “period of the declared emergency”, the new deadline will be the 90th day after the emergency is terminated. Also, if the regular deadline falls within the 30-day period that begins on the day after the emergency is ended, the new deadline will be the 120th day after the day the emergency is terminated. Note that Ontario further [amended](#) the order on April 24, 2020 to clarify that the requirement that financial information placed before an annual meeting relate to a period ending not more than six months before such meeting has also been suspended temporarily. It also clarifies that OBCA corporations are not required to send a new or amended notice of meeting if it is changing its meeting details to allow for a virtual meeting, as long as the persons entitled to receive the notice are informed. This is consistent with the CSA’s [March 20 Release](#) discussed above. See the [amendment](#) for more information.

— In British Columbia, BC Registries and Online Services has [stated](#) that corporations will be allowed to extend their meeting deadline by 6 months. Meetings are normally required to be held not later than 18 months after the corporation comes into existence and, afterwards, not later than 15 months after holding the last preceding meeting. To do so, they must send a written request by e-mail (meeting certain requirements) and ensure their shareholders are properly informed of the delay.

— In Alberta, the Alberta Corporate Registry has [suspended](#) the statutory deadlines applicable to in-person meetings. Meetings are normally required to be held not later than 18 months after the corporation comes into existence and, afterwards, not later than 15 months after holding the last preceding meeting.

— In Nova Scotia, a [Direction of Minister](#) was released allowing companies to defer required in-person meetings, without penalty or recourse, for a period of up to 90 calendar days after the last date of the declared state of emergency and provides requirements associated with such a deferral.

- **Mechanics of a Virtual/Hybrid Meeting.**

- Ensure the appropriate technology is available to allow shareholders to interact in real time and that shareholders have the ability to ask questions and interact with the board of directors in a meaningful way.

- Ensure a toll-free support line is available for technological difficulties.

- Ensure disclosure about the mechanics of the virtual meeting is provided in the management information circular. This should include detailed instructions about procedures for voting and a rationale for the decision to move to a virtual meeting. According to the CSA’s [March 20 Release](#), disclosure should be made in the proxy materials (if not already filed) or in a press release filed on SEDAR (with all parties involved in the proxy voting infrastructure being notified).

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- Review what the proxy advisory firms have said.
 - See the Glass Lewis [update](#) on virtual-only meetings. Prior to the COVID-19 pandemic, Glass Lewis had a policy of voting against members of the governance committee where the issuer does not provide adequate disclosure and assure shareholders will be afforded the same rights as with an in-person meeting. For companies opting to hold virtual-only meetings between March 1, 2020 and June 30, 2020, Glass Lewis has stated that they will not recommend voting against members of the governance committee on that basis if the company discloses, at a minimum, its rationale for doing so and cites COVID-19. For meetings after June 30, 2020, their standard [policy](#) about virtual shareholder meetings will apply and they will expect robust disclosure.
 - See the ISS [update](#) to their policy guidance in light of COVID-19. The policy does not cover virtual-only meetings in Canada. ISS did not previously have a policy of voting against boards where virtual-only meetings are held and this update recognizes that “virtual-only meetings may be both necessary and desirable”. However, it says that where issuers are not permitted to do so pursuant to their applicable regulatory requirements, it may be necessary to postpone the meeting. If adopting a virtual-only meeting, issuers are encouraged to include adequate disclosure about the rationale for doing so.
- Consider possible criticism that the company is attempting to restrict the participation of shareholders and consider how to manage those challenges. Ensure a script is prepared to deal with such objections.
- Consult with virtual meeting providers (e.g., Broadridge Financial Solutions and Lumi) and do so as soon as possible, since these service providers will be in high demand
- Work closely with your transfer agent that will facilitate the mechanics of the virtual meeting and work with your virtual meeting provider. Also, communicate with the auditors (and external counsel, if applicable) throughout the process to keep them apprised of developments.
- Assess the benefits and disadvantages of different formats (audio only vs. audio and video) and select a format. Consider the costs of different options, as well, in light of the potential cost savings of not having an in-person meeting (travel, venue, etc.).
- Consider how third-party appointees will obtain necessary information.
- Consider having a “dry run” or “dress rehearsal” for the shareholder meeting to ensure all technology works and the company is prepared for the new format.
- Think about accessibility. Consider features like translations, closed captions, large font, etc.
- Consult best practice documents, such as:
 - Broadridge’s [Principles and Best Practices for Virtual Annual Shareholder Meetings](#);
 - Lumi’s [Annual General Meeting Resources](#); and
 - the [Principles and Best Practices for Virtual Annual Shareowner Meetings](#) issued by the Best Practices Committee for Shareowner Participation in Virtual Annual Meetings.
- Review meeting materials filed on SEDAR to see how other corporations have dealt with disclosure. See [Coronavirus \(COVID-19\) Shareholder Meeting Materials](#) and [Market Trends: COVID-19 Virtual Shareholder Meetings and Risk Factors](#).

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○ For hybrid meetings:

- Assess any press release or notice of meeting and ensure it provides clear information and makes it known that shareholders may vote through virtual means if they have any concerns with attending in person.
- If the location of the meeting has been changed to accommodate a hybrid meeting, ensure you have filed an amended notice of meeting and press release and also consider delaying start of the meeting to ensure anyone who goes to the wrong location can attend.
- Since those online may not be able to participate the same way as with a virtual meeting, consider quorum requirements under the corporate statute and constating documents and ensure those will be met in-person.
- Has your jurisdiction made a hybrid meeting impossible? For instance, consider provincial prohibitions on gatherings of more than a certain number of people.

Other Corporate Governance Matters

- **Assess Your Practices.** Consider any adjustments that need to be made to ensure efficient and appropriate corporate governance practices during the outbreak.
 - Review the company's disclosure policies and internal reporting procedures to confirm that the disclosure committee, or other committee, is prepared to address any developments promptly.
 - Keep in mind the potential for class action lawsuits against public companies in light of the drop in share price and the disclosure that was made. In particular, the length of time between the date of first misrepresentation and the date of the disclosure correcting that disclosure was made and the extent of any share drop will be key factors posing risks. Ensure any risks are discussed and, if the risk is significant, consider consulting external counsel as applicable.
 - Consider holding virtual directors' or committee meetings if the constating documents permit. In Ontario, an [order](#) was made under the *Emergency Management and Civil Protection Act* amending s. [126](#)(13) of the OBCA temporarily to state that "despite any provision in a company's articles or by-laws", a committee or board meeting can be held telephonically, by electronic or other means if the persons at the meeting can communicate with each other simultaneously and instantaneously. So, in Ontario, such meetings are permitted temporarily no matter what the constating documents say.
 - Take any necessary steps to ensure directors and officers are being kept updated on the outbreak and are in a position to make decisions in the best interests of the corporation and its stakeholders. Consider having more frequent meetings of the full board of directors to discuss COVID-19 matters.
 - Review the ISS [COVID-19 update](#) that discusses board composition. ISS has stated that it will approach issues like director independence, over boarding, diversity and other issues with increased flexibility in light of COVID-19, such as where vacancies must be filled quickly.
 - Consider whether a special committee is required to monitor developments and assess courses of action.
 - Review and consider any changes to board and committee mandates to best allocate resources and react to new developments.

COVID-19: Public Company Considerations Checklist

- Ensure adequate business continuity planning in the event that key members of management or the board of directors become ill. If such an event occurs, consider its materiality to investors and any disclosure required.
- Assess internal controls over financial reporting. If there were significant disruptions to operations, the internal controls might need to be changed (e.g., changing reporting lines or access to systems).
- Consider any impact on dividend reinvestment plans and insider-implemented automatic dispositions plans.
- Assess your process for obtaining corporate signatures. Consider moving to electronic signatures or using a service like DocuSign where possible.
- **Executive Compensation.** Review executive compensation packages to ensure they are still appropriate.
 - Review “Security Based Compensation Arrangements” below for TSX and TSXV accommodations regarding the approval of awards.
 - Consider whether to keep upcoming grants or delay them. For instance, are there a sufficient number of securities available for grants? How they should they be valued given current market conditions?
 - Consider whether any performance targets need to be adjusted.
 - If delaying, ensure this is permitted under the relevant contract. Also consider any prior disclosure made about such awards and any new disclosure required to reflect material changes.
 - Review the ISS [COVID-19 update](#). ISS encourages issuers to provide contemporaneous disclosure for any changes. While ISS does not generally support changes to in-process awards under long-term compensation plans, ISS will examine those on a case-by-case basis. Even in COVID-19, ISS has stated it will maintain its policy to vote against proposals to reprice outstanding options.
 - Review the Glass Lewis [COVID-19 update](#), which highlights Glass Lewis’s observations and predictions.
 - In its [May 1 Release](#), the CSA published a temporary blanket relief from certain filing and delivery requirements in connection with annual general meetings. Normally, issuers are required under [National Instrument 51-102](#) to include prescribed executive compensation disclosure in their proxy circulars sent to shareholders. It is required to be filed on SEDAR within 140 days of the financial year-end of non-venture issuers and 180 days of the financial year-end of venture issuers. In accordance with provincial corporate statutory exemptions and stock exchange exemptions relating to meeting requirements, the CSA is allowing issuers to file this executive compensation disclosure at the same time as they mail and file their proxy materials, as long as it is done by December 31, 2020. Issuers can also include the disclosure in a standalone document prior to December 31, 2020 and include the disclosure in their next circular sent to shareholders for an annual general meeting. The requirements to rely on this relief are described in each local blanket order. They include filing a news release disclosing reliance on the relief (before the filing deadline for the disclosure or as soon as reasonably practicable thereafter) and filing annual financial statements and MD&A for its most recent financial year before releasing this disclosure. These changes are being implemented through local blanket orders. For the Ontario general order, see [Ontario Instrument 51-504](#). The CSA also updated an FAQ under [CSA Staff Notice 51-360](#) clarifying certain aspects of the requirements.

COVID-19: Public Company Considerations Checklist

- **Investor Relations.** Be ready for increased contact from investors and analysts and ensure adequate resources are available.
 - Be mindful of investor relations and ensure investors are kept apprised of any developments.
 - Have your investor relations department prepare a script or Q&A document on the impact of COVID-19 on the issuer.
 - Make sure any statements made by the investor relations department are consistent with public disclosure statements.
 - Begin preparing for your next checkpoint with investors (such as the next earnings call and quarterly report) and ensure COVID-19 is addressed in detail. In particular, consider preparing detailed information about the short-term cash requirements of the business and ways that the company is ensuring retention of key personnel and management stability.
 - Prepare for the real possibility of shareholder activism. With current volatility, it is important to engage with large/institutional shareholders and understand their concerns.
- **Shareholder Activism.** Prepare for the real possibility of shareholder activism with current volatility.
 - Engage with large/institutional shareholders and understand their concerns. See the points under “Investor Relations” above.
 - Consider structural protections, such as shareholder rights plans, increased quorum requirements and advance notice by-laws requiring notice to propose director nominees. See [Defensive Tactics: Takeover Bids](#). Adopting a limited-duration shareholder rights plan may be advisable given current share prices.
 - Follow voting guidelines from various sources, such as Institutional Shareholder Services Inc., Glass, Lewis & Co. LLC and others. For more information, see [Proxy Advisory Services](#).
 - Keep track of shareholders accumulating company shares, watch voting activity in the weeks leading up the shareholder meeting and look out for requests from shareholders (such as requests for shareholder lists or lists of non-objecting beneficial holders).
 - Consider your board composition and any weaknesses from a corporate governance perspective. Ensure your board selection process is updated.
 - Ensure you have a proxy defense team or can mobilize one quickly, including internal spokespersons, external counsel, transfer agents, public relations consultants and proxy solicitation agents.
- **Access to Capital.** COVID-19 has created significant challenges for companies looking to raise capital. Consider the following:
 - Consult regularly with your advisors (financial and external legal counsel, if applicable) to determine the best approach. They will be able to advise on the risks of any proposed transactions, such as a further reduction in value to shareholders through dilution.
 - While traditional equity offerings may be less widely available during this time, consider other opportunities to raise capital, such as non-brokered private placements, offerings through a hybrid firm commitment/best efforts basis, rights offerings, or at-the-market offerings.
 - Even if you are not using this time to raise capital, ensure your virtual data room is kept up-to-date and reactive to the COVID-19 pandemic so that you can be ready to act quickly.

COVID-19: Public Company Considerations Checklist

- Communicate frequently with current lenders to ensure you are on the same page about potential covenant breaches.
- Review insights from proxy advisory firms on private placements. In ISS' [COVID-19 update](#), it has stated that it will continue to recommend voting for private placement issuances where it is expected a company will file for bankruptcy otherwise or the company has highlighted “going concern” issues. In Glass Lewis's [COVID-19 update](#), it has recognized that companies may need flexibility in the ability to raise capital and has warned investors against “dogmatic application of pre-existing standards” that might impact the ability to raise capital and survive the crisis.
- **Dividends and Share Buy-Back Program.** Consider whether dividend programs or other programs should continue.
 - Canadian corporate statutes (for example, OBCA, s. [38](#)(3), and CBCA, s. [42](#)) contain certain solvency requirements for declaring dividends. Assess whether these will be satisfied.
 - If those solvency requirements will not be met, consider suspending the dividend program. This will need to be discussed with the applicable market regulator.
 - Consider any past disclosure on the topic and any necessary updates (including disclosure as a “material change”) from a disclosure standpoint.
 - In light of price drops in company securities, consider whether you should buy back securities for cancellation. See “Normal Course Issuer Bids” below for more information on revised thresholds.
- **M&A Transactions.** Consider your company's position with respect to current or potential M&A transactions. Items to consider are discussed in more detail in [COVID-19: Business Considerations Checklist](#), but the below provides a brief overview.
 - Consider whether your financial position makes you susceptible to a takeover bid or hostile takeover bid. Assess whether you should implement a limited-term shareholder rights plan.
 - Discuss whether there are opportunities for M&A activity in light of the pandemic.
 - If you have already signed an M&A agreement, the “material adverse change” or “material adverse effect” provision may be critical. If you are looking to sign an M&A agreement, drafting such provision appropriately will be critical. See [Material Adverse Change Definitions](#) for more information.
 - If you have already signed an M&A agreement, consider the impact of the pandemic on purchase price adjustments. If you are looking to sign an M&A agreement, consider adopting contingent purchase price mechanisms like earn-outs to deal with concerns about low target valuation.
 - Consider any required approvals for an ongoing or potential M&A transaction. For instance, regulators like the Competition Bureau may be experiencing substantial delays and it may be difficult to obtain required consents from necessary parties. When you are negotiating a new transaction, consider building in as much of a buffer as possible into the outside date.
 - Assess any impacts on upcoming closings. Physical closings will be very difficult to implement. Work with all parties well in advance to ensure closings run smoothly.
 - Note that the Government of Canada has stated in its [April 18 Policy Statement](#) that it will be subjecting certain foreign investments into Canada with enhanced scrutiny under the *Investment Canada Act*, R.S.C. 1985, c 28 (1st Supp.), in light of COVID-19. In particular, it will look at “opportunistic investment behavior”. Consider how this may impact any planned M&A activity.

COVID-19: Public Company Considerations Checklist

- Consider the impact of suspended court operations on M&A transactions, such as plans of arrangement. Check whether court approval, such as interim and final orders, are considered essential or urgent. For instance, the Supreme Court of British Columbia [stated](#) that applications for interim and/or final orders for arrangements under the CBCA or BCBCA can be considered essential or urgent. For information on urgent civil matters in Ontario, see [Urgent Civil Motions During COVID-19](#).
- Consider other items that may be impacted in an M&A deal: indemnities (in light of suspension of limitation periods), interim period covenants, filing of documents with corporate registries, acquisition financing, impact of force majeure clauses, the impact of market volatility on regulatory thresholds and more.
- **Cybersecurity.** Consider the enhanced cybersecurity risk. In light of the outbreak, increased phishing and other scams require companies to remain vigilant and adjust their practices accordingly.
- **Other Business Matters.** Consider the impact on the general operation of your business, including issues like occupational health and safety, M&A considerations, commercial leasing, privacy and immigration matters. For more detail on those considerations, see [COVID-19: Business Considerations Checklist](#).

Other Securities Law Matters

- **Insider Trading Matters.** Think about “blackout periods” or “quiet periods”.
 - Consider whether directors, officers or employees have any material non-public information related to the outbreak that may constitute insider trading if they choose to trade or encourage others to do so. Discuss whether blackout periods are appropriate. See [Insider Trading Rules](#).
 - Consider the impact of the Exemptive Relief on regular blackout or quiet periods that expire when periodic disclosure is released.
 - Consider implementing training for employees not normally in position of material non-public information that possess it in light of personnel or staffing changes.
 - Send out reminders and information to insiders to ensure they are cognizant of the impact of COVID-19 on insider trading matters.
- **IIROC Guidance.** If you are an IIROC Member, review the following releases from the Investment Industry Regulatory Organization of Canada and continue to review the IIROC site.
 - [March 10 release](#) with preliminary COVID-19 guidance;
 - [March 30 release](#) on cybersecurity concerns;
 - [March 31 release](#) on potential exemptive relief from a number of IIROC requirements;
 - [April 8 release](#) on frequently asked questions relating to COVID-19;
 - [April 14 release](#) on deferral of IIROC fees for small and medium-sized dealer members;
 - [April 21 release](#) on cybersecurity tips for advisors and employees;
 - [April 23 release](#) with further updates on exemptive relief; and
 - [May 6 release](#) with updates on applications and exemptions granted.
- **MFDA Guidance.** If you are a MFDA Member, review the following resources the Mutual Fund Dealers Association of Canada and continue to review the MFDA site.
 - [March 13 release](#) about Member operations and MFDA operations;

COVID-19: Public Company Considerations Checklist

- [March 19 release](#) on cybersecurity concerns;
- [March 25 release](#) about Members as an “essential service”; and
- [April 21 release](#) about government programs for small and medium sized members.
- **Other Registrant Matters.**
 - Conflict of Interest Reforms. If you are a registrant, the CSA has published a [relief order](#) providing registrants with an additional 6 months to comply with the conflicts of interest provisions in the Client Focused Reforms (“CFRs”) of [National Instrument 31-103](#). Registrants now have until June 30, 2021 to implement these changes.
 - Relationship Disclosure Reforms. If you are a registrant, the CSA has published a [relief order](#) providing that the relationship disclosure provisions of the CFRs will take effect on December 31, 2021.
 - Know-Your-Client Obligations. If you are a registrant, take steps to ensure the currency of know-your-client (“KYC”) information. Registrants are required under [National Instrument 31-103](#) to “take reasonable steps” to keep a client’s KYC information current and ensure that any purchases or sales recommended by the registrant or instructed by the client (or made for a managed account) are suitable for the client. Steps to do so may include reviewing internal procedures for keeping KYC information up-to-date and revising them in light of COVID-19.
- **OSFI Guidance.** For federally regulated banks and insurers, the Office of the Superintendent of Financial Institutions has released a number of statements impacting ongoing requirements.
 - [March 13 release](#) about measures to support resilience of financial institutions;
 - [March 27 release](#) about regulatory flexibility in light of COVID-19;
 - [March 30 release](#) about capital treatment of programs to support COVID-19 efforts;
 - [April 9 release](#) about further regulatory flexibility measures;
 - April 15 notice regarding technical briefings for analysts relating to measures for [federally regulated insurers](#) and [deposit-taking institutions](#);
 - [April 17 statement](#) regarding the existing regime on bank capital and dividends in light of COVID-19;
 - [May 1 release](#) on expectations for deposit-taking institutions regarding the use of Pillar II capital buffers;
 - [May 7 update](#) about revisions to private pension plan directives related to portability; and
 - various updates to its COVID-19 frequently asked questions on [April 16](#), [April 23](#), [April 30](#) and [May 7](#).
- **Syndicated Mortgage Regime.** The CSA has [adjusted](#) its timeline to implement changes to harmonize the regulation of syndicated mortgages. They now expect the changes to take effect on January 1, 2021.
- **Mutual Funds Investing in Fixed Income.** In order to provide mutual fund managers with additional ways to face the current market volatility, the CSA has issued a [temporary blanket relief](#) that permits mutual funds to engage in additional short-term borrowing between April 17, 2020 and July 31, 2020. The CSA is implementing these changes through local blanket orders. See the [OSC order](#).
- **Security Based Compensation Arrangements.** The TSX has provided that unallocated awards can be exercised even if the unallocated award grants were not ratified within the 3-year period prescribed

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by Section 613(a) of the [TSX Company Manual](#), as long as they are ratified by the December 31, 2020 extended deadline for annual shareholder meetings. See the TSX's [March 23 Staff Notice](#). The TSXV is also granting similar relief. See the TSXV's [March 23 Bulletin](#).

- **Normal Course Issuer Bids.** Consider the following with respect to current or new normal course issuer bids.
 - Consider revised thresholds. The TSX has provided temporary relief up to and including June 30, 2020. The relief allows for normal course issuer bid ("NCIB") purchases of up to 50% of the average daily trading volume of the listed securities of that class. This is a temporary change from the current limit, which is the greater of 25% of the average daily trading volume of the listed securities of that class, and 1,000 securities (Section 628(a)(ix)(a) of the [TSX Company Manual](#)). The TSX also granted similar relief for participating organizations acting on behalf of issuers for NCIB purchases. See the TSX's [March 23 Staff Notice](#).
 - If engaging in a NCIB, think about any material undisclosed information in light of the pandemic and extended filing deadlines.
 - Consider any liquidity risks of using cash for an NCIB.
 - For automatic securities purchase plans, consult with your broker to update instructions as necessary.
- **Delisting Criteria.** Section 712(a) of the [TSX Company Manual](#) says the TSX can delist an issuer's securities if the market value is less than \$3,000,000 over any 30-day period of consecutive trading days and section 712(b) of the [TSX Company Manual](#) says the TSX can delist securities if the market value of the issuer's freely-tradeable, publicly held securities is less than \$2,000,000 over any 30-day period of consecutive trading days. The TSX has stated that it will not apply these two sections when determining whether to delist an issuer's securities up to and including December 31, 2020. See the TSX's [March 23 Staff Notice](#).
- **Market Price.** The TSX and TSXV have made statements regarding the definition of "Market Price".
 - The TSX has indicated that when determining "Market Price" for purposes of Part I of the [TSX Company Manual](#), it will on a case-by-case basis use a shorter time frame than 5 days given current market vitality for pricing securities for private placements. See the TSX's [March 23 Staff Notice](#).
 - The TSXV has revised the minimum price at which "Listed Shares" (as defined in the [TSXV Corporate Finance Manual](#)) may be issued from \$0.05 to \$0.01 in certain circumstances. So, if the "Market Price" is not greater than \$0.05, the minimum price at which the issuer can issue its shares is equal to that price (subject to a minimum of \$0.01). See the TSXV's [April 8 Bulletin](#), which contains more information.
- **Cross-Border Listed Companies.** For foreign private issuers or domestic issuers, stay abreast of SEC, New York Stock Exchange ("NYSE") and Nasdaq Stock Market developments ("NASDAQ"). For instance, see information above the SEC's filing extensions under [Disclosure Matters](#) above. In addition, both the [NYSE](#) and [NASDAQ](#) have provided relief from certain requirements, such as certain listing standards and shareholder approval requirements for certain transactions.
- **Fees, Paper Filings, etc.** See the CSA's FAQs under [CSA Staff Notice 51-360](#) for specific statements made about filing fees, paper filings and other related matters in light of COVID-19.
- **Securities Regulator and Stock Exchange Operations.** Continue to monitor operational changes to securities regulators and stock exchanges in light of COVID-19 and how that may impact your interactions with your principal regulator or relevant stock exchange. For instance, communications

COVID-19: Public Company Considerations Checklist

may need to be entirely electronic given the shift to working from home. The CSA stated on [April 9](#) that its regulatory efforts are shifting towards helping address COVID-19 related challenges.

End of Document

Virtual Shareholder Meetings: Jurisdictional Comparison Table

Practical Guidance

Current as of: *05/05/2020*

This table sets out the statutory requirements for holding virtual shareholder meetings in all Canadian jurisdictions. It also lists the potential issues that may be encountered, either raising a question of validity, or imposing additional requirements. Key language is bolded and italicized for ease of reference.

In light of the COVID-19 pandemic, many Canadian jurisdictions have temporarily changed the requirements around virtual shareholder meetings and have allowed for deferrals. Those changes are indicated below. For more information on COVID-19 changes to corporate statutes and securities law, see [COVID-19: Public Company Considerations Checklist](#).

Jurisdiction	Statute	Text	Potential Issues
Canada (Federal)	Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 132 (4), (5) and 141 (3), (4) and Canada Business Corporations Regulations, 2001, SOR/2001-512, s. 45 (1) and (2)	<u>Canada Business Corporations Act</u> ("CBCA") 132 (4): <i>Unless the by-laws otherwise provide</i> , any person entitled to attend a meeting of shareholders may participate in the meeting, in accordance with the regulations, if any, by means of a telephonic, electronic or other communication facility that permits all participants to <i>communicate adequately with each other</i> during the meeting, if the corporation makes available such a communication facility. A person participating in a meeting by such means is <i>deemed for the purposes of this Act to be present at the meeting</i> .	<ul style="list-style-type: none"> • The statute requires participants to "communicate adequately", which can raise questions as to a virtual shareholder meeting's validity. • Deemed presence for quorum purposes requires adequate level of communication and participation. • Additional statutory conditions require bylaws to expressly permit a virtual meeting. • No standard of what is required to "communicate adequately" in the statute. A court order may be required. • Regulations require

Virtual Shareholder Meetings: Jurisdictional Comparison Table

		<p>132(5): If the directors or the shareholders of a corporation call a meeting of shareholders pursuant to this Act, those directors or shareholders, as the case may be, may determine that the meeting shall be held, in accordance with the regulations, if any, <i>entirely by means of a telephonic, electronic or other communication facility</i> that permits all participants to <i>communicate adequately</i> with each other during the meeting, <i>if the by-laws so provide</i>.</p> <p>141(3): Despite subsection (1), unless the by-laws otherwise provide, any vote referred to in subsection (1) may be held, in accordance with the regulations, if any, <i>entirely by means of a telephonic, electronic or other communication facility</i>, if the corporation makes available such a communication facility.</p> <p>141(4): Unless the by-laws otherwise provide, any person participating in a meeting of shareholders under subsection 132(4) or (5) and entitled to vote at that meeting <i>may vote, in accordance with the regulations, if any, by means of the telephonic, electronic or other</i></p>	<p>ability to verify and ensure anonymity.</p> <ul style="list-style-type: none"> Corporations Canada has clarified that where the bylaws do not expressly permit the meeting or are silent, a hybrid meeting will be appropriate. <p>COVID-19 Update: Corporations Canada has clarified that where the bylaws do not expressly permit a virtual-only meeting or are silent, a hybrid meeting will be appropriate. For either a hybrid or virtual-only meeting, digital voting must not be prohibited under the corporation's by-laws. Digital voting is allowed as long as votes can be gathered in a way that allows them to be verified, tallied and presented while maintaining anonymity. Corporations Canada has also stated that court approval will be required to defer a meeting.</p> <p>Recently, in <i>Glacier Media Inc (Re)</i>, [2020] B.C.J. No. 648, the Supreme Court of British Columbia decided on the petition of two CBCA companies to extend the deadline for holding their annual general meeting to December 31, 2020. The court allowed the extension in light of the fact that management was "not currently in a</p>
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Virtual Shareholder Meetings: Jurisdictional Comparison Table

		<p><i>communication</i> facility that the corporation has made available for that purpose.</p> <p><u>Canada Business Corporations Regulations, 2001</u></p> <p>45(1): For the purpose of subsection 141(3) of the Act, when a vote is to be taken at a meeting of shareholders, the voting may be carried out by means of a telephonic, electronic or other communication facility, if the facility</p> <p>(a) enables the votes to be gathered in a manner that <i>permits their subsequent verification</i>, and</p> <p>(b) permits the tallied votes to be presented to the corporation <i>without it being possible for the corporation to identify</i> how each shareholder or group of shareholders voted.</p> <p>45(2): For the purpose of subsection 141(4) of the Act, a person who is entitled to vote at a meeting of shareholders may vote by means of a telephonic, electronic or other communication facility, if the facility</p> <p>(a) enables the vote to be gathered in a manner that permits its subsequent verification; and</p> <p>(b) permits the tallied</p>	<p>position to advise as to how the Companies' operations should be conducted into the future and what proposals should be put to the shareholders in that respect", along with other factors.</p>
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Virtual Shareholder Meetings: Jurisdictional Comparison Table

		<p>vote to be presented to the corporation without it being possible for the corporation to identify how the person voted.</p> <p>COVID-19 Update: In response to COVID-19, see this release from Corporations Canada, which states that where by-laws do not expressly permit a virtual-only meeting or are silent, a hybrid meeting will be appropriate. Digital voting allowed as long as votes can be gathered in a way that allows them to be verified, tallied and presented while maintaining anonymity. It also states that court approval is required to defer a meeting.</p>	
Alberta	<p><i>Business Corporations Act</i>, R.S.A. 2000, c. B-9, s. 131(3) and (3.1)</p>	<p>131(3): Subject to any limitations or requirements set out in the regulations, if any, a shareholder or any other person entitled to attend a meeting of shareholders may participate in the meeting by electronic means, telephone or other communication facilities that <i>permit all persons participating in the meeting to hear or otherwise communicate with each other</i> if</p> <p>(a) <i>the bylaws so provide</i>, or</p> <p>(b) subject to the bylaws, <i>all the shareholders entitled to</i></p>	<ul style="list-style-type: none"> • The statute requires participants to “communicate adequately”, which can raise questions as to a virtual shareholder meeting’s validity. • Deemed presence for quorum purposes requires adequate level of communication and participation. • No standard of what is required to “communicate adequately” in the statute. A court order may be required. • Additional statutory conditions require

Virtual Shareholder Meetings: Jurisdictional Comparison Table

		<p><i>vote at the meeting consent</i>, and a person participating in a meeting by those means is <i>deemed for the purposes of this Act to be present at that meeting</i>.</p> <p>131(3.1): If the directors or the shareholders of a corporation call a meeting of shareholders, the directors or the shareholders, as the case may be, may determine that the meeting shall be held, in accordance with the regulation, if any, <i>entirely by electronic means, telephone or other communication facility</i> that permits all participants to <i>communicate adequately with each other</i> during the meeting, <i>if the bylaws so provide</i>.</p> <p>COVID-19 Update: In response to COVID-9, the Alberta Corporate Registry suspended the statutory deadlines applicable to in-person meetings. Meetings are normally required to be held not later than 18 months after the corporation comes into existence and, afterwards, not later than 15 months after holding the last preceding meeting.</p>	<p>bylaws to expressly permit a virtual meeting.</p> <ul style="list-style-type: none"> • For information about deferring a meeting under the statute in light of COVID-19, see COVID-19: Public Company Considerations Checklist. <p>COVID-19 Update: In response to COVID-9, the Alberta Corporate Registry suspended the statutory deadlines applicable to in-person meetings. The corporate statute normally requires a court order for deferral.</p>
British Columbia	<p><i>Business Corporations Act</i>, S.B.C. 2002, c. 57, s. 174(1), (2) and (3)</p>	<p>174(1): Unless the memorandum or articles provide otherwise, a shareholder or proxy holder who is entitled to</p>	<ul style="list-style-type: none"> • The statute is silent as to whether entire meeting may be held by electronic means, which

Virtual Shareholder Meetings: Jurisdictional Comparison Table

		<p>participate in, including vote at, a meeting of shareholders may do so by telephone or other communications medium if all shareholders and proxy holders participating in the meeting, whether by telephone, by other communications medium or in person, <i>are able to communicate with each other.</i></p> <p>174(2): Nothing in subsection (1) obligates a company to take any action or provide any facility to permit or facilitate the use of any communications medium at a meeting of shareholders.</p> <p>174(3): If one or more shareholders or proxy holders participate in a meeting of shareholders in a manner contemplated by subsection (1),</p> <p>(a) each such shareholder or proxy holder is <i>deemed, for the purposes of this Act and of the memorandum and articles of the company, to be present at the meeting</i>, and</p> <p>(b) the meeting is deemed to be held at the location specified in the notice of the meeting.</p> <p>COVID-19 Update: In light of COVID-19, B.C. has released a Ministerial</p>	<p>can raise questions as to its validity.</p> <ul style="list-style-type: none"> • The statute requires that participants be able to “communicate with each other”, which can raise questions as to its validity. • Deemed presence for quorum purposes requires adequate level of communication and participation. • No standard of what is required to “communicate with each other” in the statute. A court order may be required. <p>COVID-19 Update: In light of COVID-19, B.C. has released a Ministerial Order allowing virtual or hybrid meetings even if the corporation’s constating documents state otherwise. Proper instructions and communication are required. B.C. has also stated that corporations will be allowed to extend their meeting deadline by 6 months. To do so, they must send a written request by e-mail (meeting certain requirements) and ensure their shareholders are properly informed of the delay.</p>
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Virtual Shareholder Meetings: Jurisdictional Comparison Table

		<p>Order allowing virtual or hybrid meetings even if the corporation's constating documents state otherwise. Proper instructions and communication are required. B.C. has also stated that corporations will be allowed to extend their meeting deadline by 6 months. Meetings are normally required to be held not later than 18 months after the corporation comes into existence and, afterwards, not later than 15 months after holding the last preceding meeting. To do so, they must send a written request by e-mail (meeting certain requirements) and ensure their shareholders are properly informed of the delay.</p>	
Manitoba	<p>The Corporations Act, C.C.S.M. c. C225, ss. 126(4) and (5) and 126.1</p>	<p>126(4): <i>Unless the by-laws otherwise provide</i>, a person entitled to attend a shareholders' meeting may participate in the meeting by means of a <i>telephonic, electronic or other communication facility that permits all participants to communicate adequately</i> with each other during the meeting, if</p> <p>(a) the corporation makes available such a communication facility; and</p> <p>(b) the meeting is held in accordance with the regulations, if any.</p>	<ul style="list-style-type: none"> • The statute requires participants to "communicate adequately", which can raise questions as to its validity. • Deemed presence for quorum purposes requires adequate level of communication and participation. • No standard of what is required to "communicate adequately" in the statute. A court order may be required. • Additional statutory conditions

Virtual Shareholder Meetings: Jurisdictional Comparison Table

		<p>126(5): For the purposes of this Act, a person who participates in a shareholders' meeting in the manner provided in subsection (4) is <i>deemed to be present at the meeting</i>.</p> <p>126.1: <i>If the by-laws so provide</i>, directors or shareholders of a corporation who call a meeting of shareholders in accordance with any provision of this Act may determine that the meeting is to be <i>held entirely by means of a telephonic, electronic or other communication facility</i> that permits all participants to <i>communicate adequately with each other</i> during the meeting. The meeting shall be held in accordance with the regulations, if any.</p>	<p>require bylaws to expressly permit a virtual meeting.</p>
New Brunswick	<p><i>Business Corporations Act</i>, S.N.B. 1981, c. B-9.1, s. 85(3)</p>	<p>85(3): A shareholder or any other person entitled to attend a meeting of shareholders may participate in the meeting by <i>means of telephone or other communication facilities</i> that <i>permit all persons participating in the meeting to hear each other</i> if</p> <p>(a) <i>the by-laws so provide</i>, or</p> <p>(b) subject to the by-laws, all the shareholders entitled to vote at the meeting consent,</p>	<ul style="list-style-type: none"> • The statute requires a platform that permits persons to “hear each other”, which can raise questions as to its validity. • Deemed presence for quorum purposes requires adequate level of communication. • No standard of what is required to “hear each other” in the statute. A court order may be required. • Additional statutory conditions require

Virtual Shareholder Meetings: Jurisdictional Comparison Table

		and a person participating in such a meeting by those means shall be <i>deemed for the purposes of this Act to be present</i> at the meeting.	bylaws to expressly permit a virtual meeting.
Newfoundland and Labrador	<i>Corporations Act</i> , R.S.N.L. 1990, c. C-36	—	The statute is silent on permission of virtual shareholder meetings, which can raise questions as to its validity.
Northwest Territories	<i>Business Corporations Act</i> , S.N.W.T. 1996, c. 19, s. 133 (3)	<p>133(3): A shareholder or any other person entitled to attend a meeting of shareholders may participate in the meeting by means of telephone or other communication facilities that <i>permit all persons participating in the meeting to hear each other</i> if</p> <p>(a) <i>the bylaws so provide</i>, or</p> <p>(b) subject to the bylaws, all the shareholders entitled to vote at the meeting consent,</p> <p>and a person participating in such a meeting by those means is <i>deemed for the purposes of this Act to be present</i> at the meeting.</p>	<ul style="list-style-type: none"> • The statute requires meeting participants to “hear each other”, which can raise questions as to its validity which can raise questions as to its validity. • Deemed presence for quorum purposes requires adequate level of communication. • No standard of what is required to “hear each other” in the statute. A court order may be required. • Additional statutory conditions require the bylaws to expressly permit a virtual meeting.
Nova Scotia	<i>Companies Act</i> , R.S.N.S. 1989, c. 81	<p>Nothing in <i>Companies Act</i></p> <p>COVID-19 Update: In response to COVID-19, see the following from the province’s April 11 Direction, which has permitted virtual meetings and allowed</p>	<ul style="list-style-type: none"> • The statute is silent on permission of virtual shareholder meetings, which raises questions as to its validity. <p>COVID-19 Update: In the context of COVID-19, the April 11 Direction</p>

Virtual Shareholder Meetings: Jurisdictional Comparison Table

		deferrals for a limited period of 90 days, retroactive to March 22, 2020.	has permitted virtual meetings and has allowed deferrals for a limited period of 90 days, retroactive to March 22, 2020.
Nunavut	<i>Business Corporations Act, S.N.W.T. (Nu) 1996, c. 19, s. 133(3)</i>	<p>133(3): A shareholder or any other person entitled to attend a meeting of shareholders may participate in the meeting by means of <i>telephone or other communication facilities that permit all persons participating in the meeting to hear each other</i> if</p> <p>(a) <i>the by-laws so provide</i>, or</p> <p>(b) subject to the by-laws, all the shareholders entitled to vote at the meeting consent,</p> <p>and a person participating in such a meeting by those means is <i>deemed for the purposes of this Act to be present</i> at the meeting.</p>	<ul style="list-style-type: none"> • The statute requires meeting participants to “hear each other”, which can raise questions as to its validity which can raise questions as to its validity. • Deemed presence for quorum purposes requires adequate level of communication. • No standard of what is required to “hear each other” in the statute. A court order may be required. • Additional statutory conditions require bylaws to expressly permit a virtual meeting.
Ontario	<i>Business Corporations Act, R.S.O. 1990, c. B.16, ss. 94(2) and 93(2)</i>	<p>93(2): A meeting held under subsection 94(2) shall be deemed to be held at the place where the registered office of the corporation is located.</p> <p>94(2): <i>Unless the articles or the by-laws provide otherwise</i>, a meeting of the shareholders <i>may be held by telephonic or electronic means</i> and a shareholder who, through those means, <i>votes at the meeting or</i></p>	<ul style="list-style-type: none"> • No issues, as long as shareholders can vote at the meeting or establish a communications link to the meeting. <p>COVID-19 Update: In light of COVID-19, the province enacted an order under the <i>Emergency Management and Civil Protection Act, R.S.O. 1990, c. E.9</i>, which temporarily amends the OBCA to state that despite any provisions in the articles</p>

Virtual Shareholder Meetings: Jurisdictional Comparison Table

		<p><i>establishes a communications link to the meeting shall be deemed for the purposes of this Act to be present</i> at the meeting.</p> <p>COVID-19 Update: In light of COVID-19, the province enacted an order under the <i>Emergency Management and Civil Protection Act, R.S.O. 1990, c. E.9</i>, which temporarily amends the OBCA:</p> <p>94(2): <i>Despite any provision in the articles or the by-laws of a corporation that provides otherwise</i>, a meeting of the shareholders may be held by telephonic or electronic means and a shareholder who, through those means, <i>votes at the meeting or establishes a communications link to the meeting</i> shall be <i>deemed</i> for the purposes of this Act <i>to be present</i> at the meeting.</p> <p>The order also extends the deadline to hold a shareholder meeting. If the deadline falls within the “period of the declared emergency”, the new deadline will be the 90th day after the emergency is terminated. Also, if the regular deadline falls within the 30-day period that begins on the day after the emergency is ended, the</p>	<p>or by-laws of a corporation that provide otherwise, a meeting may be held by electronic or telephonic means and a shareholder who votes at the meeting or establishes a communications link to the meeting shall be deemed to be present at the meeting. The order also provides an extension of the deadline to the 90th day after the emergency is terminated and, if the prior deadline falls within 30 days after the end of the emergency, the new deadline will be the 120th day after the end of the emergency. Note that Ontario further amended the order on April 24, 2020 to clarify how voting should be conducted at a virtual meeting. The amendment states that the chair of a virtual meeting needs to conduct the vote by a show of hands or by ballot, if possible. If not possible, voting may be directed by alternate means. Items such as required annual financial statements and the amended notice of meeting were covered in the amendment to the order as well. See the amendment for more information.</p>
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Virtual Shareholder Meetings: Jurisdictional Comparison Table

		<p>new deadline will be the 120th day after the day the emergency is terminated.</p> <p>Note that Ontario further amended the order on April 24, 2020 to clarify how voting should be conducted at a virtual meeting. The amendment states that the chair of a virtual meeting needs to conduct the vote by a show of hands or by ballot, if possible. If not possible, voting may be directed by alternate means. Items such as required annual financial statements and the amended notice of meeting were covered in the amendment to the order as well. See the amendment for more information.</p>	
Prince Edward Island	<p><i>Business Corporations Act</i>, R.S.P.E.I. 1988, c. B-6.01, s. 101(4) and (5) and Business Corporations Regulations, P.E.I. Reg. EC133/19, s. 12</p>	<p><u><i>Business Corporations Act</i></u> 101(4): <i>Unless the bylaws otherwise provide</i>, any person entitled to attend a meeting of shareholders may participate in the meeting, in accordance with the regulations, if any, by <i>means of a telephonic, electronic or other communication facility that permits all participants to communicate adequately</i> with each other during the meeting, if the corporation makes available such a communication facility, and a person participating in a</p>	<ul style="list-style-type: none"> • The statute requires participants to “communicate adequately”, which can raise questions as to validity. • Deemed presence for quorum purposes requires adequate level of communication and participation. • No standard of what is required to “communicate adequately” in the statute. A court order may be required. • Regulations require ability to verify and ensure anonymity.

Virtual Shareholder Meetings: Jurisdictional Comparison Table

		<p>meeting by that means is <i>deemed for the purposes of this Act to be present</i> at the meeting.</p> <p><u>101</u>(5): If the directors or the shareholders of a corporation call a meeting of shareholders pursuant to this Act, those directors or shareholders, as the case may be, may determine that the meeting shall be held, in accordance with the regulations, if any, <i>entirely by means of a telephonic, electronic or other communication facility</i> that permits all participants to <i>communicate adequately</i> with each other during the meeting, <i>if the bylaws so provide</i>.</p> <p><u>Business Corporations Regulations</u></p> <p>12(1): For the purpose of subsection 110(3) of the Act, when a vote is to be taken at a meeting of shareholders, the voting may be carried out by means of a telephonic, electronic or other communication facility, if the facility</p> <p>(a) enables the votes to be gathered in a manner that permits their <i>subsequent verification</i>, and</p> <p>(b) permits the tallied votes to be presented to the corporation <i>without it being possible for the corporation to</i></p>	<ul style="list-style-type: none"> • Additional statutory conditions require bylaws to expressly permit a virtual meeting.
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Virtual Shareholder Meetings: Jurisdictional Comparison Table

		<p><i>identify</i> how each shareholder or group of shareholders voted.</p> <p>12(2): For the purpose of subsection 110(4) of the Act, a person who is entitled to vote at a meeting of shareholders may vote by means of a telephonic, electronic or other communication facility, if the facility</p> <p>(a) enables the vote to be gathered in a manner that permits its <i>subsequent verification</i>, and</p> <p>(b) permits the tallied vote to be presented to the corporation <i>without it being possible for the corporation to identify</i> how the person voted.</p>	
Québec	<p>Business Corporations Act, CQLR, c. S-31.1, ss. 174 and 175</p>	<p>174: <i>Unless otherwise provided in the by-laws</i>, any person entitled to attend a shareholders meeting may participate in the meeting by <i>means of any equipment enabling all participants to communicate directly</i> with one another. A person participating in a meeting by such means is <i>deemed to be present</i> at the meeting.</p> <p>175: A shareholders meeting may be held <i>solely by means of equipment enabling all participants to communicate directly with one another, if the by-laws so allow</i>.</p> <p>COVID-19 Update: In</p>	<ul style="list-style-type: none"> • The statute requires that participants be able to “communicate directly with one another”, which can raise questions as to validity. • Deemed presence for quorum purposes requires adequate level of communication and participation. • No standard of what is required to “communicate directly with one other” in the statute. A court order may be required. • Additional statutory conditions require bylaws to expressly permit a virtual meeting.

Virtual Shareholder Meetings: Jurisdictional Comparison Table

		<p>response to COVID-19, the Québec Minister of Health and Social Services released an order stating that annual shareholder meetings can be held in “a means that enables all members to communicate with each other immediately”. It also discusses public sittings and secret ballots.</p>	<ul style="list-style-type: none"> • COVID-19 Update: In response to COVID-19, the Québec Minister of Health and Social Services released an order stating that annual shareholder meetings can be held in “a means that enables all members to communicate with each other immediately”. It also discusses public sittings and secret ballots.
Saskatchewan	<p><i>The Business Corporations Act</i>, R.S.S. 1978, c. B-10, s. 126(2.1)</p>	<p>126(2.1): <i>Subject to the articles, by-laws or regulations</i>, a shareholder may attend a meeting of shareholders by means of <i>telephone or other communication facilities</i> if all participants are able to <i>communicate adequately with each other</i> during the meeting.</p>	<ul style="list-style-type: none"> • The statute requires participants to “communicate adequately”, which can raise questions as to validity. • Deemed presence for quorum purposes requires adequate level of communication and participation. • No standard of what is required to “communicate adequately” in the statute. A court order may be required.
Yukon	<p><i>Business Corporations Act</i>, R.S.Y 2002, c. 20, s. 133(1) and (2)</p>	<p>133(1): <i>Unless the articles, the bylaws or a unanimous shareholder agreement provide otherwise</i>, meetings of shareholders of the corporation may be held</p> <p>(a) at the place in or outside the Yukon that the directors determine; and</p> <p>(b) partially or entirely by telephonic or</p>	<ul style="list-style-type: none"> • The statute requires a platform that permits persons to “communicate with each other”, which can raise questions as to validity. • Deemed presence for quorum purposes requires adequate level of communication and participation. • No standard of what is required to

Virtual Shareholder Meetings: Jurisdictional Comparison Table

		<p>electronic means that (i) permit all persons entitled to <i>attend the meeting to communicate with each other</i> during the meeting, (ii) permit all persons entitled to <i>vote at the meeting to participate in voting</i>, and (iii) meet the requirements prescribed by regulation, if any.</p> <p><u>133</u>(2): A shareholder or any other person entitled to attend a meeting of shareholders who participates in a meeting by telephonic or electronic means that meet the conditions of paragraph (1)(b) is <i>deemed for the purposes of this Act to be present</i> at the meeting.</p>	<p>“communicate with each other” in the statute. A court order may be required.</p>
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End of Document

[COVID-19: Reporting Issuer Filing Extensions Table](#)

Practical Guidance

Updated on: **04/09/2020**

This table summarizes the relief offered by Canadian securities regulators and stock exchanges regarding continuous disclosure filings under Canadian securities law. This table focusses on the relief available to “reporting issuers”. For more information about considerations for public companies in light of COVID-19, including information about virtual shareholders meetings, see [COVID-19: Public Company Considerations Checklist](#).

The below information summarizes the extensions offered by the Canadian Securities Administrators (“CSA”) pursuant to their [CSA Blanket Relief](#) release on March 23, 2020. Each province and territory has a corresponding “blanket order”. The CSA has also released frequently asked questions in the form of [CSA Staff Notice 51-360](#) to assist with compliance.

Requirement/Source	Relief Granted	Application	Notes
Annual and Interim Filings: CSA Blanket Relief . Each province has published orders enacting this relief. For Ontario, see Ontario Instrument 51-502 (“OSC General Order”).	<p>45-day extension to file annual and interim disclosure documents.</p> <p>Toronto Stock Exchange (“TSX”) issuers with December 31 fiscal year ends will have until:</p> <ul style="list-style-type: none"> • May 14, 2020 to file annual financial statements, management’s discussion and analysis (“MD&A”) and annual information form (“AIF”); and • June 29, 2020 to file their first quarter interim financial statements and MD&A for 2020. <p>TSX Venture Exchange (“TSXV”) issuers with December 31 fiscal year ends will have until:</p>	<p>The following filings by reporting issuers due between March 23, 2020 and June 1, 2020:</p> <ul style="list-style-type: none"> • annual financial statements; • interim financial report; • MD&A • AIF; • technical reports; and • documents listed in the applicable provincial order (e.g., Exhibit A of the OSC General Order). 	<p>Pay close attention to the requirements in the applicable general order, including the following:</p> <p>If relying on this extension, issuers must issue a press release and file it on SEDAR as soon as reasonably practicable in advance of its filing deadline. It must disclose: (a) each requirement it is relying on, (b) that its management and other insiders are subject to a black-out policy in accordance with securities law requirements, (c) the estimated date by which the required disclosure is expected to be made, and (d) an update on material business developments since the last financial report was</p>

COVID-19: Reporting Issuer Filing Extensions Table

	<ul style="list-style-type: none"> • June 15, 2020 to file annual financial statements and MD&A and • July 16, 2020 to file their first quarter interim financial statements and MD&A for 2020. 		<p>filed or confirmation of no material business developments.</p> <p>It must also file subsequent press releases every 30 days after the first day of the extension period relating to material business developments or lack thereof.</p> <p>For guidance on what is a “material business development”, see CSA Staff Notice 51-360.</p> <p>If relying on the exemption, issuers cannot file a preliminary or final prospectus until they have filed all documents that would have been required without the exemption.</p> <p>Annual financial statements and MD&A must be delivered with the management information circular before an upcoming annual shareholders’ meeting.</p>
<p>Business Acquisition Reports and Other Notices: CSA Blanket Relief. Each province has published orders enacting this relief. For Ontario, see OSC General Order.</p>	<p>45-day extension to file business acquisition reports and other notices.</p>	<p>The following filings by reporting issuers due between March 23, 2020 and June 1, 2020:</p> <ul style="list-style-type: none"> • business acquisition reports; • notices of change of year end; • notices of change of auditor; • notices of change of corporate structure; and 	<p>Pay close attention to the requirements in the applicable general order, including the following:</p> <p>If relying on this extension, issuers must issue a press release and file it on SEDAR in advance of its filing deadline that discloses each filing requirement for which it is relying on the relief.</p>

COVID-19: Reporting Issuer Filing Extensions Table

		<ul style="list-style-type: none"> documents listed in the applicable provincial order (e.g., Exhibits B of the OSC General Order). 	
<p>Filings Related to Exempt Distributions: CSA Blanket Relief. Each province has published orders enacting this relief. For Ontario, see OSC General Order.</p>	<p>45-day extension to file annual statements concerning exempt distributions.</p>	<p>The following filings by reporting issuers due between March 23, 2020 and June 1, 2020:</p> <ul style="list-style-type: none"> annual financial statements and notice of use of proceeds required under National Instrument 45-106 for exempt distributions; annual financial statements and disclosure of use of proceeds required under Multilateral Instrument 45-108 for crowdfunding; and documents listed in the applicable provincial order (e.g., Exhibits C of the OSC General Order). 	<p>Pay close attention to the requirements in the applicable general order, including the following:</p> <p>If relying on this extension, issuers must issue a press release and file it on SEDAR in advance of its filing deadline that discloses each filing requirement for which it is relying on the relief.</p>
<p>Base Shelf Prospectus Lapse Dates: CSA Blanket Relief. Each province has published orders enacting this relief. For Ontario, see OSC General Order.</p>	<p>45-day extension of the lapse period for base shelf prospectuses.</p>	<p>Base shelf prospectuses filed by reporting issuers with a lapse date that occurs between March 23, 2020 and June 1, 2020.</p>	<p>Pay close attention to the requirements in the applicable general order.</p> <p>If relying on this extension, issuers must issue a press release and file it on SEDAR in advance of its filing deadline that discloses the specific filing requirement for which it is relying on the relief.</p> <p>It also cannot be relying on the relief relating to annual and interim filings discussed above.</p> <p>CSA Staff Notice 51-360 has clarified that this also applies to renewal</p>

COVID-19: Reporting Issuer Filing Extensions Table

			<p>of a base shelf prospectus, a non-offering prospectus, an amended and restated prospectus, a PREP prospectus, an amendment to a final prospectus or the filing of a prospectus supplement under an existing base shelf prospectus.</p> <p><u>CSA Staff Notice 51-360</u> has also clarified that the extension does not apply to the 90 and 180-day lapse periods contained in section 2.3 of <u>National Instrument 41-101</u> relating to filing amendments to preliminary prospectuses and final prospectuses under the general prospectus requirements.</p> <p><u>CSA Staff Notice 51-360</u> has also clarified that if an issuer has obtained a receipt for a prospectus and is currently in a 90-day distribution period for a best efforts offering, the issuer should cease distribution if it wishes to rely on the exemption and contact their principal regulator as soon as possible.</p>
<p>TSX Form 9: <u>March 23 Staff Notice</u>.</p>	<p>No requirement to file a Form 9 for delayed financial statements.</p>	<p>TSX listed issuers relying on the extension to file financial statements. Applies during 2020.</p>	<p>N/A</p>

[Material Adverse Change Definitions](#)

From Practical Guidance — United States

Created on: *08/11/2019*

Concepts of "material adverse change" or "material adverse effect" are frequently used in acquisition agreements for a number of purposes. These purposes may include: (1) facilitating the making of representations and warranties as to the absence of specified impairments to the object of the proposed transaction; (2) establishing a standard of materiality by which individual representations and warranties of a party are qualified in order to exclude the effects of less significant matters; and (3) establishing the degree of impairment to the object of the proposed transaction that would excuse a party from proceeding with the transaction. Due to the significant impact that these concepts can have on the manner in which consummation risks are allocated between the agreement parties, both of the definitions that encompass these concepts and the specific manner in which these concepts are used throughout the acquisition agreement warrant careful consideration.

In practice, the terms "Material Adverse Change" and "Material Adverse Effect" are used interchangeably. On the one hand, the scope of the concept being expressed typically is not strictly limited to "changes" (as distinguished from other events, occurrences, developments, and circumstances). Thus, some practitioners favor the "Material Adverse Effect" formulation, as they believe it minimizes both linguistic awkwardness and the risk that the definition will be construed more narrowly than intended. On the other hand, the term "Material Adverse Change" can be defined broadly to include items that are not strictly changes, and may be easier to deploy from a grammatical perspective. Some practitioners include both terms under a single definition, and use the terms "Material Adverse Change" or "Material Adverse Effect" as may be grammatically expedient. Ultimately, with careful definition and usage, either term may be used to identical effect. For ease of reference, this practice note will use the term "MAC" in the general discussion but may use "Material Adverse Change" or "Material Adverse Effect" in sample contract language.

As with most contractual matters, the specific definition and usage of the MAC concept are subject to negotiation and will vary depending upon, among other things, prevailing market conditions and the priorities and negotiating leverage of the parties to the transaction.

This practice note will cover:

- the ways in which the MAC concept is used in an acquisition agreement;
- drafting and negotiating considerations when incorporating the MAC concept into an agreement;
- the components of a MAC definition; and
- common carve-outs to a MAC.

Material Adverse Change Definitions

For an example of a MAC definition and further guidance, see clause: [MAC or MAE Clause \(Arrangement Agreement\)](#).

Applications in an Acquisition Agreement

MAC definitions are customarily incorporated in acquisition agreements in two sections: the representations and warranties and the closing conditions.

Representations and Warranties. In the representations and warranties section, the MAC may be used to qualify certain representations and warranties so that any inaccuracies that fall below the MAC threshold will not cause the representing party to be in breach. For example:

There are no Actions pending, or, to the Knowledge of the Seller, threatened, against the Seller or any Subsidiary, which [buyer-favorable:, individually or in the aggregate], [buyer-favorable: have had or] would reasonably be expected to have a Material Adverse Effect.

The MAC can also be used in a standalone representation, as an affirmative statement that there has been no occurrence of a MAC since a baseline date:

Since the Balance Sheet Date (*can be another date; buyers tend to prefer an earlier date and sellers tend to prefer a later date*), there have been no Events that [buyer-favorable:, individually or in the aggregate,] [buyer-favorable: have had or] would reasonably be expected to have a Material Adverse Effect.

In most M&A transactions, the seller makes extensive representations and warranties about the business or assets to be acquired. Qualifying the seller's representations and warranties with a MAC definition or including a standalone MAC representation shifts the risk from immaterial inaccuracies to the buyer. In a stock-for-stock transaction, the buyer may give representations and warranties about its own business or assets (versus in a cash transaction, in which the buyer will give fewer representations and warranties focused primarily on its ability to consummate the transaction). In such a case, the buyer may also use the MAC definition to qualify its representations and warranties.

Closing Conditions. In the closing conditions, the MAC definition is used to give the buyer the right not to close the transaction or, alternatively, renegotiate the terms of the acquisition if the seller experiences a MAC between an agreed-upon date (the baseline date) and the closing date. The MAC can be used in its own closing condition as follows:

Since the date of this Agreement, no changes have occurred that [buyer-favorable:, individually or in the aggregate,] [buyer-favorable: has resulted or] would reasonably be expected to result in a Material Adverse Change.

The MAC can also be used to qualify a "bring-down" condition. A bring-down condition requires a party's (usually the seller/target's) representations and warranties to be true and correct as of the closing date. By qualifying a bring-down condition with a MAC, the risk of immaterial inaccuracies in the seller's representations and warranties shifts from the seller to the buyer, since the buyer will still be obligated to close. For example:

The representations and warranties of the Seller contained in this Agreement (disregarding any Material Adverse Effect, materiality or similar qualifiers therein) shall be true and correct as of the Closing Date as though made on and as of such date (unless any such representation or warranty is made only as of a

Material Adverse Change Definitions

specific date, in which event such representation and warranty shall be true and correct as of such specified date), except to the extent that the failure of such representations and warranties [buyer-favorable; individually or in the aggregate,] to be so true and correct [has not had, and] would not reasonably be expected to have[,] a Material Adverse Effect.

The first parenthetical in the above example is known as a “materiality scrape”. This prevents a representation or warranty that is already qualified by a MAC or other materiality standard from being qualified again through the bring-down condition (known as “double materiality”). Note that, if the agreement contains a standalone MAC representation, such representation will be brought down if the agreement also has a bring-down condition. In such a case, including a standalone MAC closing condition would be redundant unless the standalone MAC representation is explicitly time-limited (e.g., from the benchmark date to the date of the agreement).

A MAC closing condition or the combination of a MAC representation and bring-down closing condition will typically give the buyer the right to terminate the agreement due to the failure of a closing condition.

Considerations in Incorporating a MAC into an M&A Agreement

Using a MAC definition as a qualifier or standalone provision can raise numerous negotiation and drafting issues, including the following:

Actual Change versus Likelihood of Change. The parties may disagree as to whether an “adverse change” must have occurred as of the closing date or if it is sufficient if, as of the closing date, an event or circumstance has occurred that would reasonably be expected at some time in the future to result in a materially adverse change. Language that contains forward-looking aspects takes into consideration post-closing effects of a pre-closing event or circumstance. The buyer will want to expand this language so as to include the likelihood of post-closing changes, while the seller will want to limit the language to actual adverse changes occurring as of the closing date.

Individual versus Aggregate. A question that often arises in negotiating the use of MAC qualifiers is whether the occurrence of one or more materially adverse changes that a seller experiences should be viewed individually or in the aggregate. A buyer will address this issue by seeking to add the terms “individually or in the aggregate” to encompass an individual as well as a series of events. With this language, the buyer is suggesting that the occurrence of numerous non-MAC events could become a MAC if their aggregate effect is material to the seller or target. Aggregation language can be built into the MAC definition itself, or it can be added to the provisions in the agreement in which the MAC definition is used. The latter approach would allow for more flexibility in incorporating the aggregation concept into certain provisions as the parties may agree.

Baseline Date. A MAC closing condition affords the buyer the right not to close the transaction, or gives the buyer the leverage to renegotiate the business terms, if the seller experiences a MAC between an agreed-upon date (the baseline date) and the closing date. The baseline date is the date on which a representation or warranty starts to run, which is usually (1) the contract date or (2) the date of the seller or target’s most recent audited or unaudited financial statements. A buyer will typically negotiate to have the baseline date run from the date of the last financial statements audited by a reputable or agreed-upon independent firm of certified public accountants, as these financial statements provide the most precise and reliable snapshot of the seller at the balance sheet date. The seller, on the other hand, will want to extend the baseline date to the contract date so as to minimize the period of time when an adverse change may actually occur, effectively

Material Adverse Change Definitions

shifting risk to the buyer to undertake a more exhaustive due diligence process above and beyond the review of audited financial statements.

Drafting a MAC Definition

Because of its potential to shift a significant amount of risk from the seller to the buyer, MAC definitions can be heavily negotiated. Typically, the buyer will strive to keep as much risk as possible with the seller by negotiating for a broad MAC provision that allows it to terminate the agreement when adverse events make the acquisition unattractive. Sellers, on the other hand, will negotiate a narrow MAC clause intended to bolster the certainty of a closing, as well as include a broad array of exclusions, or carve-outs, which set forth scenarios that are exempted from the definition of MAC. See “MAC Carve-Outs” below for a detailed discussion of common carve-outs to MAC definitions.

The following details various issues arising in the negotiation and drafting of MAC definitions.

Definition of Material-From Whose Perspective? While typically the term “material” is not defined within a MAC clause, “materiality” depends on which party’s perspective is ultimately to be applied. A buyer will take the position that since the value of having a MAC is to give the buyer an exit from the transaction, the buyer’s standard should be applied because it is the party invoking the provision. A more acceptable approach to the seller may be a standard that would be applied by a “reasonable acquirer.” An approach potentially acceptable to both parties may be to apply the standards of a “reasonable person” in the context of the party invoking the clause. Alternatively, the buyer may seek to include one or more standards that may reflect more precisely its underlying motivations. For instance, a determining factor to be included in the MAC definition that would benefit the buyer would be to integrate a short-term perspective. More specifically, quantitative thresholds, such as, in the case of financial results, performance goals tied to income statement periods and balance sheet dates that incorporate metrics, would be a more clear-cut test.

Material Adverse Change to What? The MAC definition customarily sets forth an expansive list of the areas of the seller’s or target’s business that a materially adverse change could negatively impact. In most general terms, this would include a materially adverse change to assets, business, liabilities, results of operations and financial condition of the seller or target. The exact elements of this provision would be tailored to the actual nuances of the acquisition, the seller’s or target’s business, the nature of industry in which the seller or target operates, and other variables. For instance, if the acquisition is an asset purchase, then the MAC clause would be tied to the value of the specific assets being acquired. Generally, the buyer will seek to broaden the applicability of the concept of material adverse change to: (1) include the seller’s “prospects,” to take into consideration actual performance at the time of a closing relative to financial projections that the seller may have provided to the buyer; (2) expand the term “financial condition” of the target beyond “financial” by referring to “condition (financial or otherwise),”; (3) address the ability and obligation of the seller to consummate the acquisition on a timely basis; and (4) any other specific provision the buyer would want to integrate.

MAC Carve-Outs

Within the negotiated terms of a MAC, the seller will typically take the position that there are a variety of scenarios beyond its control for which it should not bear the risk of the transaction not closing. Thus, the seller will seek to negotiate “carve-outs” to the specific adverse changes within the MAC. Carve-outs are generally market or systemic risks, such as adverse changes caused by: (1) fluctuations or changes in: (a) the securities or financial markets or foreign currencies; or (b) the general business or economic conditions in the geographical areas where the seller’s business operates; (2) an event or circumstance that affects one or more

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of the industries where the seller operates; and (3) the effects of entry into the acquisition agreement, related announcements, and disclosures. As a countermeasure, the buyer will argue for language that would not force a closing in the event that the seller experiences disproportionately greater harm, as compared to other companies in the seller's industry or in competition with the seller.

Any time you represent a seller, it is important to begin with a clear assessment of the most important carve-outs to negotiate and what carve-outs the seller should be prepared to dilute or sacrifice. The number and type of carve-outs to be sought can vary greatly depending on the nature of your client's business, the geographic scope of its operations, other concerns specifically tailored to its business and operations, and your negotiating leverage. The introductory language to the carve-outs should be broadly drafted to include any event or circumstance directly or indirectly relating to, arising out of, or resulting from, or attributable to, the events and circumstances described in the carve-outs.

The list of carve-outs to the definition of a MAC in an acquisition agreement can be exhaustive. The following is a discussion of some of the more common events and circumstances that sellers will typically negotiate to be carved out of a MAC definition.

Macroeconomic Circumstances. Sellers take the firm position that any risk of loss incurred as a result of macroeconomic conditions should be borne by the buyer. This is particularly relevant given the cascade of lawsuits that were brought following the 2007 financial crisis by buyers trying to terminate acquisition agreements entered into prior to the financial collapse. Sellers will include within this category changes affecting economies, financial markets, securities markets, currency markets, and capital markets. As counsel to the seller, you should draft this provision to include any impact on a global, national, and, if applicable, regional basis. If the buyer is obtaining financing in connection with the acquisition, the seller will want to include any increase of interest rates or the availability of financing as carve-outs.

Losses in Business or Economic Conditions Based on Geography. With regional economies facing unique and ever-changing challenges, as seller's counsel you will want to ensure that any MAC caused by a change in the general business or economic conditions in any geographical area where the seller or any subsidiary or division exists or conducts business is excluded.

Industry-Based Events and Circumstances. There may be events or circumstances that are unique to a particular industry. Seller should consider excluding from the MAC definition any event or circumstance that directly or indirectly affects any industry in which the seller or any of its subsidiaries or business divisions operate. The breadth of this provision and specifics will, in large part, be determined by how narrow or broad the industry is defined.

Announcement of the Acquisition Transaction. The entry into the acquisition agreement (including any related transactions), the announcement of the acquisition transaction, and required public disclosure filings can each impact the seller's relationship with third parties with whom the seller does business or otherwise has an affiliation. Since third-party reactions to the announcement of the acquisition are out of the seller's control, sellers often ask to carve out MACs that may result from announcement and related events. As seller's counsel it is best to ensure that this language is broadly drafted to include any communication by the buyer (or its affiliates) regarding its plan or intentions.

Acts of War and Other Public Threats. Any acts of war (whether or not declared), insurrection, sabotage, terrorism, or any national or international political or social dislocation, are some of the public threats that a seller will wish to exclude from the MAC definition. It may be difficult to get the buyer to approve this broad-stroke approach. A more acceptable approach to the buyer may be "a general suspension of trading in

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securities on a national securities exchange” or “the commencement of war or armed hostilities or other national or international calamity involving the United States or any country where the seller does business.”

Acts Consented to, Required of, or Prohibited by the Seller. It is not uncommon in an acquisition transaction that a buyer will require the seller to take or refrain from taking a particular action in connection with the transaction. As the seller’s attorney, it is prudent to exclude from the MAC the effects of any such actions or failure to act. Buyer’s counsel can be expected to narrow the application of this provision by seeking to include language specifying that such action or inaction was “expressly” consented to or permitted, prohibited, or required by the acquisition agreement.

Stock Price. As seller’s counsel you should seek to carve out from the MAC definition any change in a party’s stock price or trading volume on the applicable exchange. The application of the carve-out would depend on the specific business terms of the acquisition and could apply to the stock price of both buyer and seller. This is particularly important if stock is being used as part of the purchase consideration or impacts the purchase price. It is important to reconcile this language with any other deal-specific language in the acquisition agreement that may provide for or include business terms that are a function of one or both parties’ stock price.

Projections, Forecasts and Earnings Reports. It is customary that the buyer will review internal and published projections, forecasts, or revenue or earnings predictions in conducting its due diligence of the seller’s business. Buyer’s counsel will typically seek to provide in the agreement that the facts and circumstances underlying any such deficiency must be considered when determining if a MAC has occurred. Seller will argue that failure to meet internal or published projections, forecasts, or revenue or earning predictions for the seller’s business or the business of any subsidiary or division should not be a basis on which the buyer can withdraw from the acquisition.

Change of Laws. Any change to a law, order, rule, or regulation, or any act of a government authority, that affects the seller or target’s business or operations is arguably outside of its control. The seller will thus argue that it should not absorb any risk associated with such changes or acts. As seller’s counsel, you should consider adding to this provision any developments that are directly or indirectly attributable to any such changes.

Financial Reporting: GAAP/IFRS. Changes in financial reporting requirements can adversely impact the presentation and the manner in which reporting of operations or other financial metrics are calculated. To the extent that there are any changes to GAAP or IFRS (as applicable) that may negatively affect the calculation or presentation of the seller’s results of operations or financial condition, you should give consideration to the effects of such a change and take the position that these are MAC exclusions.

Operating Losses. Temporary fluctuations in operating results are common in the businesses world. As seller’s counsel it is important to ensure that the occurrence of operating losses would not constitute a MAC.

Damage or Destruction of an Asset Covered by Insurance. It is possible that damage to or destruction of an asset of the seller can fall within the MAC definition. As seller’s counsel, it is prudent to provide for an exception if the asset is covered by insurance. This is based on the premise that the seller will be made whole because of the insurance coverage.

Miscellaneous MAC Carve-Outs. Other common carve-outs to a MAC that the seller should seek to include are natural disasters (e.g., earthquake, hurricane, tornado, storm, flood, fire) and failure or delay of technical facilities (such as transportation).

Material Adverse Change Definitions

Buyer Counter-Measures. As in any negotiation, the buyer will generally seek to narrow the application and language of many of the carve-outs. In addition, the buyer will negotiate for a supplemental provision that would negate the application of a MAC carve-out if the buyer demonstrates that the seller and its business are disproportionately or materially affected when compared to other participants in the business in which the seller operates.

MAC Precedents

For examples of Material Adverse Change definitions, see: [Transactions Search powered by Intelligize®: Agreements & Other Exhibits](#). Transactions Search enables Lexis Practice Advisor® users to leverage Intelligize® data and technology to find precedent documents and market intelligence. Transactions Search is included in your Lexis Practice Advisor® subscription. You can customize this search to your needs by adding filters or modifying the search criteria.

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Materiality, Material Changes and Material Facts

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This practice note provides an overview of materiality in the context of Canadian securities laws. It looks at the difference between “material changes” and “material facts”, as well as the meaning of “materiality” and determinations of what constitutes “material information”. It also provides in-depth analysis of statutory requirements and case law relating to those determinations and explains the related disclosure requirements.

Specifically, this practice note provides guidance on the following concepts relating to materiality in securities law:

- [Material Changes vs. Material Facts](#)
- [Materiality Standard and Determination](#)
- [What Is Material Information?](#)
- [When and How Must Material Information Be Disclosed?](#)

For more information on timely disclosure requirements generally, see [Timely Disclosure Requirements](#) and [Timely Disclosure Flowchart](#). For information on preparing press releases, see [Press Releases](#) and the [Timely Disclosure Toolkit](#).

Material Changes vs. Material Facts

Definition of Material Change

A material change is defined under securities laws. For example, s. [1](#)(1) of the Ontario *Securities Act*, [R.S.O. 1990, c. S.5](#) (“OSA”), specifies that a material change has occurred for an issuer other than an investment fund when one of the following two criteria is satisfied:

- there has been a *change* in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer; or
- there has been a *decision to implement a change* described above made by the board of directors or other persons acting in a similar capacity or by senior management of the issuer who believe that confirmation of the decision by the board of directors or such other persons acting in a similar capacity is probable.

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For an issuer that is an investment fund, a material change means:

- a *change* in the business, operations or affairs of the issuer that would be considered important by a reasonable investor in determining whether to purchase or continue to hold securities of the issuer; or
- a *decision to implement a change* referred to above made:
 - by the board of directors of the issuer or the board of directors of the investment fund manager of the issuer or other persons acting in a similar capacity;
 - by senior management of the issuer who believe that confirmation of the decision by the board of directors or such other persons acting in a similar capacity is probable; or
 - by senior management of the investment fund manager of the issuer who believe that confirmation of the decision by the board of directors of the investment fund manager of the issuer or such other persons acting in a similar capacity is probable.

The first criterion of the material change definition focuses on a change that has been completed, whereas the second criterion addresses proposed changes or decisions to implement material changes.

Interpreting the First Criterion of the Material Change Definition “Change”

The first criterion of the material change definition has been analysed by the Ontario Securities Commission (“OSC”) and the courts on numerous occasions, including in the decisions described below.

Kerr v. Danier Leather Inc.

In *Kerr v. Danier Leather Inc.*, [\[2007\] S.C.J. No. 44](#), the Supreme Court of Canada (“SCC”) addressed whether a change in intra-quarterly results represented a material change. In connection with its initial public offering (“IPO”), the company filed a preliminary prospectus that contained a forecast. The forecast from the preliminary prospectus was included in the final prospectus and was accompanied by cautionary language advising investors that there was no guarantee that the forecast would be met. The directors received intra-quarterly financial results following the filing of the final prospectus, but before the closing of the IPO, which cast doubt upon the reliability of the forecasts (i.e., unseasonably warm weather was adversely affecting sales). The results were not disclosed prior to closing of the IPO. The SCC held that changes to the intra-quarterly results of an issuer’s operations resulting from an external factor or event, such as the weather, does not, by itself, constitute a change in the business, operations or capital of an issuer for the purposes of the definition of “material change” in the OSA. In coming to that conclusion, the SCC stated at paras. 47 and 48 that:

[i]t almost goes without saying that poor intra-quarterly results may reflect a material change in business operations. A company that has, for example, restructured its operations may experience poor intra-quarterly results because of this restructuring, but it is the restructuring and not the results themselves that would amount to a material change and thus trigger the disclosure obligation. Additionally, poor intra-quarterly results may motivate a company to implement a change in its business, operations or capital in an effort to improve performance. Again, though, the disclosure obligation would be triggered by the change in the business, operations or capital, and not by the results themselves. In the present case, there is no evidence that Danier made a change in its business, operations or capital during the period of distribution.

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Re Rex Diamond Mining Corp.

In *Re Rex Diamond Mining Corp.*, [2008 LNONOSC 631](#), the OSC considered whether Rex Diamond Mining Corp. ("Rex Diamond"), a diamond exploration company, should have publicly disclosed that it was experiencing difficulties with a government authority in relation to its mineral leases. The OSC concluded that a change occurred in Rex Diamond's business and operations when it became legally unable to access its mining properties in order to extract diamonds. At para. 234 of its decision, the OSC stated:

We find it problematic that Rex had knowledge of the fact that it could potentially lose its Leases and Rex never revealed the final notice warning letter dated June 5, 2003 to the public. In our view, Rex should have issued a material change report when it initially learned that there was a risk that it would lose the Leases. This is because the loss of a right to mine for diamonds would impact the operations of a diamond exploration company such as Rex and this in turn would affect Rex's ability to generate profit and share price would be affected accordingly.

Re Coventree Inc.

In *Re Coventree Inc.*, [2011 LNONOSC 757](#), Coventree Inc. ("Coventree") carried on business sponsoring asset-backed commercial paper ("ABCP") which had a credit rating from an approved credit rating organization, Dominion Bond Rating Service ("DBRS"). DBRS announced that it was changing its rating system. As a consequence of DBRS' decision, Coventree could no longer receive approval for (and thus be able to sell) ABCP, which represented a substantial portion of its revenues. Coventree did not disclose this change by DBRS in a material change report within the requisite time, but informed investors of the change in its subsequently filed management's discussion and analysis. One of the issues considered by the OSC was whether Coventree failed to meet its continuous disclosure obligations by failing to disclose DBRS' decision to change its credit rating methodology for a type of ABCP. The OSC concluded that the DBRS change in rating methodology was a material change to Coventree as the change in rating methodology would have prevented Coventree from continuing a significant part of its business.

Building on its decision in *Re Rex Diamond Mining Corp.*, the OSC in *Re Coventree Inc.* affirmed that external factors that directly affect an issuer's business or operations can constitute a material change. This principle expands the SCC's finding in *Kerr v. Danier Leather Inc.* that, although changes to financial results may reflect external factors, timely disclosure obligations are only triggered when an event or development has caused an internal change in an issuer's business, operations or capital. The *Re Coventree Inc.* decision arguably broadens the *Kerr v. Danier Leather Inc.* standard by considering not just the internal changes made by an issuer in response to external factors, but also the existence of significant external factors in and of themselves. However, the scope of what constitutes a "material change" remains limited to events or developments that have caused or will cause a change in the issuer's business, operations or capital. Changes to an issuer's external environment that do not disproportionately (when compared to other companies in the same business or industry), materially and directly impact the issuer's business are not sufficient to constitute "material changes".

Interpreting the Second Criterion of the Material Change Definition "Decision to Implement a Change"

The OSC and the courts have also interpreted the second criterion of the "material change" definition. In *Re AiT Advanced Information Technologies Corp.*, [2008 LNONOSC 22](#), the OSC considered whether a board resolution adopted before a definitive agreement had been entered into constituted a "decision to implement a material change" in the context of an arm's length negotiation of a merger transaction. The OSC clarified that, where the board of directors of a company believes that the parties are committed to the transaction

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and that completion is substantially likely, a material change can occur in advance of the execution of definitive agreement. In its decision that a material change had not occurred during the relevant period, the OSC stated at paras. 222 and 223:

... [I]n the context of a proposed merger and acquisition transaction, where the proposed transaction is speculative, contingent and surrounded by uncertainties, a commitment from one party to proceed will not be sufficient to constitute a material change. In the context of a merger and acquisition transaction, it is necessary to establish whether there is sufficient commitment from both parties of the transaction to determine whether a “decision to implement” the transaction has taken place.

We rely on Anisman’s wording “when a decision has been made indicating a substantial likelihood that implementation will be forthcoming”. *In our view, for there to be a substantial likelihood that a proposed transaction will be completed, there needs to be sufficient signs of commitment on behalf of all the parties involved to proceed with the transaction.*

[emphasis added]

At para. 217 of its decision in *Re AiT Advanced Information Technologies Corp.*, the OSC took note of its earlier decision in *Re Burnett*, [1983 LNONOSC 240](#), in which it stated:

An intention by a person or company to do something, which once implemented would constitute a material change in the affairs of the reporting issuer, but which at the time the intention is formed, *for reasons beyond the control of the person or company is still not capable of achievement is not ordinarily a material change* in the affairs of the issuer.

Therefore, it appears that the mere intention to take a particular course of action is insufficient to constitute a material change. Rather, the board must provide a clear indication of its intention to implement a change *that is within the company's power to achieve*. As held in *Re AiT Advanced Information Technologies Corp.*, this indication or decision need not be confirmed in a definitive agreement, but can exist where the parties are committed to the action and completion is substantially likely.

Definition of Material Fact

In contrast to a “material change”, the OSA defines a “material fact” in s. [1](#)(1) as follows:

“material fact”, when used in relation to securities issued or proposed to be issued, means a fact that would reasonably be expected to have a significant effect on the market price or value of the securities.

While “facts” are not defined in the OSA, in *R. v. Fingold*, [\[1999\] O.J. No. 369](#) (Gen. Div.), an insider trading case, Keenan J. stated at para. 56:

... “facts” must mean more than mere rumour or gossip on the street or even an “overpowering suspicion”. It must be information obtained from an identifiable source which might reasonably be expected to have such information and obtained in circumstances which would tend to support the accuracy and reliability of the information given.

The concept of material facts is important in relation to the insider trading provisions of the OSA. A reporting issuer and any person in a special relationship with a reporting issuer are prohibited from informing, other than in the necessary course of business, anyone of a material fact or a material change before that material information has been generally disclosed.

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Differentiating Material Changes and Material Facts

Notwithstanding that “material changes” and “material facts” are both based on a market impact test (as articulated at para. 91 of the OSC’s decision in *Re YBM Magnex International Inc.*, [2003 LNONOSC 337](#), these concepts are distinct. The OSA differentiates between these terms, including their respective legal consequences and disclosure obligations.

The SCC articulated at para. 83 of its decision in *Pezim v. British Columbia (Superintendent of Brokers)*, [\[1994\] S.C.J. No. 58](#), that the definition of “material fact” is broader than that of “material change”; it encompasses any fact that can “reasonably be expected to significantly affect” the market price or value of the securities of an issuer, and not only changes “in the business, operations, assets or ownership of the issuer” that would reasonably be expected to have such an effect. Therefore, “material facts” encompass a wider scope of information than “material changes”.

The OSC made a similar observation at para. 209 of its decision in *Re AiT Advanced Information Technologies Corp.*:

Not all material facts will be significant enough to constitute a change in the business, operations or capital of the issuer, and therefore be a material change. The Act makes an important distinction between the definitions of a material fact and a material change in subsection 1(1). This distinction is fundamental to the various requirements under the Act since certain disclosure requirements are triggered by the occurrence of a material change (but not a material fact). For example, only in the event of a material change does section 75 of the Act require an issuer to issue a news release and also file with the Commission a material change report on a timely basis, or alternatively file a confidential material change report with the Commission.

Materiality Standard and Determination

The Concept of “Materiality”

As noted by the OSC at para. 151 of its decision in *Re Coventree*, the concept of materiality in the OSA is a broad one that varies with the characteristics of the issuer and the particular circumstances involved. The OSC further stated at paras. 155 and 156:

On appeal of *Re Rex Diamond*, the Ontario Divisional Court confirmed that the test for materiality is objective in nature and is not affected by the subjective assessment or optimistic views of company executives that a different outcome could be negotiated.

Accordingly, the assessment of the materiality of an event or development is a question of mixed fact and law that requires a contextual determination that takes into account all of the relevant circumstances. ... That assessment requires the application of judgement and common sense. In assessing whether a fact is a “material fact” or whether a “material change” has occurred, one must take into account both quantitative and qualitative considerations or factors.

Avoiding the Use of Hindsight

Assessments of materiality are not to be made with the benefit of hindsight. In evaluating whether a material change has occurred, an issuer is to consider the events and developments as they exist at the relevant time.

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The following are examples of decisions where the OSC has reinforced this position:

- *Re YBM Magnex International Inc.*, at para. 90: “Assessments of materiality are not to be judged against the standard of perfection or with the benefit of hindsight. It is not a science and involves the exercise of judgement and common sense”.
- *Re AiT Advanced Information Technologies Corp.*, at para. 227: “...Instead, we must objectively assess the facts that were available to the AiT Board during the Relevant Period, to determine in all the circumstances whether the three events constituted a material change in the business, operations or capital of AiT that triggered its disclosure obligation under section 75. It is important therefore, to recognize the dangers of hindsight in coming to this conclusion and to be careful not to look at the situation based on what subsequently happened”.
- *Re Coventree Inc.*, at para. 161: “Coventree should not be held to a standard of perfection and must not be judged with the benefit of hindsight. In particular, we must not judge the Respondents with the benefit of the hindsight that a market disruption in the ABCP market occurred on August 13, 2007”.

Assessments of External Factors or Developments

Section 4.4 of [National Policy 51-201: Disclosure Standards](#) (“NP 51-201”) states that companies are generally not required to interpret the impact of external political, economic and social developments on their affairs. However, there may be situations in which an external development has or will have a direct effect on a company’s business and affairs that is both material and uncharacteristic of the effect generally experienced by other issuers engaged in the same business or industry. In these circumstances, issuers are urged, where practical, to explain the particular impact on them. This guidance is consistent with the OSC’s findings in *Re Coventree*, at para. 588:

... [W]here an external event or development has a direct effect on, and changes or interferes with, the business or operations of an issuer, that external event or development can give rise to a change in the issuer’s business or operations for purposes of the definition of “material change” in the Act.

Making Materiality Judgments

In making materiality judgments, it is necessary to take into account a number of factors that cannot be captured by a simple bright-line standard or test. These factors include the nature of the information itself, the volatility of the company’s securities and prevailing market conditions. The materiality of a particular event or piece of information may vary between companies according to their size, the nature of their operations and many other factors ([NP 51-201](#), s. 4.2).

Section 4.2(2) of [NP 51-201](#) encourages companies to monitor the reaction of the market to information that is publicly disclosed. Such ongoing monitoring and assessment of market reaction to different disclosure will be helpful when making materiality judgments in the future. As a guiding principle, if there is any doubt about whether particular information is material, companies are encouraged to err on the side of materiality and release the information publicly. This principle is supported by the following comments made by the OSC in the *Re YBM Magnex International Inc.* decision at para. 518:

... The definition of material change acts as a brake on premature and undesirable disclosure. The concept of material change, like that of material fact, requires an exercise of judgement. If the decision is borderline, then the information should be considered material and disclosed. In our opinion, a

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supercritical interpretation of the meaning of material change does not support the goal of promoting disclosure or protecting the investing public.

The OSC has explained that it is the issuer itself that is in the best position to apply the concept of material information to its unique circumstances. Therefore, each issuer is responsible for determining what information is material in the context of its own affairs.

What Is Material Information?

“Material information” is defined in s. 407 of [TSX: Company Manual](#) and s. 2.1 of [TSXV: Corporate Finance Manual](#), Policy 3.3. According to these exchanges, material information is any information relating to the business and affairs of a company that results in or would reasonably be expected to result in a significant change in the market price or value of any of the company's listed securities. These exchanges explain that material information encompasses both a material change and a material fact.

The [Policies](#) of the Canadian Securities Exchange (“CSE”) define “material information” as a material fact, a material change and any other information that might influence or change an investment decision of either a reasonable conservative or speculative investor.

[NP 51-201](#), s. 410 of [TSX: Company Manual](#), s. 3.8 of [TSXV: Corporate Finance Manual](#), Policy 3.3, and s. 2.3 of [CSE Policy 5](#) suggest that the following non-exhaustive list of events may be material information:

- **Changes in Corporate Structure.** This includes:
 - changes in share ownership that may affect control of the company;
 - major reorganizations, amalgamations or mergers;
 - take-over bids, issuer bids or insider bids; or
 - any change of name.
- **Changes in Capital Structure.** This includes:
 - public or private sale of additional securities;
 - planned repurchases or redemptions of securities;
 - planned splits of common shares or offerings of warrants or rights to buy shares;
 - any share consolidation, share exchange or stock dividend;
 - changes to a company's dividend payments or policies;
 - the possible initiation of a proxy fight; or
 - material modifications to rights of security holders.
- **Changes in Financial Results.** This includes:
 - significant increase or decrease in near-term (such as in the next fiscal quarter) earnings prospects;
 - unexpected changes in the financial results for any periods;
 - shifts in financial circumstances, such as cash flow reductions, major asset write-offs or write-downs;

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- changes in the value or composition of the company's assets; or
- any material change in the company's accounting policy.
- **Changes in Business and Operations.** This includes:
 - any development that affects the company's resources, technology, products or markets;
 - a significant change in capital investment plans or corporate objectives;
 - major labour disputes or disputes with major contractors or suppliers;
 - significant new contracts, products, patents, or services or significant losses of contracts or business;
 - significant discoveries by resource companies;
 - changes to the board of directors or executive management, including the departure of the company's chief executive officer, chief financial officer, chief operating officer or president (or persons in equivalent positions);
 - any employment, consulting or other compensation arrangements between the issuer or any subsidiary and any director or officer, or their associates, for their services as directors or officers, or in any other capacity;
 - the commencement of, or developments in, material legal proceedings or regulatory matters;
 - any management contract, any agreement to provide any investor relations, promotional or market making activities, any service agreement not in the normal course of business or any related party transaction;
 - any amendment, termination, extension or failure to renew any material contract;
 - waivers of corporate ethics and conduct rules for officers, directors, and other key employees;
 - any notice that reliance in a prior audit is no longer permissible;
 - the establishment of any special relationship or arrangement with a participating organization or member or other registrant;
 - notice of suspension review or suspension of trading of an issuer's securities; or
 - de-listing of the company's securities or their movement from one quotation system or exchange to another.
- **Acquisitions and Dispositions.** This includes:
 - significant acquisitions or dispositions of assets, property or joint venture interests; or
 - acquisitions of other companies, including a takeover bid for, or merger with, another company.
- **Changes in Credit Agreements.** This includes:
 - borrowing or lending of a significant amount of money;
 - mortgaging or encumbering of the company's assets;
 - defaults under debt obligations, agreements to restructure debt, or planned enforcement procedures by a bank or any other creditors;
 - changes in rating agency decisions; or
 - significant new credit arrangements.

Materiality, Material Changes and Material Facts

Courts have stated that individual pieces of information may not be material by themselves but may amount to material information when taken together and in certain contexts. The following statement was made at paras. 154 and 155 of the OSC's decision in *Re YBM Magnex International Inc.*:

YBM's prospectus did not contain full, true, and plain disclosure of all material facts by failing to disclose that YBM was subject to unique risks. When each alleged omission is analysed in isolation, a technical argument can be made that some of them may not be material. We do not believe that is the appropriate approach to this case. The factual context cannot be ignored.

In our view, when the omissions which are material on their own and the omissions which in isolation may not appear to be material are considered together, the evidence indicates that YBM was subject to a set of risks specific to itself.

When and How Must Material Information Be Disclosed?

Section 408 of the [TSX: Company Manual](#) and s. 3.1 of [TSXV: Corporate Finance Manual](#), Policy 3.3 require an issuer, by way of a press release, to disclose material information concerning its business and affairs immediately upon the information becoming known to management, or in the case of information previously known, forthwith upon it becoming apparent that the information is material. As an example, where a decision made at a meeting of an issuer's board of directors held during market hours constitutes material information, the issuer is required to immediately notify the Investment Industry Regulatory Organization of Canada ("IIROC") of the material information before it is disseminated to the public, notwithstanding that the meeting is continuing. Accordingly, where a board meeting takes place during market hours and a decision is expected to be made at such meeting, it is prudent for a draft press release to be prepared in advance. If the expected decision is reached, the press release can be reviewed and approved by the board of directors and sent to the IIROC immediately for pre-clearance, even while the meeting continues.

The above requirement is subject to certain exceptions (including for confidentiality reasons) and pre-notification requirements of the IIROC. See tables [Market Surveillance Notification Table \(TSX\)](#) and [Market Surveillance Notification Table \(TSXV\)](#), and practice note [Timely Disclosure Requirements – Delayed Disclosure due to Confidentiality](#) for more information.

If an announcement regarding a proposed development has been disclosed by an issuer, the exchanges generally require subsequent updates with respect to such material information every 30 days, unless the original announcement indicated that an update would be disclosed on another date ([TSX: Company Manual](#), s. 410; and [TSXV: Corporate Finance Manual](#), Policy 3.3, s. 3.5).

For information concerning when and how material changes must be disclosed, see practice note: [Material Change Reports](#).

Termination Triggering Events in M&A Transaction Agreements

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There are a number of events that may give rise to a termination right. These will vary depending on what is relevant to the particular transaction and are generally linked to the closing conditions for the transaction. Almost all agreements, regardless of whether the transaction is structured as a share purchase, asset purchase or merger, will include the following: (1) a mutual right to terminate for any reason; (2) a termination right of each party relating to the other party's breach of its representations, warranties, covenants, or agreements; (3) a mutual termination right relating to any legal impediments to consummating the transaction; and (4) a mutual right to terminate in the event the closing conditions are not satisfied by an agreed date. These and other triggering events that commonly apply in M&A transactions are described in more detail below.

This practice note will cover:

- Mutual Agreement of the Parties
- Breach of Representation, Warranty, Covenant, or Other Agreement
- Governmental or Legal Restrictions
- Failure to Satisfy Closing Conditions by a Specified Date
- Failure to Receive Required Regulatory Approvals
- Failure to Receive Required Shareholder Approvals
- Company Board Failure
- Fiduciary Out
- Buyer's Failure to Obtain Financing
- Failure to Complete Tender Offer
- Decline in Buyer's Share Price
- Deal-Specific Items
- Cure Period, Extension or Exclusion

For a further discussion of termination provisions, see practice notes: [Termination Provisions in M&A Transaction Agreements](#) and [Termination Consequences in M&A Transactions](#).

For a discussion of break-up fees, see the practice note: [Break Fee and Reverse Break Fee Provisions: Drafting Considerations](#).

Termination Triggering Events in M&A Transaction Agreements

Mutual Agreement of the Parties

It is customary to include a termination right by which the parties can mutually agree to terminate the transaction at any time. Key points to consider in relation to this termination right include the following:

- **Agreement in Writing** — The parties should evidence such mutual agreement in writing to avoid any dispute about whether a party consented to the termination.
- **Authorization by Board/Committee** — Depending on the nature of the transaction, the parties may want to specify that the determination to exercise this termination right must first be authorized by their respective boards of directors. In some cases, the target company's board will establish a committee to be responsible for transaction-related approvals on behalf of the board. Such a committee is typically comprised of independent directors who do not have a potential conflict of interest with respect to the transaction, and so will exclude any directors who may stand to benefit personally from the transaction (e.g., management or other employees who may be entitled to improved compensation arrangements or other benefits as a result of the transaction). If the target company has established such a committee, then any matter that would ordinarily require board approval should instead require the approval of such committee.

Breach of Representation, Warranty, Covenant, or Other Agreement

It is also customary to include a termination right for breach of representation, warranty, covenant or other agreement. In general, the terminating party will not be entitled to exercise this termination right if such party is then also in breach of any of its representations, warranties, covenants, or other agreements under the agreement, or if the terminating party's breach of any such provisions caused the event that is the grounds for termination.

The benefit of this termination right is that it allows the non-breaching party an opportunity to exit the transaction early if there has been a breach so serious that such party would not be obligated to close the transaction. The termination right effectively allows non-breaching party to cut its losses and move on without having to wait until the agreement expires by its terms, which may be several months in the future. This early termination can be particularly beneficial to sell-side clients in the event of a buy-side breach, as sell-side clients are generally subject to a number of restrictive covenants during the period between signing and closing which limit their business and operations. Once the agreement has been terminated, the seller will be able to start a new transaction process and ideally find an alternative buyer, and buy-side clients will be free to seek an alternative investment.

In drafting and negotiating this termination right, it is important to keep in mind that the seller's right will mirror the buyer's equivalent right, so any qualifiers or other limitations will apply to both. This parallel treatment makes this an easier right to negotiate.

Other key points to consider include the following:

- **Bring-Down Closing Conditions** — The termination right for breach of representation, warranty, covenant or other agreement is generally only triggered if a breach occurs that will result in a failure of the corresponding bring-down closing conditions to be satisfied. In most M&A transactions, the closing conditions will include a "bring-down" by each party of such party's representations, warranties, covenants, and agreements set forth in the agreement, in each case as of the closing date.

Termination Triggering Events in M&A Transaction Agreements

These closing conditions will generally require that each party's representations and warranties must be true and correct in all material respects as of the closing date (unless specifically made as of a different date), and that each party has performed, in all material respects, the covenants and agreements that it is required to perform prior to the closing of the transaction. The parties will often be required to certify in writing that such conditions have been satisfied, usually in the form of an officer's certificate or equivalent document. The parties may expand this provision to also refer to breaches that are *reasonably expected* to result in the event of a failure of the corresponding bring-down closing conditions to be satisfied; this modification is viewed as buyer-friendly because the seller or target company typically has more expansive representations, warranties, covenants and other agreements than the buyer, and so has more opportunities to potentially be in breach. The provision generally does not refer to *material* breaches because the bring-down closing conditions usually already include materiality qualifiers. An alternative structure for this termination right, although less common, is to refer to material breaches but with no reference to the corresponding bring-down closing conditions. Material misrepresentations by a party may also be included in this provision as a triggering event.

- **Cure Period** — It is customary to include a cure period before the termination right may be exercised. The party proposing to terminate the agreement on the basis of this right would first be obligated to notify the other party of the relevant breach, and the termination right will only apply if the breaching party is not able to remedy the breach during the cure period. If the breach, by its nature, is not capable of being cured then the cure period will not apply. The length of the cure period will vary, although 30 days (or 20 business days) is commonly used, and a cure period of more than 45 days is unusual. The parties may also specify that the cure period will expire on the drop-dead date in case such date occurs during the cure period. A longer cure period is generally considered more seller-friendly even though the cure period will apply equally to seller and buyer's parallel termination rights. This is because, as noted above, the sell-side party generally has more extensive representations and warranties and more significant obligations under the agreement than the buyer, and therefore more opportunities to be in breach. If the agreement allows the seller to update its disclosure schedules prior to closing, this can have a similar effect on the ability to terminate after the cure period, as the seller may be able to remedy a breach of representation or warranty by modifying the corresponding disclosure.
- **Relationship to Indemnity Protections** — The parties should consider the relationship between this termination right and the indemnity protections that would apply as a result of the underlying breach. In some agreements, the non-breaching party will be barred from seeking indemnification for the breach if it was aware of the breach and did not elect to terminate the agreement, effectively forcing such party to choose between termination and the ability to seek damages as its remedy. As a practical matter, such a choice may lead to re-negotiation of certain terms of the agreement or even a modification to the purchase price as a way to avoid a threatened termination, and the parties should keep this possibility in mind when negotiating these provisions.

Governmental or Legal Restrictions

It is customary to include a mutual termination right that applies in the event a governmental authority or court of competent jurisdiction has issued a final, non-appealable order or judgment, or has otherwise taken any final action, that prohibits or restricts the parties' ability to complete the transactions contemplated by the principal transaction agreement. This restriction could be specific to the particular parties or the transaction, such as the failure to grant a required regulatory approval or the issuance of an injunction that adversely impacts the transaction, or it could be a more general matter, such as a change in law. The provision will typically reference a broad range of governmental or related authorities, including governments, courts,

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regulatory or administrative agencies, *etc.*, as well as a wide variety of possible orders or actions such bodies can take; the objective of this termination right is to provide the parties an opportunity to exit the transaction if it becomes legally impossible to complete, without having to wait until the termination date.

Key points to consider include the following:

- **Limiting the Scope** — If the parties desire to narrow the scope of this termination right, they can: (1) limit the universe of relevant governmental authorities to only those in jurisdictions material to the parties or their respective businesses or operations or, alternatively, expressly excluding certain regulatory approvals that are deemed less critical to the transaction; or (2) specify the relevant transactions (*e.g.*, the merger, parent share issuance, acceptance for payment of the shares pursuant to the tender offer) that must be prohibited in order to trigger the termination right, rather than referring to all transactions contemplated by the agreement. These modifications introduce potential risks, however. For example, even if a jurisdiction or approval is not material to a party's business or operations or to the transaction generally, failure to obtain a required regulatory approval could result in fines or other adverse consequences to the parties or the transaction, including rescission of the deal altogether. Likewise, specifying only certain transactions to which the termination right applies could mean that the parties are forced to close even if one party is not getting the full benefit of all the items agreed in the transaction documents.
- **Breach or Failure to Perform** — This termination right often includes language to preclude termination by a party if such party's breach of or failure to perform its obligations under the agreement resulted in the legal or regulatory restriction. This limitation can be modified to refer to only material breaches and/or breaches of only certain specified provisions of the agreement (rather than the entire agreement). A less common limitation is to preclude a party from exercising this termination right if such party failed to take certain actions to oppose or object to the legal impediment, although this limitation generally only applies if the parties have included affirmative obligations to take such actions in the agreement.

Failure to Satisfy Closing Conditions by a Specified Date

In most transactions, the parties will want to specify a date by which either party may terminate the agreement if the conditions to closing (or to the effectiveness of the merger, if applicable) have not been satisfied. This is often referred to as a "drop-dead date", "outside date" or "long-stop date." The agreed date reflects the expected time period needed in order to satisfy the conditions to closing (or to the effectiveness of the merger, if applicable), in particular to account for the expected timeline for receiving any required regulatory approvals, and typically includes a reasonable margin to cover potential delays.

As with other termination rights, the parties will generally include language to make clear that this termination right will not be available to a party whose breach of or failure to perform its obligations under the agreement caused or resulted in the failure of the conditions to closing (or the effectiveness of the merger, if applicable) to be satisfied by the original drop-dead date. This limitation can be modified to refer to only material breaches and/or to only certain specified provisions of the agreement.

The parties should consider including an extension of the drop-dead date under certain circumstances, as described below:

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- **Regulatory Extension.** In many cases, the reason that the closing (or the effective time of the merger, if applicable) has not occurred by the drop-dead date is due to a delay in the regulatory approval process. Because a delay is often due to factors outside of the control of the parties, the parties may want to include the ability to extend the drop-dead date to accommodate the regulatory approval process if all other conditions to closing have been satisfied as of the original drop-dead date. Such an extension is typically not for more than 3-6 months as the parties will not want to keep the transaction pending for too long, particularly as significant delays may be an indication that the required regulatory approval will not ultimately be granted. The extension can be structured as an automatic extension for a specified period, or a right that may be exercised in the sole discretion of one or both parties to extend the drop-dead date by an agreed time period (with possible repeat extensions). In all cases, the parties should specify an agreed final termination date.
- **Financing/Marketing-Period Extension** — A less common variation to the extension right that can be included in transactions where the buyer is funding the transaction consideration with third-party financing is to include an automatic extension if the buyer is in the middle of the “marketing period” relating to its debt financing for the transaction when the original drop-dead date occurs. The marketing period is the period of time during which the buyer (or its lender) is actively syndicating any debt financing associated with the transaction, and generally lasts about 20 business days. The buyer will generally need certain financial and other information from the seller in order to commence the marketing period, and other pre-requisites may apply that can delay the start of such period. This extension right is a buyer-friendly addition, although it can also be helpful to the seller to permit such an extension (which is typically only 1-2 months), as a short delay to facilitate the consummation of the transaction will generally still be a better option for the seller than having to completely restart the transaction process with a new buyer.

Failure to Receive Required Regulatory Approvals

Termination for failure to receive any required regulatory approvals is usually covered by the broader termination right in the event of any governmental or legal restriction.

Failure to Receive Required Shareholder Approvals

In transactions where the approval of the shareholders of one or more parties is required in order to consummate the transaction, receipt of such approval is generally a condition to closing. It is also typical to include a termination right that will apply if the applicable shareholder meeting is held and the shareholders do not approve the transaction. While approval of the target company's shareholders is most commonly required in M&A transactions, certain transaction structures or provincial law or other governance requirements may also require approval of the buyer's shareholders. For example, if the transaction involves the issuance by the parent company or buyer of new equity as consideration for the transaction, the buyer's shareholders must approve the deal.

Some key points to consider include the following:

- **Mutuality** — Typically, either party can exercise this termination right, which allows the parties to immediately move on and pursue alternative transactions upon failure to receive the required approval rather than waiting for the drop-dead date, particularly as the transaction will not be able to close absent such approval. While less common, the buyer may have an additional stand-alone termination right in the event the target company breaches any of its obligations under the agreement relating to the shareholder approval process. As with several other termination rights, this termination

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right will not be available to the party whose shareholders failed to approve the transaction if such party's breach of or failure to perform its obligations under the agreement resulted in the failure to obtain the required shareholder approval.

- **Covenants Relating to the Shareholder Meeting** — The agreement will typically include various covenants relating to the shareholder meeting, including what actions each party must take in order to arrange and prepare for the meeting, the materials to be delivered to the shareholders in connection therewith, etc. — most of these obligations will fall on the party whose shareholders are being asked to vote. A variation of this limitation is to refer to such covenants only rather than the entire agreement and/or to refer only to material breaches. Regardless of how broadly the limitation is drafted, if the termination right is mutual then the party who is not responsible for submitting the transaction to its shareholders for approval should always insist on including this type of limitation on the other party's termination right.

Company Board Failure

In merger transactions where the target company is publicly listed, the merger agreement will typically include a termination provision that allows the buyer to terminate the agreement if the target company's board has taken certain actions that would potentially upset the transaction. This is particularly important in merger agreements that contain a "fiduciary out", a provision that is included in almost all public merger agreements. The triggering events that comprise this termination right typically mirror corresponding obligations of the target company set forth in the agreement relating to the shareholder approval process and related matters, as well as matters required by applicable law (including any fiduciary duties and related obligations).

Triggering the Right

The triggering events for this termination right may include some or all of the following:

- The target company's board fails to include its recommendation in favor of the transaction in the proxy statement that is sent to shareholders in order to solicit the shareholders' approval of the transaction.
- The target company's board changes its recommendation of the transaction, for example by recommending an alternative proposal or by entering into an alternative transaction that comes along after the signing of the transaction (even if doing so is permitted by the merger agreement pursuant to a fiduciary out.
- The target company's board fails to re-affirm its support of the transaction following a written request by the buyer, typically following some activity indicating the presence of a competing transaction (e.g., a third party's commencement of a competing tender or exchange offer, usually for at least 10% of the target company's relevant securities), or alternatively fails to recommend *against* such competing transaction.
- If the agreement includes a "no-shop" or non-solicitation provision prohibiting the target company from actively soliciting a competing transaction or taking certain related actions, the material breach by the target company (acting through its board) of its obligations under such provision.
- A catch-all to cover any public indication of the target company's board's intent to take any of the actions that would trigger this termination right. If the target company's board has established a committee (typically comprised of independent directors who do not have a potential conflict of

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interest with respect to the transaction) to be responsible for transaction-related approvals on behalf of the board, then the termination provision will reference such committee instead of the board.

Certain of the triggering events described above may not be relevant to the transaction and should be modified or excluded as appropriate. Another formulation of this termination provision is to incorporate a defined term that covers some or all of the triggering events (a commonly used term is “Adverse Recommendation Change”).

Time Period

A common variation to this provision is to limit the time period during which the buyer can exercise this termination right to before the target company’s receipt of shareholder approval for the transaction. Another alternative, although less common, is to require that the buyer must exercise the termination right within a certain time period after learning about the triggering event.

Fiduciary Out

It is prudent for sell-side counsel to include a “fiduciary out” in the acquisition agreement, effectively allowing the seller or target to enter into an alternative, competing transaction that is “superior” to the contemplated transaction, if failing to do so would be a violation of its fiduciary duties. The board of directors of a target company has various fiduciary duties in the context of M&A transactions:

- **Superior Offers** — A target company’s board of directors is obligated to consider and/or pursue an alternative, superior offer.
- **Revlon Duties** — The target’s board is obligated to maximize shareholder value in change-in-control transactions.
- **Duty of Candor** — The target’s board must fully disclose all of the facts or circumstances relevant to the transaction, and has an ongoing obligation to ensure that the board’s recommendation of a particular transaction remains consistent with its fiduciary duties once circumstances change.

For a more detailed discussion of fiduciary duties, see the practice note: [*Fiduciary Duties and Director Approvals in M&A Deals \(US\)*](#).

Key Negotiating Points

Fiduciary out provisions are heavily negotiated and have been the subject of extensive case law. Regardless of how the fiduciary out provisions are structured, in addition to the buyer’s right to terminate the agreement following a change of recommendation by the target company’s board, the target company will also have a termination right allowing it to pursue a superior, competing transaction, although such right is often conditioned on the target company having complied with the no-shop or go-shop provisions (if applicable) and other covenants relevant to the fiduciary out.

A description of key negotiating points follows:

- **Superior Proposals** — The buyer may insist on including parameters around what constitutes a “superior” deal such as: (1) a comparison of the non-financial terms to the non-financial terms of the pending deal; (2) the likelihood and expected timing of closing (including the impact of any third-party

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approvals required or dependence on any third-party financing); and (3) and various other relevant risk factors. Similarly, the buyer may request that the target company's board consult with counsel to confirm whether failure to accept an alternative proposal is a violation of its fiduciary duties before the fiduciary out can be exercised.

- **Matching Right** — In many cases, the buyer will also insist on a matching right, allowing it an opportunity (typically exercisable within a period of 2-5 business days following receipt of notice of the competing offer) to match the terms of the competing offer before the seller can terminate the agreement and proceed with the new buyer.
- **Market Check and Size of Premium** — Deal-specific considerations are also relevant to the negotiation of the scope of a fiduciary out, such as the extent to which there was a “market check” before the target company entered into an agreement with the buyer and the size of the premium being paid to the target company's shareholders. These and other relevant factors may make it easier for the target company to accept a more limited fiduciary out, as it has already taken measures to vet the purchase price.
- **No-Shop** — A related provision may limit the target company's ability to actively solicit or take actions that may encourage or otherwise lead to competing deals, referred to as a “no-shop” provision. For a more detailed description of no-shop provisions, see the practice note: [No-Shop and Go-Shop Provisions](#). However, the no-shop provision will not prevent a third party from making a competing offer, and the fiduciary out provision is designed to allow the target company to consider such an offer and, if the target company's board believes such offer is superior to the pending deal, to change its recommendation of the pending transaction in favor of such alternative transaction. This action may trigger a termination right of the buyer, but failing to take such action could be a breach of the target company's board's duty of candor, which effectively requires that the board provide the shareholders with its honest opinion of a transaction.
- **Go-Shop** — An alternative formulation of these provisions, although not very common, is to allow the target company to proactively seek out competitive transactions during a specified time period (generally 1-2 months after the parties have entered into the principal transaction agreement for the pending deal) to allow it to “test the market”. This provision is referred to as a “go-shop” provision. For a more detailed description of go-shop provisions, see the practice note: [No-Shop and Go-Shop Provisions](#).
- **Intervening Events** — A variation of the fiduciary out provision that has become increasingly prevalent allows the target company to terminate the agreement if a material event or circumstance, typically referred to as an “intervening event”, occurs or is discovered after signing that would result in a windfall for the buyer if the transaction were to proceed on the agreed terms. Such provisions will often contain an additional requirement that such event or circumstance was not reasonably foreseeable at the time the merger agreement was signed, and the buyer is likely to seek to limit what constitutes an “intervening event” as much as possible.

Termination Fee

Because termination for this purpose clearly benefits the target company to the detriment of the buyer, the target company will typically be required to pay the buyer a termination fee upon exercising this right. The amount of such a termination fee is heavily negotiated, and will likely be large enough to not only compensate the buyer for the time, energy, resources, and costs incurred in connection with the transaction, but to also act as a deterrent to potential competing transactions (within reason). For more details on termination fees, see the practice note: [Fiduciary Duties and Director Approvals in M&A Deals \(US\)](#).

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Buyer's Failure to Obtain Financing

In transactions where the buyer is relying on third-party financing in order to fund the purchase price and other transaction consideration, the target company or seller may want to include a right to terminate the agreement if the closing conditions have all been satisfied but the transaction has not closed when required (generally within a few business days following the satisfaction of such conditions) due to the buyer's failure to obtain such financing. The provision does not need to expressly refer to the buyer's inability to obtain financing, as this will be implied even if not expressly included.

Terminating the agreement at this late stage is generally not an ideal situation for either party, and in most cases the seller will only exercise this right if there is a serious threat to the buyer's ability to obtain financing (e.g., as occurred during the recent financial crisis) and it has an alternative buyer lined up. If this is the case, exercising this termination right allows the target company or seller to immediately move on, rather than having to wait until the drop-dead date or the occurrence of another triggering event that allows termination of the agreement. Early termination will also relieve the target company or seller from the various restrictive covenants relating to the operation of its business that would have otherwise remained in place while the transaction was pending.

Some other elements to consider include the following:

- **Grace Period** — Typically this provision will include a limited grace period (1 to 5 business days) between when the seller's notice of intent to terminate is delivered to the buyer and when the closing can occur.
- **Breach** — The target company or seller may be precluded from exercising this termination right if, at the time of proposed termination, it is in breach of any provision of the agreement that would cause the corresponding bring-down closing conditions relating to its representations, warranties, covenants and agreements to no longer be satisfied.
- **Mutuality** — In some cases where the buyer has significant bargaining power, the buyer may negotiate to make this termination right mutual, in which case the seller should insist on including language to preclude the buyer's right to terminate if the failure to obtain financing was due to the buyer's breach of or failure to perform its obligations under the agreement and any related financing commitments. Failure to include this restriction, much like a financing closing condition, effectively turns the agreement into an option and is very risky for the seller.

Failure to Complete Tender Offer

Transactions that involve a tender or exchange offer may include a termination right that is similar to the right to terminate for the buyer's failure to obtain financing. This termination right permits termination when the conditions to the buyer's obligation to accept and pay for the securities that are the subject of such tender or exchange offer have been satisfied and the buyer fails to make such payment when required.

A different formulation of this right applies when the tender or exchange offer fails due to insufficient participation. This will render it impossible to satisfy the closing conditions, which generally specify a percentage threshold of required shareholder participation. If the merger agreement allows for an extension of the offer period, the termination right will not apply until the extended period has expired.

Termination Triggering Events in M&A Transaction Agreements

Decline in Buyer's Share Price

If consideration for the transaction includes the buyer's publicly-listed equity, the target company will typically want to include a termination right for a decline in the buyer's share price. The exchange ratio to determine the amount of the buyer's equity to be included as transaction consideration will be based on the relative values of the target company's equity and the buyer's equity, typically as of the time the parties enter into the principal transaction agreement. If there is subsequently a material decline in the value of the buyer's equity, either relative to the value of the target company's equity or another agreed reference point (e.g., such as a share index), the transaction may no longer be desirable to the target company. This termination right allows the target company to terminate the agreement if such a decline in price occurs, and typically requires a decline of 15% or more as compared to the relevant reference point in order to be triggered.

Deal-Specific Items

In addition to the termination rights discussed above, the parties may negotiate additional termination rights relevant to the specific facts and circumstances of the transaction. In most cases, it will be the buyer requesting such additional rights in an effort to mitigate the potential risks associated with the transaction. Sell-side counsel should resist such additional termination rights where possible, as a terminated deal can be highly detrimental to the sell-side client; in addition to losing the time, resources, and other costs of negotiating the failed deal, a terminated transaction can also have an adverse impact on valuation and a chilling effect on future potential transactions.

Cure Period, Extension or Exclusion

Because termination of the transaction is such a significant and final event, and generally comes at considerable cost to the parties given the time and resources devoted to the transaction and the corresponding expense, it is typical to include mitigating factors and exceptions to certain termination rights.

- **Cure Periods** — Termination rights that relate to a party's breach or failure to perform will often include a reasonable cure period to allow the breaching party an opportunity to remedy the issue.
- **Extensions** — If the basis for termination is failure to complete the transaction within the agreed timeline and such failure is due to matters outside the control of all parties, it can be helpful to include a modest extension to the expiration date as in most cases a short delay will be preferable to re-starting the entire transaction process and/or losing the deal altogether.
- **Contributing Factors** — In almost all cases a party will be barred from exercising a termination right if such party's actions, or failure to perform, contributed to the matter that gave rise to such termination right.

The parties may negotiate additional limitations to a particular right, and in many cases a termination right will also be linked to a set of covenants or other agreements that relate to the same subject matter and outline the parties' obligations with respect to such matter.

MAC or MAE Clause (Arrangement Agreement)

Practical Guidance

“Material Adverse Change” or “Material Adverse Effect” means in respect of any person, any change, effect, event, occurrence or facts that individually or in the aggregate with other such changes, effects, events or occurrences, is or could reasonably be expected to be, material and adverse to the business, prospects, operations, assets, liabilities (contingent or otherwise), results of operations or condition (financial or otherwise) of that person and its subsidiaries, taken as a whole, except any change, effect, event or occurrence resulting from or relating to: (a) the announcement of the execution of this Agreement or the transactions contemplated hereby and, in the case of [Target], the communication by [Acquiror] of its plans or intentions with respect to [Target] or its subsidiary; (b) changes in applicable general economic, securities, financial, banking or currency exchange markets or conditions; (c) any change in GAAP; (d) any natural disaster provided that it does not have a materially disproportionate effect on that person relative to comparable exploration and/or mining companies; (e) changes affecting the industry in which the [Target] operates, provided that such changes do not have a materially disproportionate effect on that person relative to comparable companies in such industry; (f) the commencement or continuation of any war, armed hostilities or acts of terrorism; (g) any decrease in the market price or any decline in the trading volume of that person’s common shares on the Exchange (it being understood that the causes underlying such change in market price or trading volume (other than those in items (a) to (g)) may be taken into account in determining whether a Material Adverse Change or Material Adverse Effect has occurred); or (h) any actions taken (or omitted to be taken) upon the request of [Acquiror] or [Acquisition Company] or pursuant to this Agreement; references in certain paragraphs of, or definitions in, this Agreement to dollar amounts are not intended to be, and shall not be deemed to be, illustrative or interpretative for purposes of determining whether a “Material Adverse Change” or “Material Adverse Effect” has occurred;

Termination Clause (Arrangement Agreement)

Practical Guidance

1 Termination

(a) This Agreement, other than para. [specify] hereof, may be terminated and the Arrangement may be abandoned at any time prior to the Effective Time (notwithstanding any approval of this Agreement or the Arrangement Resolution by the [Target] Shareholders or the Arrangement by the Court):

(i) by mutual written agreement of [Target] and [Acquiror];

(ii) by either [Target] or [Acquiror], if

(A) the Effective Time shall not have occurred on or before the Outside Date, except that the right to terminate this Agreement under this para. 1((a))(ii) shall not be available to any Party (or failure such Party's affiliate) whose failure to fulfill any of its obligations or breach of any of its representations and warranties under this Agreement has been the cause of, or resulted in, the failure of the Effective Time to occur by such Outside Date;

(B) after the date hereof, there shall be enacted or made any applicable Law that makes consummation of the Arrangement illegal or otherwise prohibited or enjoins [Target] or [Acquiror] from consummating the Arrangement and such applicable Law (if applicable) or injunction shall have become final and non-appealable; or

(C) the Arrangement Resolution shall have not been approved by the requisite [Target] Shareholder Approval at the [Target] Meeting (including any adjournment or postponement thereof) in accordance with the Interim Order;

(iii) by [Acquiror], if

(A) prior to obtaining the [Target] Shareholder Approval, the [Target] Board fails to recommend that [Target] Shareholders vote in favour of the Arrangement Resolution or withdraws, amends, modifies or qualifies its recommendation that [Target] Shareholders vote in favour of the Arrangement Resolution within 5 business days (and in any case prior to the [Target] Meeting) after having been requested in writing by [Acquiror] to do so, in a manner adverse to [Acquiror] or fails to re-affirm its recommendation (it being understood that the taking of a neutral position or no position with respect to an Acquisition Proposal beyond a period of 5 business days or beyond the date which is the day prior to the date proxies in respect of the [Target] Meeting must be deposited shall be considered an adverse

Termination Clause (Arrangement Agreement)

modification) (a "Change in Recommendation");

(B) subject to para. [specify] any of the conditions set forth in paras. [specify] has not been satisfied or waived by the Outside Date or it is clear that such condition is incapable of being satisfied by the Outside Date provided that [Acquiror], [Acquisition Company] or any of their affiliates or persons acting jointly or in concert with [Acquiror], [Acquisition Company] or any of their affiliates is not then in breach hereof, or has otherwise taken any action, so as to cause any of the conditions set forth in paras. [specify] not to be satisfied;

(C) subject to para. [specify], a breach of any representation or warranty or failure to perform any covenant or agreement on the part of [Target] set forth in this Agreement (other than as set forth in para. [specify]) shall have occurred that would cause the conditions set forth in paras. [specify] not to be satisfied, and such breach or failure is incapable of being cured by the Outside Date; provided that [Acquiror], [Acquisition Company] or any of their affiliates or persons acting jointly or in concert with [Acquiror], [Acquisition Company] or any of their affiliates is not then in breach hereof, or has otherwise taken any action, so as to cause any of the conditions set forth in paras. [specify] not to be satisfied;

(D) [Target] is in breach or in default in any material respect of any of its obligations or covenants set forth in para. [specify];

(E) the [Target] Meeting has not occurred on or before [specify date], provided that the right to terminate this Agreement pursuant to this para. 1((a))((iii))((E)) shall not be available to [Acquiror] if the failure by [Acquiror] or [Acquisition Company] to fulfil any obligation hereunder, or any action is taken by [Acquiror], [Acquisition Company], their affiliates or any person acting jointly or in concert with [Acquiror], [Acquisition Company] or any of their affiliates, is the cause of, or results in, the failure of the [Target] Meeting to occur on or before such date; or

(F) the [Target] Board authorizes [Target] to enter into a binding written agreement relating to a Superior Proposal, other than an agreement pursuant to para. [specify]; or

(iv) by [Target], if

(A) the [Target] Board authorizes [Target], subject to complying with the terms of this Agreement, to enter into a definitive agreement providing for a Superior Proposal, provided that [Target] pays the Termination Fee payable pursuant to para. [specify];

(B) any of the conditions set forth in paras. [specify] or [specify] have not been satisfied or waived by the Outside Date or it is clear that such condition is incapable of being satisfied by the Outside Date; or

(C) subject to para. [specify], a breach of any representation or warranty or failure to perform any covenant or agreement on the part of [Acquiror] set forth in this Agreement shall have occurred that would cause the conditions set forth in paras. [specify] or [specify] not to be satisfied, and such conditions are incapable of being satisfied by the Outside Date, provided that [Target] is not then in breach of this Agreement so as to cause any of the

Termination Clause (Arrangement Agreement)

conditions set forth in paras. [specify] or [specify] not to be satisfied.

(b) The Party desiring to terminate this Agreement pursuant to this para. 1((a)) (other than pursuant to para. 1((a))((i))) shall give notice of such termination to the other Parties.

(c) If this Agreement is terminated pursuant to this para. 1((a)), this Agreement shall become void and of no effect without liability of any Party (or any shareholder, director, officer, employee, agent, consultant or representative of such Party) to any other Party hereto, except as otherwise expressly contemplated hereby, and provided that the provisions of this para. 1((c)) and paras. [specify] shall survive any termination hereof pursuant to para. 1((a)), provided further that, subject to para. [specify], neither the termination of this Agreement nor anything contained in this para. 1((a)) shall relieve a Party from any liability arising prior to such termination.

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Risk Factor (Pandemics, Natural Disasters, Terrorism and Unforeseen Events)

Pandemics, Natural Disasters, Terrorism or other Unforeseen Events

The outbreak of infectious disease or occurrence of pandemics[, such as the recent outbreak of the novel coronavirus COVID-19]; natural disasters; terrorist attacks; or other unanticipated events, such as cyberattacks, war, riot or civil unrest, fires or railway blockades, in any of the areas in which the Company, its customers or its suppliers operate could cause interruptions in the Company's operations. In addition, pandemics, natural disasters, terrorism or other unforeseen events could negatively impact [global supply chains, project development, operations, labour shortages, and financial markets,] [the demand for, and price of, oil and natural gas,] and cause increase costs to the corporation, which could have a material adverse effect on the Company's business, financial condition, results of operations and cash flows.

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SEC Reporting Companies: Considering the Impact of the Coronavirus on Public Disclosure and Other Obligations: First Analysis

Created on: 03/19/2020

by Mark S. Bergman, John C. Kennedy, and Christopher J. Cummings, Paul, Weiss, Rifkind, Wharton & Garrison LLP

Introduction

This First Analysis article discusses some key areas of focus regarding the coronavirus outbreak. It also highlights below conditional relief issued by the Securities and Exchange Commission (SEC) on March 4, 2020 for reporting companies affected by the coronavirus that have SEC filings due between March 1 and April 30, 2020. The press release (the Conditional Relief Release) is available [here](#) and the related order (the Order) is available [here](#).

Background

In December 2019, an outbreak of a new strain of coronavirus, COVID-19, emerged in Wuhan, China. Within weeks, despite efforts to contain the virus in China that included widespread shutdowns of cities and businesses, the number of those infected grew significantly, and beyond China's borders. As of early March, the coronavirus is reported to have spread to over 80 countries, and the list is expected to continue to grow. As the virus continues to spread and effect business operations, supply chains, business and leisure travel, commodity prices, consumer confidence and business sentiment, and as companies ponder the impact on their businesses of employees working from home and consumers shunning air travel, stores, restaurants, sports events and other venues, it is hard to imagine a business or a sector that will be unaffected. SEC reporting companies need to consider not only the impact of the coronavirus on their operations from business continuity and risk management perspectives, but also on their public disclosure and SEC filing obligations.

The coronavirus outbreak is still evolving and its effects remain unknown. As SEC Chairman Jay Clayton noted in a January statement, available [here](#), the SEC recognizes "that [the current and potential effects of the coronavirus] may be difficult to assess or predict with meaningful precision both generally and [on] an industry- or issuer-specific basis." While it may be impossible to predict the ultimate impact of the coronavirus, what is clear today is that SEC reporting companies need to consider their disclosure obligations as events unfold. The coronavirus will impact public statements generally (including earnings releases), SEC reports (including financial statements), disclosure controls and procedures (DCP) and internal control over financial reporting (ICFR). The disclosure effort could require the attention of the audit committee, senior management, the financial reporting function, the legal/compliance function and internal audit. Presumably most, if not all, of these functions are represented on a company's disclosure committee. And all of this will likely be taking place in the context of broader business continuity efforts, governmental actions and market turbulence.

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Initial Guidance

Disclosure Considerations

Speaking in March 2019, Director of the Division of Corporation Finance William Hinman used the example of Brexit as a disclosure topic that is complex, associated with uncertain risk and rapidly evolving. He noted that the SEC disclosure system, which in recent years has evolved to a more principles-based regime, emphasizes materiality and its requirements “articulate an objective and look to management to exercise judgment in satisfying that objective by providing appropriate disclosure when necessary. Management’s Discussion and Analysis of Financial Condition and Results of Operations (MD&A) and Risk Factors are examples of such disclosure requirements and are well-suited to elicit disclosure about complex and evolving areas.” He could have been speaking of the coronavirus as well.

- **Risk Factors.** Management should consider whether existing risk factors in the most recently filed Form 10-K, Form 20-F or Form 40-F annual report are adequate or need to be updated to address the coronavirus outbreak. To the extent that the coronavirus outbreak has caused material changes that make updates to the risk factors appropriate following the release of the annual report, reporting companies should consider updating risk factors in their quarterly reports (Form 10-Q) or by supplementing them in a Form 8-K. Non-U.S reporting companies should consider how best to update their risk factors, including by supplementing their risk factors in a Form 6-K submission. Reporting companies that have already filed reports with the SEC that contain risk factors related to the coronavirus have tended to include disclosure related to developments within existing risk factors related to natural disasters, public health or uncertainty regarding global macroeconomic conditions.

The SEC Staff (the Staff) has stressed repeatedly that risk factors should not simply consist of boilerplate language and should not present risks in the hypothetical when the risks, in fact, have occurred. In light of this, reporting companies should ensure that risk factor disclosures related to the coronavirus speak to the specific risks to their business, rather than merely offer an overly broad account of recent events and general economic impacts. In recent public statements, the Staff also has reminded reporting companies that they should communicate with the board when preparing risk factor disclosure about emerging risks so that investors have knowledge of the same risks as are discussed at the board level.

Management should, concurrently with any review of risk factors, also review the risks listed in the disclosure regarding forward-looking statements. This list tends to appear in a variety of places, and care should be taken to ensure that updates are carried across the various disclosures. Recall too that boilerplate language will not satisfy the “meaningful cautionary language” prong of the safe harbor under the Private Securities Litigation Reform Act (PSLRA).

- **MD&A.** A properly drafted MD&A is intended to provide investors with the information “necessary to an understanding of [a company’s] financial condition, changes in financial condition and results of operations.” Simply put, the MD&A, in the words of a former SEC Commissioner, is where “management discusses and analyses where it has been and where it is going.” The SEC requires the identification of any known trends, demands, commitments, events and uncertainties that will, or that are reasonably likely to, impact a reporting company’s financial condition and results of operations. The Staff regularly emphasizes the need for reporting companies to focus on the importance of early

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warning disclosures, particularly where known trends and uncertainties are reasonably likely to create a significant disconnect between historical and future financial performance, to avoid later surprise disclosures.

In the context of the evolving and fast-spreading public health emergency, the challenge will be to address the trends and uncertainties with any degree of precision. The effects of the spread of the coronavirus and the myriad of responses could impact results of operations, as well as balance sheet items and cash flow. Management should consider whether unexpected cash needs could result in a stress on liquidity. To the extent that access to the capital markets is impaired, liquidity could become a significant issue (for example, for retailers and those in the travel and leisure sector). This, in turn, could present refinancing risks.

- **Accounting Impact.** Reporting companies should ensure that their accounting and financial reporting takes into account the current uncertainties and market volatility. Key assumptions and sensitivities should be re-evaluated. In addition, reporting companies should consider the adequacy of their disclosures regarding:
 - Potential inventory write-downs and impairment losses
 - Loan defaults or covenant breaches, or amendments or waivers in lending agreements
 - Changes in credit risk of customers or others negatively impacted by current developments
 - Insurance recoveries
 - Changes in business or economic circumstances that affect the fair value of financial and nonfinancial assets and liabilities
 - Changes in growth forecasts that may impact impairment evaluations (g., goodwill, other intangible assets) –and–
 - Strategies and policies to manage evolving developments
- **Subsequent Events (ASC 855).** In a recent joint [Public Statement](#) regarding coronavirus reporting considerations, SEC Chairman Jay Clayton, Director Hinman, SEC Chief Accountant Sagar Teotia and PCAOB Chairman William D. Duhnke III emphasized the “need to consider disclosure of subsequent events in the notes to the financial statements, in accordance with the guidance” included in Accounting Standards Codification (ASC) 855-10, *Subsequent Events*. The standard requires evaluation of events subsequent to the balance sheet date through the date the financial statements are issued.
- **Access to Information.** Reporting companies need to have access to their own control locations for purposes of preparing consolidated financial statements as well as financial or other information from equity method investees (Regulation S-X Rule 3-09), guarantors (Regulation S-X Rule 3-10) and acquired/to be acquired businesses (Regulation S-X Rule 3-05 or 3-14). If a reporting company will have challenges accessing control locations, it should consider the effects any such limitations will have on the preparation of its audited financial statements.

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Internal Controls

If a reporting company were to experience significant disruptions to operations, access to offices and travel, internal controls may need to be modified or replaced as the business implements emergency measures. These changes to internal controls could include, for example, changes to personnel or functions, shifting of reporting lines or altering access to IT systems to enable a remote workforce to operate virtually. A partial or complete evacuation of physical premises to remote home offices, by definition, has the potential to increase the pressure on the efficacy of existing internal controls.

In addition to the need to evaluate the many disruptions caused by the coronavirus in the context of ICFR, reporting companies will also need to consider the potential increase in cybersecurity risk. The spread of the coronavirus, with the attendant uncertainty and internal changes to controls and reporting, is an ideal opportunity for cyber criminals to unleash phishing and other scams, whether as part of alerts purporting to provide updates on the spread of the virus or emails purporting to be from internal sources requesting changes in procedures (or wire transfers) on an emergency basis. Press reports already note a spike in suspicious emails seeking to exploit the coronavirus, including what appears to be emails coming from the World Health Organization. Malicious emails also may be used to spread panic among business partners, employees, vendors, suppliers and others.

As the SEC noted in the context of cybersecurity, it is critical that reporting companies take all required actions to inform the market about material risks and incidents in a timely fashion, and crucial to a company's ability to make required disclosures of risks and incidents in a timely manner are DCPs. DCPs must provide an appropriate means of discerning the impact of significant risks on the business, financial condition and results of operations, and a "protocol" for assessing materiality. To the extent a reporting company suffers a cybersecurity breach, it will also need to consider its disclosure obligations in respect of that incident.

Market Updates

In light of the recent spread of the coronavirus beyond China, a number of reporting companies that issued earnings releases in the past few weeks (as part of their regularly scheduled earnings updates) are assessing whether previously issued guidance now needs to be revised. An increasing number of reporting companies are disclosing revisions to previously issued guidance or otherwise addressing in greater detail specific effects of the spread of the coronavirus on their businesses and operations. Some reporting companies may withdraw guidance and not provide any update due to the current level of uncertainty.

The SEC, in the Conditional Relief Release, suggests that reporting companies may need to consider whether previous disclosure needs to be revisited, refreshed or updated to the extent that prior disclosures have become materially inaccurate. It also has reminded reporting companies providing forward-looking information to keep the market informed of material developments, including known trends or uncertainties regarding the spread of the coronavirus, that they can take steps to avail themselves of the safe harbor under the PSLRA.

Regulation FD

U.S. reporting companies should be mindful of their obligations under Regulation FD. Shareholders and analysts will be keen to understand as much as they can, and in the crucible of a fast moving crisis things may be said that, in fact, constitute material non-public information, the disclosure of which may constitute

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selective disclosure for purposes of Regulation FD. In the Conditional Relief Release, the SEC has reminded reporting companies of their obligations in respect of selective disclosure.

While the SEC has for some time recognized social media as an appropriate method for U.S. reporting companies to announce key information in compliance with Regulation FD, use of social media for this purpose has its limitations. All reporting companies should also remind employees of their social media policies as statements could well be attributed to companies and their managements for liability purposes.

Restrictions on Trading

Officers, directors and other corporate insiders should be mindful of applicable restrictions on trading in connection with developments related to the coronavirus. Recent market conditions have presented opportunities for corporate share buybacks and individual purchases by officers and directors, and many companies and individuals are taking advantage of these opportunities. While the coronavirus is common knowledge, its evolving impact on a particular company may constitute material non-public information. As a result, any trading activity – whether involving share purchases or sales of shares, including in the case of employees following option exercises, and whether or not occurring during an open trading window – should be carefully evaluated to ensure that the company or individual is not in possession of material non-public information (and otherwise complies with applicable rules).

The SEC, in the Conditional Relief Release, reminds reporting companies that, if they have become aware of a risk related to the coronavirus that would be material to investors, they should refrain from engaging in securities transactions with the public and should take steps to prevent directors and officers (and other insiders) from trading until the material risks have been disclosed. This reminder is particularly important in light of the fact that corporate securities trading policies tend to tie trading windows to the release of earnings and that reporting companies, under the Order, may delay SEC filings for up to 45 days.

The Role of the Board

Directors of reporting companies should remain mindful that the SEC is of the view that Item 407(h) of Regulation S-K and Item 7 of Schedule 14A require disclosure of a board's role in risk oversight. The SEC has, from time to time, highlighted that this disclosure is intended to provide investors with information about the role of the board, and the relationship between the board and senior management, in managing material risks. The SEC also has said that where a matter presents a material risk to the business, disclosure should address the nature of the board's role in overseeing the management of that risk. The SEC has noted this most recently in the context of cybersecurity, and since then has suggested that this principle could apply to other areas where reporting companies face emerging or uncertain risks and that the cybersecurity guidance may well be useful when preparing disclosures about other similar themes. The SEC specifically had sustainability in mind, but this applies equally to the spread of the coronavirus.

Conditional Relief

In recognition of the fact that the effects of the coronavirus may present challenges for certain reporting companies to timely meet their SEC filing obligations, the SEC has issued the Order that, subject to certain conditions, provides reporting companies with an additional 45 days to file certain reports, schedules and forms that otherwise would have been due between March 1 and April 30, 2020. The SEC has indicated it may extend the time for the relief or provide additional relief as circumstances warrant. In the absence of the relief, reporting companies would have been subject to existing deadlines and otherwise would have been

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able to avail themselves of a 15-calendar day extension for annual reports (on Form 10-K, Form 20-F or Form 11-K) or a five-calendar day extension for quarterly reports (on Form 10-Q), in each case by relying on Rule 12b-25 under the Securities Exchange Act of 1934 (the "Exchange Act").

To take advantage of the relief, a reporting company must be unable to meet a filing deadline due to circumstances related to the coronavirus and must furnish a Form 8-K or, if eligible, a Form 6-K by the later of March 16 and the original filing deadline, which:

- States that the reporting company is relying on the Order
- Provides a brief description of the reasons why the reporting company is unable to file the report, schedule or form on a timely basis
- Discloses the estimated date by which the report, schedule or form is expected to be filed –and–
- Provides, if appropriate, a risk factor explaining, if material, the impact of the coronavirus on the reporting company's business

If the reason the report cannot be filed timely relates to the inability of any person, other than the reporting company, to furnish any required opinion, report or certification, the Form 8-K or Form 6-K must have attached as an exhibit a statement signed by such person stating the specific reasons why such person is unable to furnish the required opinion, report or certification on or before the date such report must be filed.

The delayed filing must be made no later than 45 days after the original due date. The filing when made must disclose that the reporting company is relying on the Order and must state the reasons why it could not file the report, schedule or form on a timely basis.

The Order also provides relief from the requirement to make available a proxy statement, annual report and other soliciting materials (Soliciting Materials) or to furnish an information statement and annual report (Information Materials), in each case under the Exchange Act, provided:

- The reporting company's securityholder has a mailing address in an area where, as a result of the coronavirus, common carriers have suspended delivery service of the type or class customarily used by the reporting company or other person making the solicitation –and–
- The reporting company or other person making a solicitation has made a good faith effort to furnish the Soliciting Materials to the securityholder, as required by the rules applicable to the particular method of delivering Soliciting Materials to the securityholder or, in the case of Information Materials, the registrant has made a good faith effort to furnish the Information Materials to the securityholder in accordance with the rules applicable to Information Materials.

The Conditional Relief Release sets forth various Staff positions regarding eligibility to use Form S-3 (and well-known seasoned issuer status) and Form S-8 eligibility (and the current public information eligibility requirement of Rule 144(c)), in each case if the reporting company is current as of the first day of the relief period and it files any report due during the relief period within 45 days of the filing deadline of the report. The Conditional Relief Release also states that reporting companies relying on the Order will be deemed to have a due date 45 days after the original filing deadline for an annual or quarterly report and, as such, will be permitted to rely on Rule 12b-25 if they are unable to file the annual or quarterly report on or before the extended due date.

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The SEC has indicated in the Conditional Relief Release that reporting companies facing administrative or other challenges in complying with their obligations under the securities laws by reason of the coronavirus should contact the Staff, which will address issues raised on a case-by-basis “in light of their fact-specific nature.” Staff members have reiterated in various conversations with us that the Staff stands ready to provide assistance where possible.

Looking Ahead

The Staff is on record as monitoring the effects of the coronavirus. Staff statements have been made largely in the context of a willingness to provide guidance and other assistance to reporting companies. The Order is one example of that willingness. At the same time, the Staff has been clear in reminding reporting companies of their ongoing disclosure obligations and the importance of internal processes. In the Conditional Relief Release, Chairman Clayton states:

We also remind all companies to provide investors with insight regarding their assessment of, and plans for addressing, material risks to their business and operations resulting from the coronavirus to the fullest extent practicable to keep investors and markets informed of material developments. How companies plan and respond to the events as they unfold can be material to an investment decision, and I urge companies to work with their audit committees and auditors to ensure that their financial reporting, auditing and review processes are as robust as practicable in light of the circumstances in meeting the applicable requirements.

This is a useful reminder of the importance of transparency, accuracy and precision of public disclosure and of maintaining proper internal controls. A critical component of these efforts will be internal coordination to ensure that all of the dots are connected.

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Diagnosing and Treating Coronavirus Risks in M&A Transactions

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Novel coronavirus (COVID-19) continues to dominate headlines as confirmed cases of the virus escalate. As of March 2, 2020, the World Health Organization reported over 80,100 confirmed cases of the disease in China, and roughly another 8,800 elsewhere. These developments have led global markets to decline precipitously, local economies to suffer, and governments to take dramatic steps to protect against the spread of the virus turning into a pandemic. Factory, school, and office closures; quarantine and stay-at-home orders; travel and transport restrictions; and other measures have been introduced around the world and will inevitably expand as more nations report COVID-19 cases. These steps have significant consequences on businesses across industries by reducing consumer spending, creating disruption to supply chains and workforces, and decreasing energy demand. The full effect of COVID-19 on global M&A activity will not be known for some time, but as buyers and sellers continue to diligence businesses and negotiate transactions, they can take certain steps to protect against risks introduced by this outbreak. This article seeks to help parties navigate such issues in the context of M&A transactions. While these issues are most acute when the target business is based or has significant operations in Asia, as COVID-19 continues to spread globally, so too will the relevance of the issues discussed below.

Due Diligence

Many offices and factories in the communities most affected by the coronavirus epidemic largely remain closed or limited in operation. Combined with significant travel restrictions and quarantine measures, in-person management presentations and site visits have become challenging or impossible, especially in the hardest hit areas. Transaction parties will need to adjust expectations and timetables accordingly. Due diligence and electronic meetings, however, can continue to proceed thanks to the proliferation of virtual data rooms and video conferencing.

Buyers should ensure their diligence on the target business extends to:

- Existing insurance policies and their coverage, including business interruption policies and the nature and extent of stopgap health and disability coverage related to the target's welfare plans for employees
- The effectiveness and use of business continuity plans and crisis management procedures
- Supply chain risk and the availability of, and costs associated with, utilizing alternative sources of supply
- Exposure of the business (including its key counterparties, suppliers, and customers) to jurisdictions highly impacted by the coronavirus epidemic

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- Regulatory, licensing, and data privacy implications as a result of remote working arrangements, particularly in certain industries (e.g., financial services)
- The effectiveness of any risk protocols in place for dealing with unwell or higher risk employees, the communication and implementation of health and safety procedures within the workplace, adequate compliance with relevant government health guidelines, and the possible impact of travel bans for highly mobile or immigration dependent workforces
- The legal basis under privacy laws, particularly the GDPR in the EU/UK, to process health data on employees, visitors, and customers and whether privacy notices cover processing for COVID-19 purposes
- Solvency or going concern risk and the ability to service debt (especially where high-yield debt may be in place) –and–
- The ability of the target business or its counterparties to perform, suspend, or walk away from obligations under material contracts, including exercising force majeure or similar provisions—in particular, investigating scenarios where the nonperformance by the target’s counterparty has the consequence of causing the target to breach its obligations under other contracts

Sellers should be prepared for buyer sensitivity to these issues and preemptively prepare information on the current and expected future impact of the coronavirus outbreak on the target business and relevant mitigation efforts. Sellers should also be prepared to manage due diligence expectations and be prepared and organized, including making use of third-party advisor resources to help manage the due diligence process. The effects of the coronavirus outbreak are likely to have an impact on various aspects of the target (or seller) businesses resulting in management time and attention being diverted away from the relevant transaction.

Price and Consideration

The uncertainty around the short- and long-term impact of the virus on businesses can make valuations challenging. Because the outbreak is likely to have a negative effect on revenue and earnings forecasts, and deals are commonly priced on the basis of revenue or earnings expectations, certain buyers may be tempted to take advantage of the outbreak to secure more favorable pricing. On the other hand, because the outbreak’s effects are still unknown and may be short-term, sellers are likely to resist such attempts and take the position that the effects and duration of the outbreak are atypical and business fundamentals are unaffected. How negotiations will unfold on this issue is yet to be seen, but largely will be a function of several factors, including the negotiating leverage a party has relative to its counterparty in any particular transaction and the ultimate scope, reach, and duration of the outbreak.

Buyers should consider whether locked-box and fixed pricing carries too much risk in this environment. In this regard, a trend may develop toward post-closing purchase price adjustment mechanics to ensure that the purchase price paid reflects the state of the target business as of the closing (i.e., that it reflects any deterioration of the target business between signing and closing). Buyers may also consider structuring the purchase price through deferred or staggered consideration payments that are contingent on the performance of the business post-closing in line with agreed targets. If a deal involves post-closing deferred payments, sellers should insist on adequate audit and information rights and post-closing covenants from the buyer to ensure that the new owners conduct the target business optimally post-closing. Given the highly public nature of the coronavirus outbreak, however, sellers may instead prefer to resist these types of purchase price adjustment and payment mechanics altogether on the premise that COVID-19 is a well-known market risk at this time that should be borne by buyers.

Diagnosing and Treating Coronavirus Risks in M&A Transactions

COVID-19 will continue to impact the revenue and solvency of businesses in certain industries and, of course, in affected jurisdictions. This, in turn, may adversely affect the cash reserves and ability of certain trade buyers to obtain acquisition financing. Sellers should be cognizant of the credit risk of their counterparties and should undertake due diligence on the financial viability of buyers and also consider the use of structures such as escrow arrangements, parent company guarantees and termination fees to reduce the risk of buyers defaulting on their payment obligations under acquisition agreements. Sellers should also carefully review all acquisition financing documents, including all side letters, in order to make sure that the coronavirus risk is not treated differently than in the acquisition documents themselves.

Material Adverse Change

Buyers would be well-served to insist on material adverse change (MAC) clauses that capture COVID-19 and other pandemic or epidemic risks to give them the ability to terminate and walk away from an agreed transaction if the situation continues to materially worsen. These clauses are heavily negotiated, however, and buyers should expect strong pushback from sellers on the basis that the coronavirus risk has been broadly publicized and is well known to market participants. Parties may, however, be able to compromise so that situations where the impact of the coronavirus on the target business is disproportionate to other businesses in the same industry or jurisdiction, or where there is a disproportionate impact of the coronavirus on specific important contracts, would trigger the MAC clause. MAC clauses with these compromise formulations (i.e., specifically picking up the effects of the COVID-19 outbreak to the extent disproportionately impactful on the target business relative to other industry participants) have begun to appear in acquisition agreements.

Outside Dates

Most acquisition agreements include a “drop-dead date,” “outside date,” or “long stop date” provision that enables termination of the agreement if the transaction has not closed by a specified date. Even though some governments and regulators are publicizing that their operations are business as usual, the reality is that office closures, working from home arrangements, and dislocation of employees means that parties should expect governmental and regulatory approvals and other change of control approvals or third-party consents to take longer than normal in the countries affected by the outbreak of the coronavirus. Given that due diligence and in-person meetings are increasingly being delayed or have become impossible, and credit markets have begun to tighten quickly, it is likely that financing may become more difficult and take longer than would otherwise be customary. In light of all of the foregoing, parties should adjust outside dates accordingly. Given the fast-changing environment, longer periods between signing and closing of a transaction will mean greater risk on the operations of target businesses and buyers should be alert to this when negotiating clauses such as purchase price mechanisms and MAC clauses (each described above), as well as the scope and granularity of interim operating covenants (described below). Parties should consider including automatic extensions of outside dates where the only unsatisfied conditions precedent are in highly affected jurisdictions (e.g., Chinese regulatory approval), but only if the relevant party has used, and continues to use, appropriate efforts to satisfy the relevant conditions.

Interim Operating (and Other Operating) Covenants

Between the signing and closing of a transaction, buyers generally want sellers to operate the target business in the ordinary course to protect the value of the business they committed to purchase and want to be consulted (and their consent obtained) on a variety of material or non-ordinary course matters. On the other hand, sellers continue to own the target business until closing and, particularly if the transaction has been priced under a post-closing adjustment mechanism, sellers will continue to take pricing risk on the business

Diagnosing and Treating Coronavirus Risks in M&A Transactions

during the applicable measuring period. Sellers will therefore want to retain the authority to take the steps they feel necessary to operate the business during the sign-to-close period with minimum oversight and interference by the buyer, as well as rights over the operation of the business during any post-closing adjustment period. The uncertainty associated with the coronavirus outbreak means that sellers should insist on being able to (and buyers should be amenable to allowing them to) respond quickly to the coronavirus threat in order to protect their workforce, comply with legal or public health requirements and orders and undertake other activities that may be deemed necessary or prudent in this environment. In this regard, it may be beneficial for sellers to review their coronavirus contingency plan with a buyer prior to signing the acquisition agreement to obtain pre-approval for activities outlined in the plan.

Representations and Warranties

Buyers should consider seeking additional representations and warranties relating to the target business's emergency protocols, contingency planning, business continuity processes, and other similar matters that are critical in this environment. If sellers are willing to agree to such expanded representation and warranty coverage, it is fair for them to seek appropriate knowledge, materiality, and "subject to law" qualifiers, to resist forward-looking representations and warranties, and to insist on appropriate "bring-down" standards at closing. Sellers should also consider ring-fencing their representations and warranties to protect against buyers having the ability to make coronavirus-related claims across the entire suite of representations and warranties. In addition, sellers should disclose as much as possible in the disclosure schedules about the impact or potential impact of the coronavirus on the target business and its effects or potential effects to ensure adequate defenses in the event of a claim. If parties are considering utilizing representations and warranties insurance, they should pay close attention to the policy exclusions—since coronavirus is a known risk, some insurers have started to specifically exclude coronavirus-related losses from their policy coverage.

Choice of Governing Law

Finally, buyers and sellers should be thoughtful and deliberate in selecting the governing law applicable to their contracts. While a full accounting of the differences among various jurisdictions is beyond the scope of this article, it is worth noting that the laws of many U.S. jurisdictions will deal with the interpretation and enforcement of contractual clauses (e.g., MAC clauses) differently than the laws of other jurisdictions (including those of China, Hong Kong, England, and Singapore, for example). Ultimately, it is likely that no jurisdiction is entirely seller-favorable or buyer-favorable in the context of contractual issues arising from the coronavirus outbreak, so parties will need to take the good with the bad.

This is a rapidly evolving situation, and Sidley's global team of M&A and Private Equity lawyers based in Asia, the U.S. and Europe are ideally positioned to help you address and mitigate the risks posed by the coronavirus and ensure you are appropriately protected and informed.

[Cybersecurity and COVID-19](#)

Practical Guidance

Created on: 04/02/2020

This practice note discusses cybersecurity measures to be taken by companies in view of the COVID-19 pandemic. In particular, it sets out a summary of the challenges of working from home and the rise in cybersecurity crimes as a result of those seeking to exploit the anxiety caused by COVID-19. It also provides a summary of the most common types of cyber attacks, and considerations for the workplace in order to reduce the risk of a cyber attack or breach.

For further information on cybersecurity, see the practice notes: [Cybersecurity Fundamentals](#), [Cybersecurity Legal Framework \(Canada\)](#), [Employee Training in Cybersecurity](#) and the checklists: Cybersecurity Due Diligence Checklist and [Cybersecurity Risk Mitigation Checklist](#). For further information on cyber insurance, see the practice note: [Cyber Insurance Coverage](#), and the checklists: [Cyber Insurance Checklist](#) and Cyber Insurance Coverage Checklist. For information on cyber breaches, see the practice notes: [Cyber Breach Incident Management](#) and [Cyber-Incident Response and Law Enforcement](#), and the checklist: [Cybersecurity Incident Response Plan Checklist](#).

One of the results of the COVID-19 pandemic is that many employees are now required to work from home. The work from home environment may be familiar to some, but for others, working from home is new and brings forth new cybersecurity and physical security challenges.

In particular, working from home increases the likelihood that company devices could be misplaced or stolen (home locations are not as secure as office buildings with security personnel for example). Further, employees are using computers and other devices that are not protected by a company's firewalls, and other controls. Employees may also be using unsecured wi-fi connections that are vulnerable to attack.

Executives working from home also increases the likelihood of fraud given that it may be more difficult to implement financial controls. For example, the collection of signatures to approve transactions becomes more difficult. For information on electronic signatures, please see the practice notes: [Electronic Signatures](#) and [Security and Encryption of Electronic Signatures](#).

Common Types of Cyber Attacks

There are a number of weapons that are used by cyber criminals to commit cybercrimes, including the following:

- 1 **Malware.** This is one of the most common ways of damaging or infiltrating a computer and often comes in the form of a link or file over e-mail that the user is requested to open. Malware is malicious

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software that infects the user's computer. The result can be the altering or deletion of files, stealing sensitive information or sending e-mails on the user's behalf.

- **Phishing.** The use of fake e-mail or websites that mask official companies. The scheme tricks the user into providing information by requesting the user to update or confirm an account. It provides the cyber criminal with personal information such as username and passwords and they are then able to access bank accounts, credit card numbers, *etc.*
- **Ransomware.** A type of malware that restricts access to computers or files and demands payment in order to have the restriction removed. They often appear in the form of pop-up advertisements on websites.
- **Trojans.** A program that is disguised as legitimate software and takes control of a computer. The purpose of the Trojan may be to gather data to be sold to another organization or to gather personal information or credit card information. A Trojan may appear on a social media site and announce that users can enter sweepstakes by running "sweepstakes.exe" to get started. It may also appear as an instant message or e-mail.
- **Worms.** A worm is a self-replicating program that can copy and spread. Worms can delete files, send documents by e-mail, spam or slow down networks. Worms can show up as an attachment in spam e-mails or instant messages. Worms can steal data and allow hackers to gain control over a user's computer.

COVID-19 Cyber Attacks

A number of organizations are reporting specific attacks targeting individuals seeking information with respect to COVID-19. The Canadian Centre for Cyber Security reports seeing an increase in the use of COVID-19 in phishing campaigns and malware scams.

[IT World Canada](#) has noted that one of the e-mails scams is aimed specifically at Canadians and the message indicates "Canadian Prime Minister Justin Trudeau approved an immediate check of \$2,500 for those who choose to stay at home during the Coronavirus crisis. Here is the form for the request. Please fill it out and submit it." The attachment file is called "Covid19 relief.doc". Anyone clicking on the attachment has their device infected.

President's Choice Services Inc. also sent an e-mail to subscribers notifying them that members reported receiving fraudulent phishing texts allegedly from PC Optimum about COVID-19.

Other scams include e-mails that appear to be coming from a company's IT team asking individuals to click on a link to register for a COVID-19 seminar, and fake COVID-19 outbreak maps.

Workplace Cybersecurity Considerations

Given that many employees (if not most) are now working from home in less secure environments, and given that cybercriminals are actively seeking to exploit individuals based on their fears of COVID-19, there is an increase in the likelihood of the loss of corporate data and an increased risk of privacy breaches. As such, it is important for companies to consider the following:

- Make sure employees are aware of company policies governing device use and security. See the precedents: [Bring Your Own Device \(BYOD\) Policy](#), [Telework Agreement](#), [Technology Use Policy](#), [Social Media Policy \(General\)](#) and [Social Media Corporate Policy](#).

Cybersecurity and COVID-19

- A Virtual Private Network (“VPN”) should be used to ensure remote connections are secure. The VPN will provide a direct connection to the company’s computer applications. The applicable VPN networks should be vetted by the IT department and the company should also confirm that the current VPN can handle any excess bandwidth.
- The network access logs should have regular audits to determine whether there are unusual patterns in access.
- Look into cyber liability insurance. The costs of a data breach can be very costly or even crippling for small businesses. See the practice note: [Cyber Insurance Coverage](#) and the checklists: [Cyber Insurance Checklist](#) and Cyber Insurance Coverage Checklist.
- Remote workers must be able to quickly contact IT for advice and IT contact information should therefore be readily available.
- Employees should be reminded about using work devices for work purposes only and limit online shopping and other personal activities to personal devices.
- Work should be backed up frequently.
- Consider setting up employees with a password manager to track the use of passwords and encouraging the use of unique and complex passwords.
- Individuals working from home should keep their computers updated with the latest software patches. IT teams should keep in touch to make sure patches continue and program updates are available. Software is regularly updated by vendors to address any weaknesses. Employees should be reminded that updates often occur at night and therefore computers should be turned off in the evening after use.
- Employees should also be reminded of physical security measures with respect to technology including reminders not to leave computers or devices in vehicles unattended, and not to lose or misplace thumb drives.
- Remind employees to shred any potentially confidential information that is in a printed format.
- Financial transactions should be monitored carefully to ensure proper signatures are obtained.
- Encourage employees to take caution with respect to e-mail and attachments. In particular:
 - Be cautious if the e-mail tone is urgent.
 - Don’t click on unsolicited e-mail attachments. Most valid e-mails, for example government communications, do not include attachments.
 - If an e-mail is received from a known contact but an attachment is unexpected, the sender should be called to confirm the attachment is legitimate prior to opening.
- With respect to websites, the following should be reinforced:
 - Prior to clicking on hyperlinks, hover over the link to confirm it goes to an official website.
 - Type the URL in the search bar instead of clicking on the link provided.
 - Pop-up windows should not be clicked on.
- Remind employees to think carefully about letting family and friends use a computer that’s also now used for work.
- Develop an incident response plan that addresses internal processes that will be engaged in response to a breach. See the practice note: [Cyber Breach Incident Management](#).

Cybersecurity and COVID-19

- Employees should be encouraged to call IT immediately if they notice anything suspicious so that any damage can be mitigated. For example, if malware is installed on an employee's computer IT can run anti-malware in an attempt to mitigate damage.

COVID-19 Specific Cyber Considerations

With respect to COVID-19 employees should be extra vigilant and treat the following with caution:

- Any website that starts with the word "Covid" or "Coronavirus".
- E-mails claiming to come from the government or healthcare company. For example, the use of "ontariohealth" followed by random letters in the sender's e-mail address. It should be noted that any official government e-mails have an appropriate address that ends for example in "Canada.ca".
- Unsolicited e-mails or texts asking for urgent payment, including supposed charities requesting money for COVID-19 victims or products.
- E-mails offering miracle testing or cures for COVID-19.
- Fake ads offering products that are difficult to obtain such as toilet paper, hand sanitizers, or cleaning products.

For further information, see the practice note: [Employee Training in Cybersecurity](#) and the checklists: [Cybersecurity Due Diligence Checklist](#) and [Cybersecurity Risk Mitigation Checklist](#).

In Summary

The COVID-19 pandemic is a reminder to companies of the importance of having a strong cybersecurity program in place. Breaches in cybersecurity could result in time loss and significant financial harm to the company. While companies and employees are distracted in the face of the epidemic it is more than ever important to ensure employees are following safety protocols with respect to IT and reporting incidents promptly.

Other Resources:

- The Canadian Government has a [Get Cyber Safe](#) site designed to help Canadians be aware and safe online.
- The Government of Canada's [Anti-Fraud Centre](#) also publishes a list of threats, including information regarding COVID-19 fraud specifically.
- The Canadian Centre for Cyber Security has issued a publication on [Cyber Hygiene for COVID-19](#) and publishes [alerts](#) on potential or actual threats.
- LawPro's practicePRO [guidance](#) document contains tips on how to work from home safely.

Canadian Intellectual Property Office COVID-19 Update

Practical Guidance

Current as of: *04/30/2020*

This practice note discusses the practices of the Canadian Intellectual Property Office (“CIPO”) during the COVID-19 pandemic, and in particular discusses the granting of extensions of time.

For further information on COVID-19 legal implications, see the practice note [Coronavirus \(COVID-19\) Guidance](#).

CIPO announced an extension of all deadlines under the *Trademarks Act*, [R.S.C. 1985, c. T-13](#); the *Patent Act*, [R.S.C. 1985, c. P-4](#); and the *Industrial Design Act*, [R.S.C. 1985, c. I-9](#), for all deadlines falling between March 16 and March 31. This was subsequently extended to end on May 19th. All deadlines falling within March 16 to May 15 have been automatically extended to May 19, 2020.

CIPO has also indicated that its document dissemination service has resumed full service but delays should be expected.

For further information, see CIPO’s [website](#) which also has guidance for managing your business during the COVID-19 outbreak.

End of Document

Government Emergency Patent Use COVID-19

Practical Guidance

Created on: 03/31/2020

This practice note discusses the passing of [Bill C-13](#), An Act respecting certain measures in response to COVID-19. This legislation amends the *Patent Act*, [R.S.C. 1985, c. P-4](#), to allow for the Canadian government to use patented inventions for the purposes of COVID-19 emergencies between now and September 30, 2020.

For further information on COVID-19 legal implications, see the practice note [Coronavirus \(COVID-19\) Guidance](#).

The Federal Government passed Bill C-13 on March 24th, 2020 in order to permit the Government to use Canadian patents to deal with the health emergency caused by COVID-19. In particular, the legislation amends s. [19](#) of the *Patent Act* as follows:

Patent Act

51 The *Patent Act* is amended by adding the following after section 19.3: Application by Minister

19.4 (1) The Commissioner shall, on the application of the Minister of Health, authorize the Government of Canada and any person specified in the application to make, construct, use and sell a patented invention to the extent necessary to respond to the public health emergency described in the application.

The application must set out the name of the patentee and patent number, include a confirmation that the Chief Public Health Officer believes there is a public health emergency, describe the emergency and specify a person that is authorized to make, construct, use and sell the patented invention.

The Government is also required to pay the patentee a royalty that is considered adequate in the circumstances, taking into account the value of the authorization and the extent that the patented invention is used.

Interestingly, the legislation also notes that the use of the patented invention is not an infringement (as opposed to being an exception to patent infringement).

Coronavirus (COVID-19) Impact on Borrowers and Lenders

Practical Guidance

Created on: 04/02/2020

The novel coronavirus (COVID-19) has battered global markets as many industries grapple with weaker demand and an uncertain outlook. In turn, borrowers and lenders may find themselves navigating credit documentation that did not anticipate such a drastic downturn, leaving forecasted cash flow (which lenders counted on for repayment) lower than the reality. While credit documentation may not specifically address a global outbreak, it will put pressure on certain provisions of a credit agreement. This practice note reviews key considerations for borrowers and lenders addressing the COVID-19 pandemic.

Borrower Considerations

- Borrowers should review the financial covenants (see [Financial Covenants](#)) in their debt documents to assess their ability to comply with certain financial thresholds. For example, a borrower with lower [EBITDA](#) may have unexpected difficulty complying with their financial covenants.
- Borrowers with revolving facilities (see [Revolving and Non-Revolving Loans](#)) may also question whether they can bring down their “material adverse change” (see [Material Adverse Change Definitions](#)) representation and warranty.
- Changes in the borrower’s circumstances or the credit market, such as those triggered by COVID-19, may prompt the borrower to request relief from the terms of the credit agreement.
 - Borrowers should review the amendments (see [Amendments and Lender Voting Rights Issues in Credit Agreements](#)) section of their debt documents to see what level of lender consent is necessary.
 - For most amendments, the vote of lenders holding greater than 66 2/3% of the sum of unused commitments and outstanding loans under a credit agreement is required.
 - In addition, borrowers should look in the “defaulting lender” section to see if their credit agreement has yank-a-bank provisions, which would allow the replacement of a lender that does not agree to certain types of amendments.
 - Finally, borrowers should check the intercreditor agreement (if applicable) (see [Intercreditor Agreements](#)), as credit groups are sometimes restricted from making certain amendments without the consent of other tranches.
- In lieu of an amendment, lenders might agree to a consent or waiver (see [Waiver and Consent Requests](#)). The underlying purpose of the consent or waiver is often the same as an amendment. The level of lender approval may be the same as for amendments, and the conditions may be the same. However, certain consents may require only the approval of the administrative agent.

For additional considerations businesses should address due to the COVID-19 pandemic, please see the

Coronavirus (COVID-19) Impact on Borrowers and Lenders

[COVID-19: Business Considerations Checklist.](#)

Lender Considerations

- Lenders should review their loan portfolio to determine their overall risk exposure.
- The impacts of COVID-19 will likely threaten borrower's ability to repay the loans as and when due. While in normal situations lenders are often unwilling to provide borrowers with a grace period for late payments of principal on the loans, lenders may need to work with borrowers to provide grace periods for late payments of interest and other relief.
- Most loan agreements include a mechanism under which a lender can, if it chooses, take certain actions if the borrower breaches the loan agreement or certain other events occur. The events that allow the lender to take such action are normally specifically set in the credit agreement and are referred to as "events of default" (see [Event of Default Provisions](#)).
- If there is an event of default that is continuing, the lender will normally be allowed to take any or all of the following actions:
 - cancel its commitments;
 - declare all or part of the loans to be payable on demand;
 - declare all or part of the loans to be immediately due and payable; and
 - enforce any security.
- Additionally, there may be a number of other consequences that occur automatically during the continuance of an event of default. Such provisions may include the following:
 - the default rate immediately applies to all outstanding loans;
 - conditions to the lenders' ability to make certain inspections of the borrower and its operations, or to require certain information to be provided or certain actions to be taken by the borrower, will be relaxed;
 - certain privileges of the borrower, such as the ability to reinvest the proceeds of dispositions rather than apply them to mandatory prepayments of the loans, or to requests increases in the commitments or extensions of the maturity date, are temporarily cancelled; and
 - some of the exceptions to the credit agreement's negative covenants are temporarily inapplicable (for example, a borrower may be unable to make certain voluntary restricted payments and may be unable to enter into certain transactions or to make certain investments).
- Financial covenant (see [Financial Covenants](#)) defaults are usually automatic events of default. However, lenders will need to determine whether covenant holidays are appropriate. Borrowers frequently seek to amend their loan documents for covenant relief.
- Lenders should seek to make the exceptions and relief as narrowly tailored as possible (both in scope and term).
- A lender should consider its legal and commercial position before responding to any amendment (see [Amendments and Lender Voting Rights Issues in Credit Agreements](#)) request from the borrower. In particular:
 - The lender should seek legal advice on the proposed amendments and how they should be documented sooner rather than later. In particular, most cross-border transactions require legal advice from local law firms; this is a process that is likely to take a considerable amount of time.

Coronavirus (COVID-19) Impact on Borrowers and Lenders

o The lender may need further information from the borrower to consider the requested amendment. Oftentimes the lender must respond to the borrower within a certain period of time, so any further information required should be requested as soon as possible.

o In some cases, the lender will require internal credit approval for the proposed amendments. The borrower should factor this into its timetable. Whether or not credit approval is required depends on the nature of the amendments. For example, credit approval will likely be required for fundamental changes to the commercial rationale behind the transaction and for issues which were discussed or approved at credit committee at the start of the transaction.

- In lieu of an amendment, lenders might agree to a consent or waiver (see [Borrower Considerations](#) above).
- If the borrower is creditworthy, a lender might decide to grant a waiver with a view to getting it back on its feet.
- Ultimately, a credit agreement default may cross-default (see [Cross-Default vs. Cross-Acceleration in Credit Agreements](#)) the borrower's other indebtedness, which may affect the borrower's contractual relationships with its key customers and vendors, or at least make them apprehensive about the borrower's financial condition. Therefore, it is often in the lender's best interest to find a quick resolution with the borrower following a default, especially in light of the impacts of COVID-19 on the business community.

Event of Default Provisions

Reviewed on: *01/23/2020*

Introduction

The events of default section of a credit agreement sets forth the events or circumstances that the lenders believe will threaten the borrower's ability to repay the loans as and when due. Serious breaches such as not meeting payment obligations or breaching financial covenants may indicate that the borrower is in financial difficulty and urgent action may be needed if the lender is to protect its investment. Some events of default merely indicate that the borrower's financial situation has deteriorated or it has decreased its likelihood of repaying the loans, and in any case, the event or events that have transpired are serious enough that the lenders have the option at that time to determine whether they want to enforce the remedies available to them under the loan documents or at law.

Most loan agreements include a mechanism under which a lender can, if it chooses, take certain actions if the borrower breaches the loan agreement or certain other events occur. The events that allow the lender to take such action are normally specifically set out in the credit agreement and are referred to as "events of default".

An event of default is "continuing" when it is not cured by the borrower or waived by the requisite percentage of lenders. Almost all credit agreements contain a provision that provides that upon an occurrence and during the continuation of an event of default, the lender's obligation to make additional credit extensions will be suspended. If there is an event of default that is continuing, the lender will normally be allowed to take any or all of the following actions:

- cancel its commitments;
- declare all or part of the loans to be payable on demand;
- declare all or part of the loans to be immediately due and payable; and
- enforce any security.

Additionally, there may be a number of other consequences that occur automatically during the continuance of an event of default. Such provisions may include the following:

- the default rate immediately applies to all outstanding loans;
- conditions to the lenders' ability to make certain inspections of the borrower and its operations, or to require certain information to be provided or certain actions to be taken by the borrower, will be relaxed;

Event of Default Provisions

- certain privileges of the borrower, such as the ability to reinvest the proceeds of dispositions rather than apply them to mandatory prepayments of the loans, or to requests increases in the commitments or extensions of the maturity date, are temporarily cancelled; and
- some of the exceptions to the credit agreement's negative covenants are temporarily inapplicable (for example, a borrower may be unable to make certain voluntary restricted payments and may be unable to enter into certain transactions or to make certain investments).

Common Events of Default

Common negotiation points are dealt with in the discussion in the specific events of default set out below. Generally, however, the borrower's lawyers will attempt to introduce grace periods and materiality qualifications into the events of default in order to prevent an event of default being triggered by minor or remediable breaches.

The lender's lawyers will try to limit too much "watering down" of the events of default and in particular will want to guard against grace periods or materiality qualifications applying. This can happen where the obligation itself contains grace periods and/or materiality qualifications as well as the event of default. Some common types of events of default include:

Failure to Pay

Payment defaults are one of the most serious breaches of the borrower's obligations under the credit agreement. Failure to pay will cover non-payment of any amount under the loan documents when due, though the lender will normally permit a limited grace period in certain circumstances. Lenders are often unwilling to provide the borrower with a grace period for late payments of principal on the loans or for failure to reimburse a drawing under a letter of credit on the date when due. However, lenders sometimes agree to grace periods for late payments of interest and periodic fees payable.

Breach of Financial Covenants

Financial covenant defaults are also usually automatic events of default. The rationale for this is twofold. First, as with negative covenants, it is impossible to cure a financial covenant default since the financial tests are merely a reflection of borrower's financial performance over periods that have already passed. Second, a financial covenant default signals a serious deterioration of the borrower's financial performance. In fact, most financial covenants were modeled and set at levels to provide the borrower with a certain cushion prior to any default; accordingly, defaults lead to automatic events of default.

Bankruptcy or Other Insolvency Proceeding

The insolvency of the borrower or a guarantor is generally a non-negotiable event of default. What constitutes insolvency is generally specifically set out in the event of default and often includes:

- the borrower/guarantor being unable to pay its debts; and
- the value of the borrower's/guarantor's assets being less than its liabilities.

Event of Default Provisions

Unlawfulness and Repudiation

It is commonly an event of default if it becomes unlawful for the borrower or guarantors to perform their obligations under the finance documents. Unlawfulness for the lender is normally a mandatory prepayment event. The borrower may try to negotiate a materiality qualification into this event of default. This may particularly be the case with a large cross-border group where there could well be some changes in law during the life of the loan which, while affecting the group's compliance with the finance documents, in practice will have a minor effect.

Repudiation of a finance document (*i.e.*, a party effects a breach of contract that goes to the very core of the agreement by indicating that it does not intend to perform its obligations) is also normally an event of default.

Change of Control

A change in the ownership of the borrower that rises to the level of a “change of control” is generally considered an event of default. The exact definition of “change of control” varies according to the borrower and the credit agreement. However, a change of control typically occurs when a new entity obtains a 50% or greater interest in the borrower.

Cross-Default and Cross-Acceleration

The cross-default event of default is triggered if a third party creditor becomes entitled to demand early payment of amounts it has lent to, or is otherwise owed by, the borrower or guarantors as a result of an event of default under the relevant document.

Cross-default is important to the lender as:

- the lender will effectively get the benefit of any events of default that are not in the credit agreement but are in another agreement the borrower/guarantor is a party to;
- if there is an event of default under another loan agreement, the third party creditor will gain substantial leverage over the borrower which it may use in a way that is unfavourable to the lender – in this situation, the lender will want to ensure it has similar leverage; and
- it may provide an important indicator about the financial condition of the borrower/guarantor.

Common borrower concerns include:

- limiting the cross-default to borrowers and guarantors as opposed to the whole group;
- requesting a *de minimis* level of financial indebtedness below which the cross-default will not be triggered;
- requesting that the cancellation of any undrawn commitment should not be a cross-default, especially if it has no impact on the ability to pay debts as they fall due; and
- requesting that the cross-default is only triggered if the third party creditor actually accelerates its loan (commonly called “cross-acceleration”).

Event of Default Provisions

Other Common Events of Default

Other possible events of default include:

- the borrower changing its business or ceasing business;
- material litigation;
- misuse of funds;
- failure to provide notice of material events; and
- failure to provide annual and quarterly financial statements.

Example Events of Default Clauses

For examples of events of default clauses, see the precedent [Events of Default in a Loan Agreement](#).

End of Document

MAC Clauses

Reviewed on: *10/21/2019*

[Stephanie Robinson](#), BMO Financial Group and [David Thring](#), McMillan LLP

“Material adverse change” (“MAC”) clauses are found in various documents in an acquisition transaction.

In a commitment letter from a lender or an equity investor, a MAC clause may release the lender or the investor from its obligation to fund a transaction where, before closing, an adverse event occurs in the financial or capital markets generally (“market MAC”) or in the business of either the buyer or the target. Similarly, in an acquisition or purchase agreement, a MAC clause may release the buyer from its obligation to complete the purchase where an adverse event occurs in the business of the target. In a credit agreement, a MAC clause may be a specific event of default which gives the lender(s) the right to demand repayment upon the occurrence after closing of an adverse event affecting the business of the buyer and the target. By negotiating each relevant definition of “material adverse change”, the applicable parties allocate who bears the risk of unforeseeable and significant adverse events which may affect deal pricing, valuation and risk. Sellers usually favour a limited scope of MAC clauses with multiple exceptions to the definition of a material adverse change, while buyers, lenders and equity investors typically favour the broadest possible definition.

Here is a sample MAC definition: “[a]ny occurrence, change or event that has [or could reasonably be expected to have] a materially adverse effect on the business, assets, liabilities, condition (financial or otherwise), operations [or prospects] of the [borrower or target] and its subsidiaries [taken as a whole]”. When negotiating a seller-friendly version of a MAC clause in an acquisition agreement, the seller may request exceptions for changes in general macro-economic conditions (such as changes in interest rates, rates of exchange, etc.), or market-wide changes in the seller’s particular industry or sector (such as changes in the supply and pricing of raw materials), or force majeure type events or changes arising from the announcement of the sale transaction itself.

When negotiating a MAC clause in a credit agreement, the parties should consider the following:

- Determine whether the agreement refers to the actual occurrence of a MAC, which “has had” a material adverse effect (borrower friendly); or it refers to an event that “would” or “could reasonably be expected” to have a material adverse effect (lender friendly). Where it is not possible to define MAC in objective terms, typically a lender will insist that the occurrence be determined by the lender in its “sole discretion”.
- Consider whether the lender has knowledge of pre-existing circumstances that could affect the business of the borrower. Those circumstances should be clearly included in the MAC clause (lender friendly) so the lender can choose to rely on them with more certainty or alternatively be excluded from the MAC clause (borrower friendly).

MAC Clauses

- In order to provide a more precise definition of “materiality”, parties may include a specific monetary threshold to identify what constitutes “material”. In the absence of a specific dollar amount, “material” is generally considered to be a change significant enough to affect the valuation of the borrower and its assets.
- Avoid using boilerplate language and instead consider how the clause applies to each particular circumstance in which it is used.

End of Document

Courts Close in Response to COVID-19 Pandemic

Practical Guidance

Current as of: *05/05/2020*

This legal update discusses how the courts — the Ontario Small Claims Court, the Ontario Superior Court of Justice (handling civil, family and criminal matters), the Ontario Court of Appeal, Federal Court and the Supreme Court of Canada — have reacted to the COVID-19 worldwide pandemic.

While this practice note does not address other jurisdictions, bear in mind that courts in other provinces have taken similar measures to stop the spread of COVID-19, including suspending court hearings and adjourning matters. See, for example, the following notices in Alberta and British Columbia:

- Alberta Court of Queen's Bench notice, [COVID-19: Suspension of Sittings](#)
- Alberta Court of Appeal's [Notice: COVID-19](#)
- Provincial Court of Alberta's notice, [COVID-19 Pandemic Planning for the Scheduling of Matters](#)
- [Supreme Court of British Columbia Modified Proceedings](#)
- [Court of Appeal for British Columbia Modified Proceedings](#)
- Provincial Court of British Columbia's COVID-19: Suspension of Regular Court Operations, [COVID-19 \(March 19, 2020\)](#)

Ontario Small Claims Court

All sittings in the Ontario Small Claims Court are suspended effective March 16, 2020, until further notice. This includes trials, settlement conferences, motions, assessment hearings, garnishment hearings, contempt hearings and examinations, including teleconference and video conference hearings.

Currently, the courthouses will remain open and filings may continue at the courthouses. However, online filings are available.

For more information on small claims matters during the COVID-19 pandemic, see the [Notice Regarding the Suspension of Small Claims Court Sittings](#).

Ontario Superior Court of Justice

The Ontario Superior Court of Justice is suspending all regular operations, effective March 17, 2020, until further notice. All criminal, family and civil matters scheduled to be heard are adjourned. The court will continue to hear urgent matters during this emergency period.

Courts Close in Response to COVID-19 Pandemic

Pursuant to s. [7.0.1](#) of the *Emergency Management and Civil Protection Act*, [R.S.O. 1990, c. E.9](#), all limitation periods, both procedural and substantive, have been suspended indefinitely. The suspension is retroactive as of March 16, 2020.

For further information about the suspension, please see the Order in Council 518/2020 (or Ontario Regulation 50/20), linked [here](#).

At this time, the courthouses remain open and filings may continue to occur at courthouses.

Civil and Family Matters in the Superior Court of Justice

As noted above, all civil and family matters are adjourned until further notice. The court will hear any matters that it deems necessary and appropriate to hear on an urgent basis. Additionally, the court is prepared to hear the matters listed below.

Urgent and Emergency Civil Matters that will be Heard

The following matters related to public health and safety and COVID-19:

- applications by the Chief Medical Officer of Health for orders in relation to COVID-19;
- applications to restrain the contravention or continued contravention of an order made under the *Health Protection and Promotion Act*, [R.S.O. 1990, c. H.7](#);
- applications to enforce orders requiring the seizure of premises, medications or supplies under the *Health Protection and Promotion Act*;
- appeals under s. [35](#)(16) of the *Health Protection and Promotion Act*;
- urgent requests for injunctions related to COVID-19; and
- urgent Divisional Court appeals and requests for judicial review related to COVID-19.

Additionally, the court will hear urgent and time-sensitive motions and applications in civil and commercial list matters where immediate and significant financial repercussions may result if there is no judicial hearing.

The court will also handle outstanding warrants issued in relation to a Small Claims Court or Superior Court civil proceeding.

Urgent and Emergency Family Matters that will be Heard

The following family and child protection matters will continue to be heard:

- requests for urgent relief relating to the safety of a child or parent (e.g., a restraining order, other restrictions on contact between the parties or a party and a child, or exclusive possession of the home);
- urgent issues that must be determined relating to the well-being of a child including essential medical decisions or issues relating to the wrongful removal or retention of a child;

Courts Close in Response to COVID-19 Pandemic

- dire issues regarding the parties' financial circumstances including, for example, the need for a non-depletion order; and
- in a child protection case, all urgent or statutorily mandated events including the initial hearing after a child has been brought to a place of safety, and any other urgent motions or hearings.

Note that the court has discretion to decline to hear any of these matters, if appropriate.

Hearings may be conducted in writing, by teleconference, or video conference, unless the court determines that an in-person hearing is necessary.

For more details on the court's handling of criminal matters during the COVID-19 pandemic, see the court's [*Notice to the Profession, the Public and the Media Regarding Civil and Family Proceedings*](#).

On March 27, 2020, the Chief Justice of the Superior Court of Justice notified the legal community in Ontario, via letter, that the Superior Court of Justice will be expanding the scope of events that may be heard remotely. For further information, please see [*Notice to the Profession \(March 27, 2020\)*](#)

A further notice was provided to the legal community on April 2, 2020 that itemizes the court's plan for expanded virtual courts. Beginning April 6, 2020, remote hearings have been expanded to include matters in addition to "urgent" matters.

The complete list of civil and family matters that may be heard in each region is contained in region-specific Notices to the Profession, issued April 2, 2020, which include the process to seek a hearing, and are as follows:

- Central East Region ([*civil*](#), [*family*](#))
- [*Central South Region*](#)
- [*Central West Region*](#)
- [*East Region*](#)
- [*North East Region*](#)
- [*North West Region*](#)
- [*Southwest Region*](#)
- [*Toronto Region*](#)

For further information, please see the Notice to the [*Profession for Civil and Family Matters \(April 2\)*](#).

For information on Divisional Court, see the [*Notice to the Profession for Divisional Court \(April 2\)*](#).

Criminal Matters in the Superior Court of Justice

All criminal matters scheduled for any type of appearance in the Superior Court of Justice between March 17, 2020 and June 2, 2020 have been adjourned. For all accused persons scheduled to appear during this time, a bench warrant with discretion will issue as of the date the person is scheduled to appear.

Courts Close in Response to COVID-19 Pandemic

The court will continue to hear urgent matters during the emergency period of March 17, 2020 to June 2, 2020.

Other relevant updates include:

- Judicial pre-trials are adjourned. Judicial pre-trials on urgent in-custody matters may be requested through the trial coordinator. The pre-trials will be handled by phone, and Crown and defence counsel will file matters electronically.
- All trials are adjourned, unless ordered otherwise.
- Witnesses, lawyers and jurors should not attend court for any matters between March 17, 2020 and May 29, 2020, unless specifically ordered to do so by the presiding judge.
- Bail, bail reviews and detention reviews will be available remotely. Some will be held in the absence of the accused, others in the presence of the accused by way of audio or video conference.
- Guilty pleas and sentencing can be dealt with remotely for persons in custody in urgent circumstances.

Beginning April 6, 2020, remote hearings have been expanded to include matters in addition to “urgent” matters. The complete list of criminal matters that may be heard in each region is contained in region-specific Notices to the Profession, issued April 2, 2020, which include the process to seek a hearing, and are as follows:

- [Central East Region](#)
- [Central South Region](#)
- [Central West Region](#)
- [East Region](#)
- [North East Region](#)
- [North West Region](#)
- [Southwest Region](#)
- [Toronto Region](#)

For further information, see the [Notice to the Profession for Criminal Matters \(April 2\)](#).

For more details on the court's handling of criminal matters during the COVID-19 pandemic, see the court's [Notice to Accused Persons, Profession, Crown, Public Prosecution Service of Canada, Correctional Institutions, Witnesses, Jurors, The Public and The Media Regarding Criminal Operations](#).

Ontario Court of Appeal

Effective March 17, 2020, the Court of Appeal has suspended all scheduled appeals until April 3, 2020. During this time, urgent appeals will be heard based on written materials or remotely. Non-urgent appeals may be requested to be heard in writing. The court is encouraging parties who are scheduled to have their appeals heard between April 3 and April 30, 2020 to consider and consent to an adjournment.

Courts Close in Response to COVID-19 Pandemic

Osgoode Hall will remain open to accept filings. However, the court encourages parties to mail or drop off their filings. Filings can continue to be filed electronically.

Urgent Appeals

Any party can request to have an urgent appeal heard by sending a request to the attention of the Senior Legal Officer at COA.SeniorLegalOfficer@ontario.ca. The request should include the following information:

- why the matter is urgent;
- whether all parties consent to the hearing of the appeal on an urgent basis; and
- whether the parties consent to having the decision rendered based on the written materials already filed or whether they want the appeal heard remotely.

Non-Urgent Appeals

Any party can request to have a non-urgent appeal heard (based on the written materials already filed) by sending a request to the attention of the Senior Legal Officer at COA.SeniorLegalOfficer@ontario.ca. The requests should only be made if all parties consent to having the matter heard in writing.

Single Judge Motions

Single judge motions will continue to be heard as scheduled for the week of March 16, 2020. The motion judge will preside remotely. Alternatively, on consent, a motion may proceed based on the written materials that the parties have filed. The same process will be followed from March 20, 2020 onward until further notice.

Again, the court encourages all parties to non-urgent motions that are scheduled to proceed to request and consent to adjournments.

For more details on the Court of Appeal's response to COVID-19, see the [COVID-19: Notice to the Profession and the Public](#).

Federal Court

All Federal Court hearings previously scheduled to be heard between March 16, 2020 and May 29, 2020 are adjourned, and hearings will not be held until June 29, 2020.

The Suspension Period does not apply to urgent or exceptional matters (to be heard by telephone or video conference unless the court determined that an in-person hearing is necessary), case management hearings, and by request of a party as outlined in the [Updated Practice Direction and Order \(COVID-19\)](#) dated April 4th, 2020.

Further, timelines for filing documents (and taking other steps) is extended to 14 days following the end of the suspension period.

However, the court issued another notice on April 15, 2020 indicating that the Court would exempt some

Courts Close in Response to COVID-19 Pandemic

cases from these Notices and allow them to progress. Cases that are selected to progress are cases that are ready to be determined (all necessary procedural steps have been completed), and some selected cases that still have some procedural steps to be completed. An April 29, 2020 practice direction and order also notes that a substantial number of matters are ready to proceed, and the court will reach out to parties to discuss video conference (over Zoom) or teleconference.

For more information on Federal Court matters, see the [Practice Direction and Order \(COVID-19\)](#) dated March 17, 2020; [Updated Practice Direction and Order \(COVID-19\)](#) dated April 4th, 2020; [Notice to the Parties and Profession](#) dated April 15, 2020; and [Practice Direction and Order](#) dated April 29, 2020.

Supreme Court of Canada

The Supreme Court of Canada has not closed amid the COVID-19 pandemic. However, it has made numerous changes to their procedures. Physical access to the court building is restricted to those persons who are necessary to the proceedings before the court. The building is closed to visitors. All currently scheduled public events at the court, including guided tours, are cancelled until further notice.

The Court will continue to issue judgments on applications for leave and on appeal for the time being. Until further notice, all media briefings on judgments on appeal will only be provided by teleconference.

The hearings scheduled for March 24, 25 and 26, 2020, in the cases of *Attorney General of Saskatchewan v. Attorney General of Canada* (38663), *Attorney General of Ontario v. Attorney General of Canada* (38781) and *Estate of Bernard Sherman v. Kevin Donovan* (38695) are rescheduled, tentatively, to the month of June 2020. All other currently scheduled hearings remain on the agenda until further notice. Parties may seek adjournments or request to appear via teleconference or video-link. Out of respect for the open court principle, the press and media will be allowed to attend the hearings in person.

For more information on the Supreme Court of Canada's response to COVID-19, see its [news release dated March 16, 2020](#).

Virtual Commissioning and Remote Client Verification in Response to COVID-19

Practical Guidance

Created on: 03/23/2020

The Law Society of Ontario has recently issued a corporate statement providing guidance for lawyers and paralegals as a result of the Coronavirus ("COVID-19") pandemic. In particular, the corporate statement provides guidance on using virtual means to identify a client or commission documents.

Remote Client Identification and Verification

The client identification and verification requirements in By-Law 7.1 continue to apply, save and except for the following exceptions:

- there is no obligation to meet with a client face-to-face to identify the client; and
- alternative means of verification will be permitted, such as video conference.

Virtual Commissioning

Commissioning documents is governed by the *Commissioners for Taking Affidavits Act*, R.S.O. 1990, c. C.17. Prior to COVID-19, the best practice for commissioners is to be in the physical presence of the deponent in order to commission the document. As a result of COVID-19, the Law Society will allow alternative means of commissioning such as commissioning documents via video conference.

For more information on the impact of COVID-19 in the practice of law and delivery of legal services, see the Law Society of Ontario's Corporate Statement re: COVID-19.

[Urgent Civil Motions During COVID-19](#)

[Andrew Winton](#), Lax O'Sullivan Lisus Gottlieb LLP and LexisNexis Canada

Created on: *04/09/2020*

This practice note discusses urgent civil motions in the Superior Court of Justice (Ontario) during the COVID-19 pandemic. Andrew Winton, Lax O'Sullivan Lisus Gottlieb LLP, presented the information contained in the practice note with LexisNexis Canada during the webinar "Urgent Civil Motions During COVID-19".

View our webinar recording [here](#). Download the webinar presentation deck [here](#).

On March 15, 2020, the Superior Court of Justice (hereinafter the "court"), notified the legal profession that it would be suspending all regular criminal and civil and family operations effective March 17, 2020, to help contain the spread of the 2019 novel coronavirus. A copy of the Notice to Profession can be found [here](#). To facilitate access to justice in the face of the pandemic, the court advised it would continue to hear urgent matters during the emergency period via videoconference or teleconference hearing.

What Qualifies as an Urgent Civil Matter?

The court provided some guidance on what it considers an "urgent" civil matter. The highest priority will be given to matters related to COVID-19 and the health and safety of the public including:

- applications by the Chief Medical Officer;
- applications concerning *Health Protection and Promotion Act*, [R.S.O. 1990, c. H.7](#), matters;
- urgent requests for COVID-19 relating injunctions; and
- urgent Divisional Court hearings related to COVID-19.

Additionally, the court will hear urgent civil motions where immediate and significant financial repercussions may result if there is no judicial hearing. The court will also consider outstanding warrants issued in relation to the Small Claims Court or Superior Court proceedings as urgent.

With respect to the Commercial List (Toronto), the following matters will likely be considered urgent or "time-sensitive":

- initial orders under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA");
- CCAA stay executions;
- receivership applications;
- plans of arrangement;

Urgent Civil Motions During COVID-19

- injunctions; and
- approval and vesting orders.

The court has already begun to hear urgent matters. Some examples include:

- a motion for return of IT systems from alleged unauthorized party in possession of sensitive and private information;
- an application to challenge disqualification as a candidate for the leadership of the Conservative Party of Canada; and
- an application to set aside default judgment and writ of execution registered against lands in connection with imminent closing of sale of subject lands.

Urgent Motions on the Commercial List (Toronto)

It is likely that the court will not require proof of irreparable harm on urgent or time sensitive matters on the commercial list as per the test for obtaining an interlocutory injunction set out in *RJR-Macdonald Inc. v. Canada (Attorney General)*, [\[1994\] S.C.J. No. 17](#) ("*RJR Macdonald*"). Recall the three-part test for obtaining an interlocutory injunction:

- The plaintiff must demonstrate a serious question to be tried.
- The plaintiff must establish that damages will not be an adequate remedy and that it will suffer irreparable harm if the relief is not granted.
- The court must assess the balance of convenience and find that it favours the plaintiff (*RJR Macdonald*).

Nonetheless, the court will have to be provided some evidence of either irreparable harm to the client or immediate and significant repercussions, financial or otherwise, that may result if the matter is not heard expeditiously.

April 2, 2020 Notice to Profession

On April 2, 2020 the court provided an updated notice to the legal profession, which can be found [here](#). The court expanded the scope of matters that can be heard remotely via teleconference or videoconference to include:

- select Pre-Trial Conferences; and
- Rule 7 applications, Rule 7 motions, and other applications and motions in *writing that are proceeding on the consent of all parties*.

Procedure to Bring an Urgent Matter

Filing Urgent Documents

You should file urgent motion or application materials to the appropriate courthouse. To request an urgent hearing, counsel must reach out to the civil list in Toronto via e-mail at civilurgentmatters-scj-

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Toronto@Ontario.ca. If the matter is on the commercial list, the e-mail should be addressed to Toronto.commercialist@just.gov.on.ca.ca. Note that any e-mails received after 4:30 p.m. will be addressed the following day.

Ensure you send your e-mail to the court staff or trial coordinators and not to the judges directly. The subject line of the e-mail should include the following:

- level of court (*i.e.*, Superior Court of Justice);
- type of matter (*i.e.*, civil, family, commercial list or estates);
- court file number; and
- type of document.

There is an expectation that counsel will submit brief materials to allow for a fair, timely and summary disposition of the matter. E-mail filings of materials must be under 10MB per e-mail. If the materials exceed the 10MB you should consider sending multiple e-mails.

In the e-mail to the court, you should set out the basis for the hearing request and attach the minimum required to demonstrate urgency, such as the Notice of Application or Notice of Motion, or include excerpts from supporting materials, such as an affidavit. Avoid submitting the entire motion or application record, which may draw the ire of the court and potentially create technical issues with file size. Your filed materials should also include any prior order or endorsements that were issued and are relevant to the relief sought.

Ultimately, you should aim to include any materials that demonstrate urgency and avoid filing a “pro forma” notice. Be specific and include sufficient details to convince the triage judge that the client requires a hearing immediately. Also, alert the court if there will be issues with your filed materials. For example, if you are unable to commission an affidavit prior to requesting a hearing, you should inform the court as to what will be in the affidavit and explain when the materials will be finalized. Note that you can file an unsworn affidavit, if the affiant is able to participate in any telephone or videoconference hearing to swear or affirm the affidavit at the hearing.

If you file a factum, caselaw and other sources should be hyperlinked, in which case you do not need to file a Book of Authorities.

Finally, you should be prepared to show when and how service was made to the responding parties. Service by e-mail is available without a court order and/or the consent of the other party.

Scheduling a Hearing

The trial coordinator will seek the direction from the triage judge to schedule an urgent matter. The triage judge will decide if the matter qualifies as urgent, and if so, the manner of hearing and related procedural issues, such as the schedule for the service and filing of any responding material. Once the triage judge deems the matter urgent, the trial coordinator will advise the parties of the date, time and method of the hearing.

Likely, most matters will be dealt with via telephone, unless a judge directs a videoconference hearing. If the matter is going to proceed via videoconference, you should familiarize yourself with and learn to navigate the online platform that will be in used to hold the videoconference hearing before the hearing itself.

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The Hearing

Strict time limits will be imposed for oral submissions in telephone and videoconference hearings. You will be expected to adhere to these time limits. Note that if the matter proceeds via videoconference, you do not have to gown for the hearing, although business attire is required.

Conclusion

The court did not take the decision to suspend operations lightly; it did so to protect the health and well-being of the public and all persons involved in our justice system. This unprecedented step requires all of us to be flexible, cooperative and professional in all our dealings during this critical time. Counsel would do well to remember and apply the three “Cs” that are familiar to practitioners on the Toronto Commercial List: communication, cooperation and common sense.

End of Document

COVID-19 Update: Supreme Court of Canada Announces Appeals to Be Heard in June 2020

Practical Guidance

Current as of: *05/05/2020*

On April 29, 2020, the Supreme Court of Canada announced the list of appeals that will be heard in June 2020.

In response to COVID-19, hearings scheduled for the months of March, April, and May were adjourned as stated in the press releases of [March 16, 2020](#) and [March 25, 2020](#). Some of those hearings have been scheduled to be heard in June by video conference.

The hearings that will be heard in June are scheduled as follows:

- June 9 – *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corporation* ([38741](#))
- June 10 – *Her Majesty the Queen v. Sivaloganathan Thanabalasingham* ([37984](#))
- June 11 – *Cheung Wai Wallace Li v. Her Majesty the Queen* ([38903](#))
- June 12 – **Oral hearing on leave:** *Haben Abraham Weldekidan v. Her Majesty the Queen* ([38984](#))

The following cases will be heard in September, on dates that will be confirmed at a later date:

- *Attorney General of Saskatchewan v. Attorney General of Canada* ([38663](#))
- *Attorney General of Ontario v. Attorney General of Canada* ([38781](#))
- *Attorney General of British Columbia v. Attorney General of Alberta* ([39116](#))
- *Conférence des juges de la Cour du Québec, et al. v. Chief Justice, et al.* ([38837](#))

All other hearings postponed due to COVID-19 will be heard in the regular fall session, which will begin the week of October 5, 2020.

The Court continues to issue judgments on applications for leave and judgments on appeal, and to provide media briefings (by teleconference).

The Supreme Court Building remains open for case-related matters, but close to the public.

For further information on additional measures taken in response to COVID-19, please visit the Court's [home page](#).

OSB Guidance in Response to COVID-19

Practical Guidance

Created on: *04/09/2020*

This practice note provides guidance based on stakeholder concerns revolving around the COVID-19 pandemic. It also highlights important information regarding the *COVID-19 Emergency Response Act*, [S.C. 2020, c. 5](#), as well as temporary guidance for Licensed Insolvency Trustees (“LIT”).

COVID-19 Emergency Response Act

The Government of Canada has introduced the *COVID-19 Emergency Response Act* to help Canadians pay for essentials including housing and groceries, to provide additional support to families with children, and to help businesses to pay their employees and operational costs during this time of uncertainty. The Office of the Superintendent of Bankruptcy (OSB) emphasizes that funds received pursuant to the *COVID-19 Emergency Response Act* go to debtors, and not to estates.

The *COVID-19 Emergency Response Act* is broken down into 2 parts:

- 1 GST/HST credit payments; and
- Income Support Payments.

Part 1: GST/HST Credit Payments

Additional assistance is provided to individuals and families with low and modest incomes with a special top-up payment under the Goods and Services Tax (“GST”) credit or Harmonized Sales Tax (“HST”) credit.

A LIT’s powers to receive and retain GST/HST credit payments from a bankrupt person are limited pursuant to s. [67\(1\)\(b.1\)](#) of the *Bankruptcy and Insolvency Act*, [R.S.C. 1985, c. B-3](#) (“BIA”); r. [59](#) of the Bankruptcy and Insolvency General Rules, C.R.C., c. 368; and s. [67](#) of the *Financial Administration Act*, [R.S.C. 1985, c. F-11](#) (“FAA”).

It is important to note that the GST/HST credit payments are property exempt from execution or seizure, except if they are required to satisfy the LIT’s fees and disbursements. If there is sufficient money to make a dividend available to creditors, GST/HST credit payments are considered exempt.

GST/HST credit payments cannot be assigned and will be considered ineffective when administering a bankruptcy. The LIT would be required to return the GST/HST credit payments to the bankrupt (FAA, s. 67). As GST/HST credit payments cannot be assigned, it is inappropriate for LITs to request that they be assigned in a conditional order of discharge.

OSB Guidance in Response to COVID-19

It is important to note that the OSB strongly encourages LITs to allow debtors to keep increases in GST/HST payments they receive pursuant to the *COVID-19 Emergency Response Act*, in spite of r. 59 which may permit LITs to accept such amounts for fees and where no dividend is payable to creditors.

Temporary Increase in Canada Child Benefit

Further to part 1 of the *COVID-19 Emergency Response Act*, additional assistance is given to families with children by providing temporary additional amounts under the Canada Child Benefit ("CCB").

Pursuant to s. 122.61(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("ITA"), the CCB:

- shall not be subject to the operation of any law relating to bankruptcy or insolvency;
- cannot be assigned, charged, attached or given as security;
- does not qualify as a refund of tax for the purposes of the *Tax Rebate Discounting Act*;
- cannot be retained by way of deduction or set-off under the *Financial Administration Act*; and
- is not garnishable moneys for the purposes of the *Family Orders and Agreements Enforcement Assistance Act*.

Therefore, debtors are entitled to keep the CCB received pursuant to the *COVID-19 Emergency Response Act*, and these payments should not be included as property or income pursuant to the BIA.

Part 2: Income Support Payments

Part 2 of the *COVID-19 Emergency Response Act* enacts the Canada Emergency Response Benefit Act to authorize the making of income support payments — the Canada Emergency Response Benefit (CERB) — to support workers who lose their income as a result of the COVID-19 pandemic. The benefit covers Canadians who have lost their job, are sick, quarantined, or taking care of someone who is sick with COVID-19, as well as working parents who must stay home without pay to care for children who are sick or at home because of school and daycare closures. Additionally, workers who are still employed, but are not receiving income because of disruptions to their work situation related to COVID-19, would also qualify for the CERB. The CERB is available to Canadian workers affected by the current situation whether or not they are eligible for Employment Insurance ("EI").

Pursuant to the *COVID-19 Emergency Response Act*, the CERB:

- is not subject to the operation of any law relating to bankruptcy or insolvency;
- cannot be assigned, charged, attached or given as security;
- cannot be retained by way of deduction, set-off or compensation under any Act of Parliament other than this Act; and
- is not garnishable moneys for the purposes of the *Family Orders and Agreements Enforcement Assistance Act*, R.S.C. 1985, c. 4 (2nd Supp.).

Therefore, debtors are entitled to keep income support payments received pursuant to the *COVID-19*

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Emergency Response Act, and these payments should not be included as property or income pursuant to the BIA.

Temporary Guidance for LITs

In light of the Covid-19 pandemic, LITs are encouraged to exercise their professional judgment to remain flexible and to take necessary steps to reduce in-person contact. Section [187](#) of the BIA are considered (in particular s. [187](#)(9), (11) and (12) with the caveat that some sections of the BIA, such as s. [50.4](#)(10), may override this provision). The OSB encourages LITs to make use of the considerable flexibilities that exist in Superintendent's Directives when determining which measures may be appropriate. During this time, LITs are expected to document their policies, procedures and rationales. The OSB will continue to support LITs in these efforts, while maintaining the integrity of Canada's insolvency system. The OSB will also be more flexible in scheduling debtor exams, mediations and Trustee Office Visits.

LITs may consider the following options to support social distancing:

- **Assessments.** Directive 6R3 provides for the use of methods other than in-person assessments in extraordinary circumstances. The OSB recognizes the COVID-19 pandemic is an extraordinary circumstance and, until further notice, no separate approval will be required to conduct assessments using methods other than in-person. Assessments may be performed via video, telephone discussion and e-mail for document receipt.
- **Insolvency Counselling.** Directive 1R5 allows LITs or their registered counsellors to provide counselling via videoconference. Upcoming amendments to the Directive will also allow registered counsellors to provide counselling over the telephone, when other means are not possible.
- **Meetings of Creditors.** Recently updated Directive 22R2 encourages the Chair of a meeting of creditors to make every reasonable effort to hold creditors meetings by electronic or digital means of communication.
- **Signatures and Oaths.** LITs are encouraged to exchange documents that require signature via e-mail, or other electronic means, and provide debtors the necessary support to explain the documents via videoconference or over the phone or as otherwise required. LITs should obtain the original signed copies to add to their records as soon as practical. LITs should explore legal methods for the witnessing of signatures and swearing of oaths or consider delaying these steps until they can be safely undertaken in person. Verification of identity remains a crucial step.

Core OSB Services

- E-filing continues to function.
- E-filing flags will be dealt with by select OSB staff remotely.
- Bankruptcy and Insolvency Records Search via online service remains functional. Phone service is also being explored via remote delivery.
- Callers to the OSB National Service Centre will be directed to submit an online request which will be actioned via e-mail remotely or, if needed, by remote telephone call.
- The final Oral Boards scheduled for March 18-20, 2020 have been postponed until further notice and will be rescheduled as soon as possible in order to complete this year's licensing process for new

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applicants. All 2020 Oral Board candidates have been notified of expected delays in the delivery of results.

- OSB is also reviewing options relating to statutory deadlines which may be difficult to meet in the current circumstances. Further communication in that regard will be sent as soon as possible.

Levy and Registration Fees

OSB employees are currently being encouraged to work from home wherever possible until further notice, in line with Government of Canada and Public Health Agency of Canada recommendations regarding physical distancing and teleworking.

As a result, OSB processing of all levy and registration fees has been reduced significantly, which directly affects the status of LITs Statement of Outstanding Balances. All affected payments will be appropriately safeguarded and allocated to the appropriate estates when possible. March registration fees, due April 15, 2020, can be remitted by LITs by May 15, 2020.

LIT Fees or Missed Surplus Income Payments

Many creditors are choosing to forbear, provide payment relief and other flexibilities to support individuals and businesses affected by the pandemic. The Superintendent strongly urges LITs to do the same and expects that courts will hold LITs to high standards in this regard when matters are brought forward.

Annual Banking Review

This year, due to the COVID-19 pandemic, the OSB will be accepting Annual Banking Reports (ABR) and Request for Bank Confirmations no later than June 30, 2020. LITs will be able to submit their ABR at their earliest convenience within this timeframe.

As the current economic circumstances may present an increased risk to the management of estate funds, the OSB will increase monitoring to detect possible defalcation of estate funds.

Service Fees Act (SFA)

The OSB recognizes that the COVID-19 pandemic is an extraordinary circumstance and that many LITs are entirely focused on how to continue to comply with federal and provincial direction for their workplaces, while continuing to help debtors deal with the financial impacts of the current situation. As such, until further notice, the OSB will be seeking to defer the implementation of the following fee increases pursuant to the SFA:

- filing fees;
- licence renewal fees;
- licence application fees; and
- levy for summary administrations.

Provincial Courts and Avoiding Prejudice to Debtors

LITs are encouraged to check in with their local courts and to file documents with the court and/or OSB as

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necessary to extend timelines as appropriate. Alternatively, LITs may also opt to temporarily delay filing, where such a step may prejudice the debtor and where permissible under the BIA, for example by delaying the filing an opposition to discharge for non-payment of surplus income or voluntary fees. LITs are encouraged to consider filing an amended proposal to avoid the deemed annulment of a Division II Consumer Proposal following three missed payments. LITs should also file the necessary extensions with the court and/or Efile with the OSB where applicable to avoid the failure of a Division I Proposal and/or a deemed assignment into bankruptcy.

Swearing Documents

Some provincial courts and/or law societies have adopted interim measures, such as virtual oaths or witnessing of documents by video conference. If no interim measures have been communicated by the courts and/or law societies, LITs are encouraged to be flexible. For example, debtors could sign and make oaths via video conference (e.g., via a computer or smart phone) or the use of electronic signature software, with documents exchanged via e-mail and signed originals submitted in the mail. The confirmatory sworn statement should be obtained when possible and uploaded to the LITs system for their records and for review by the OSB, as needed. Official receivers will be flexible and accommodating regarding such interim measures.

Any questions should be sent via e-mail to: osbregulatoryaffairs-affairesreglementairesbsf.ic@canada.ca.

End of Document

*COVID-19: Ontario Construction Act Exempt from Limitation and Procedural
Time Periods Effective April 16, 2020*

Practical Guidance

Current as of: **04/21/2020**

On March 20, 2020, the Attorney General announced an order under s. [7.1](#)(2) of the *Emergency Management and Civil Protection Act*, [R.S.O. 1990, c. E.9](#) ("EMCPA"), to temporarily suspend limitation periods and procedural deadlines in response to COVID-19, retroactive to March 16, 2020.

On April 9, 2020, due to several issues which flowed from the presumed suspension of deadlines to preserve and perfect construction liens, the Attorney General introduced an [amendment](#) under EMCPA. The amendment, effective Thursday, April 16, 2020, serves to lift the suspension of limitation and procedural time periods under the *Construction Act*, R.S.O. 1990, c. C.30, at which point the suspension will no longer apply and deadlines will start running again.

During the 1-month suspension period between March 16 and April 16, 2020, the effect of suspending the deadlines to preserve and perfect construction liens resulted in owners and lenders being cautious about releasing the statutory holdback since there could be no guarantee that liens might be registered in the future. The suspension order also may have had the unintended consequence of creating cash flow issues within the industry. Overall, the confusion tended to slow down or stop holdback payments to contractors during the 1-month suspension period, while forcing contractors to abide by the same time periods that had previously governed their lien claims.

As of April 16, 2020, the time periods for preserving and perfecting liens in Ontario remain the same as they were on March 15, 2020. Owners and contractors can now proceed with some clarity about the rules governing the lien process.

Service Requirements During COVID-19

Susan Blackwell, Blackwell Family Law

Created on: *04/14/2020*

As a result of the COVID-19 pandemic, regular court operations in the Ontario Court of Appeal and Superior Court of Justice were suspended effective March 17, 2020, in the Ontario Court of Justice effective March 16, 2020. As a result, the practice of family law has changed dramatically. The changes related to service as set out in the various Notices to the Profession found at the [Ontario Courts](#) website are summarized and discussed below.

There has been some limited discussion of service issues in the case law to date. If and when there are cases with specific guidance on service issues, they will be added to this practice note.

Ontario Court of Appeal

For Court of Appeal matters, documents served electronically are presumed to be effective service unless the affected party shows otherwise. The April 6, 2020 Practice Direction creates a reverse onus where the person who receives documents electronically is required to show why the service is improper and ineffective.

Special Service

No specific changes have been made to the rules for special service by either the Superior Court of Justice or the Ontario Court of Justice. So at least for now, the existing rules for special service still apply. Special service is required where an application or motion to change needs to be issued as the preliminary step for an urgent motion for a temporary order. It is also required where that urgent motion is a contempt motion.

In the current circumstances, special service is problematic. In-person service where the document is handed directly to the recipient by the person effecting service is no longer possible or appropriate given the clear directions and emergency orders requiring social distancing in Ontario. The Superior Court of Justice has inherent jurisdiction to make rules and orders to govern its process. The Ontario Court of Justice does NOT have inherent jurisdiction, but Rule 1(7.2) of the Family Law Rules, O. Reg. 114/99 ("FLR"), allows a court to make procedural orders in order to achieve the primary objective of dealing with cases justly. As a result, both levels of court can make orders to change the special service requirements. However, there is no specific guidance on special service adjustments yet from the courts, either by direction or in the case-law. Until that guidance is provided from the courts, lawyers who need to deal with special service may find the following 10 recommendations helpful:

- 1 Remember that the point of special service is to ensure that the person to be served actually receives the documents.

Service Requirements During COVID-19

- Consider what minor changes could be made to the special service rule which would take social distancing into account and effect service by that alternate method.
- If possible, obtain a written consent to an alternate form of service, which can be filed as a 14B consent motion.
- Include a request for an order for substituted service or approving irregular service with urgent motion or case conference materials.
- If the request for substituted or irregular service is on consent, it can be filed as a 14B consent motion.
- Alternatives to special service should continue to be effected by a third party who is an adult, and who is available to swear an Affidavit of Service remotely by video conference or over the telephone during a court hearing.
- Special service by mail is effective if the person receiving the document returns the Form 6 Acknowledgment of Service card, and that is still an available option since mail is an essential service that is still operating.
- Consider using e-mail as an alternative to special service, using the request delivery receipt and read receipt functions, and include a Form 6 to be signed and returned by e-mail acknowledging service, with the automatically generated receipt e-mails to be used as exhibits to the Affidavit of Service if the Form 6 is not returned.
- If personal delivery is still needed because an e-mail address is not available, consider delivering the documents to the door or even “curbside” with the person who serves staying to observe from a safe distance that the documents are picked up by an adult who resides at the address.
- Remember that Rule 24 relating to Costs requires parties to behave reasonably throughout the court process, and refusing to consent to adjustments to the procedural requirements of the FLR could be considered to be unreasonable behaviour when costs are considered now or in the future.

Regular Service

The rules for regular service in the Superior Court of Justice have changed. It is no longer necessary to obtain prior consent or a court order to serve by e-mail. An Affidavit of Service must be included with court materials. If an Affidavit of Service is not included, the court may defer the hearing to ensure that service has been affected. If the Affidavit of Service is unsworn, the affiant must be available by telephone during the court hearing to swear the Affidavit at that time.

In the Ontario Court of Justice, the rules regarding regular service have not been changed. Technically, service by e-mail still requires written consent or a court order. But, the March 28, 2020 update regarding Pandemic Scheduling does state that “Materials sent by email must indicate when and how service on any other party was made” and that “Legal representatives/ parties should retain a copy of the relevant affidavit of service and/or related documents (e.g., email confirmations) and be prepared to produce it to the Court on request.” It sounds like the court is relaxing the standard for service by e-mail, but the Notice is not as clear on that point as the Superior Court of Justice Notice. For OCJ matters, consider including a request for an order for substituted service or approving irregular service by e-mail with urgent motion or case conference materials. Better yet, make that request on Consent. As the courts have said in many reported decisions during this crisis, now is the time for more cooperation and less litigation.

Substituted and Irregular Service

Service Requirements During COVID-19

Requests for substituted service orders and orders approving irregular service should be made as needed, taking into consideration the ten recommendations listed under the “Special Service” section above. Lawyers should pay careful attention to the difference between the requirements for substituted service as compared to irregular service, as set out in the practice note, [Substituted Service and Irregular Service](#).

International Service

As noted in the practice note, [International Service of Documents](#), the rules relating to service of documents internationally is complicated. E-mail service is generally not permitted for the originating process document. However, the *Hague Convention on International Service* allows exceptions in situations of urgency. It is quite possible to request a substituted service order or an order approving irregular service from an Ontario court on an urgent motion for a temporary order relying on this urgency exception. See the practice note, [International Service of Documents](#) for more details. This exception will be useful in urgent situations with dire financial consequences where the responding party who needs to be served is abroad.

Timing Considerations

On March 20, 2020, the Ontario Regulation, O. Reg. 73/20 (“O. Reg. 73/20”) under s. [7.1\(2\)](#) of the *Emergency Management and Civil Protection Act*, [R.S.O. 1990, c. E.2](#), suspended limitation periods and any period of time within which any step must be taken in any proceeding in Ontario, subject to the discretion of the court. Accordingly, the timelines set out in the Effective Date of Service Based on Method of Delivery and the Type of Service Required for Each Step in a Proceeding are also suspended, subject to the comments below.

The Ontario Court of Appeal has said that O. Reg. 73/20 does not apply to urgent family law appeals. See the March 30th [Notice About Urgent Family Law Appeals](#).

The Superior Court of Justice has indicated that it expects procedural timelines to be complied with if it is reasonably possible to do so. The March 15th Notice to the Profession, which preceded O. Reg. 73/20, specifically stated that procedural timelines for delivery of documents between parties had to be followed, although filing timelines would be extended. The April 2nd Notice to the Profession, made **after** O. Reg. 73/20, acknowledges that strict compliance with procedural rules may be “impossible or impractical” “in some instances”. The April 2nd Notice does not specifically mention adherence to timelines but does say that the power to “relieve compliance with procedural rules” will be used “sparingly”. Counsel and parties should make best efforts to prepare, serve and respond to court matters on time, or be prepared to explain why compliance is not possible.

The Ontario Court of Justice has not made any specific comments about adherence to timelines in its Notices and Practice Directions. Accordingly, those timelines have been suspended by O. Reg. 73/20. However, lawyers and parties should still attempt to comply with the timelines whenever possible, or obtain consent from the other party to extend time periods as permitted by Rule 3(6) of the FLR. Now, more than ever, all parties should remember the guidelines set out in Rule 2(3) about dealing with cases justly and the requirement to act reasonably or risk the cost consequences set out in Rule 24.

Court Notices and Directions

The court notices and directions which affect service of family law court documents are listed and summarized in the tables below. Reference should also be made to local practice directions posted on the [Ontario Courts](#) website.

Service Requirements During COVID-19

Superior Court of Justice

<i>Date</i>	<i>Document</i>	<i>Change</i>
March 15, 2020	Notice to Profession	<p>All regular court operations suspended effective March 17, 2020, except for urgent matters.</p> <p>Court is expected to grant extensions of time to file non-urgent matters if needed.</p> <p>Parties must still comply with orders/rules requiring the service or delivery of documents as between parties.</p>
April 2, 2020	Notice to the Profession	<p>Matters in addition to urgent matters will begin to be heard, subject to regional practice directions.</p> <p>Strict compliance with procedural rules may be impossible or impractical. The Superior Court of Justice will rely on its inherent jurisdiction sparingly and with caution to relieve compliance with procedural rules.</p> <p>It is not necessary to obtain prior consent or a court order to serve by e-mail.</p>

Ontario Court of Justice

<i>Date</i>	<i>Document</i>	<i>Change</i>
March 16, 2020	Notice to Profession	All non-urgent matters adjourned for 8-12 weeks, new date to be requested by 14B.
March 20, 2020	COVID-19 Scheduling Update	Do not attend court between March 20 and May 29; Urgent matters by telephone or videoconference.
March 28, 2020	COVID-19 Pandemic – Scheduling of Family Matters	Materials sent by e-mail must indicate when and how service on any other party was made.

Service Requirements During COVID-19

		Legal representatives/ parties should retain a copy of the relevant affidavit of service and/or related documents (e.g., e-mail confirmations) and be prepared to produce it to the Court on request.
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End of Document

[Urgent Family Law Motions During COVID-19](#)

Founding Author: [Kathryn Hendrikx](#), Hendrikx Family Law. Updating Author: Practical Guidance

Created on: *04/14/2020*

This practice note discusses urgent family law motions in the Ontario Superior Court of Justice during the COVID-19 pandemic. Kathryn Hendrikx presented some of the information contained in this practice note during LexisNexis Canada's webinar, "Urgent Civil Motions During COVID-19". Also discussed are the practice directions for the Ontario Court of Justice, Divisional Court and Court of Appeal.

You can view our webinar recording [here](#) and download the webinar presentation deck [here](#).

Superior Court of Justice: List of Urgent Family Law Matters

On April 2, 2020, the Ontario Superior Court of Justice, issued two notices to the profession regarding criminal, civil and family matters that will be heard by the court during the COVID-19 pandemic, which is supplementary to the [March 15, 2020 notice for civil and family law matters](#).

The notices came into effect on April 6 and expand the matters that can be heard during the pandemic beyond the "urgent" matters that chief justice Geoffrey Morawetz had limited the court to during the month of March.

Beyond urgent matters, in family court, the matters in most courts are expanded to include requests for consent orders submitted by 14B motions under the Family Law Rules, O. Reg. 114/99 ("FLR"), and case conferences with a potential limit on the number of issues that can be addressed at the hearing.

The complete list of civil and family matters that may be heard in each region is contained in region-specific Notices to the Profession, issued April 2, 2020, which include the process to seek a hearing. You may access each region's Notice to the Profession at the following link on the Superior Court of Justice's page, [Notice to the Profession, the Public and the Media Regarding Civil and Family Proceedings – Update](#).

Effective April 6, 2020, below are the list of family and child protection matters that are heard:

- Only urgent family law events as determined by the presiding justice, or events that are required to be heard by statute will be heard during this emergency period including:
 - (a) requests for urgent relief relating to the safety of a child or parent (e.g., a restraining order, other restrictions on contact between the parties or a party and a child, or exclusive possession of the home);
 - (b) urgent issues that must be determined relating to the well-being of a child including essential medical decisions or issues relating to the wrongful removal or retention of a child;

Urgent Family Law Motions During COVID-19

(c) dire issues regarding the parties' financial circumstances including, for example, the need for a non-depletion order; and

(d) in a child protection case, all urgent or statutorily mandated events including the initial hearing after a child has been brought to a place of safety, and any other urgent motions or hearings.

- Consent orders to be brought by way of 14B motions under the FLR.
- Case conferences with a potential limit on the number of issues.

The chart below summarizes the additional matters heard in each region in addition to the above list set out in the April 2, 2020 notice.

<p>Toronto Region</p> <ul style="list-style-type: none"> • Urgent issues including failure to comply with existing court orders and parenting plans • Dire issues regarding support • In a child protection case, CAS appeals • Case conferences: 1 hour; 1 or 2 isolated issues and limited to substantive matters on the issues listed in the urgent family law matters; case conference briefs: 6 pages 	<p>East Region</p> <ul style="list-style-type: none"> • 14B consent motions • 14B motions for procedural issues and disclosure • Case conferences: 1/2 hour; no more than 2 most pressing issues; and case conference briefs: 6 pages • Selected settlement conferences: if it appears that resolution is probable, issues are focused, and the conference can be accommodated; case conference briefs: 6 pages; and 1/2 hour
<p>Central East Region <i>Matters eligible for virtual hearing</i></p> <ul style="list-style-type: none"> • 14B motions requesting consent Orders on: support, changes to temporary support, parenting issues (primary residence, "access" time), disbursement of funds held in trust, appointment of OCL, child protection matters and other consent matters • Consent Motions to Change • Case Conferences: upon request by 14B; 1/2 hour; only 1 or 2 pressing issues (parenting, COVID-19 concerns, financial issues, child protection matters not meeting the test of urgency) • CAS: adoption applications, urgent openness hearings upon 14B request, case conference on the basis of urgency requested by 14B, consent orders granted by 14B 	<p>Northeast Region</p> <ul style="list-style-type: none"> • 14B consent motions • 14B motions for procedural issues and disclosure • Case conferences: 1/2 hour (audio or video conference) and case conference briefs: 6 pages in length
<p>Central South Region</p> <ul style="list-style-type: none"> • Non-urgent matters: consent motions and other basket motions (motions in writing) • Case conferences: 1/2 hour; 1 or 2 pressing urgent issues 	<p>Northwest Region</p> <ul style="list-style-type: none"> • Consent motions • Motions in writing • Case and settlement conferences: 1/2 hour; no

Urgent Family Law Motions During COVID-19

<ul style="list-style-type: none"> • Motions in writing 	more than 2 urgent or pressing issues; and case conference briefs: 4 pages plus attachments
Central West Region <ul style="list-style-type: none"> • Case conferences: 1/2 hour; 1 or 2 pressing urgent issues; case conference briefs: 4 pages plus attachments • Motions in writing 	Southwest Region <ul style="list-style-type: none"> • 14B consent motions • 14B motions for procedural issues and disclosure • Case conferences: 1/2 hour; no more than 2 pressing issues; and case conference briefs: 6 pages

For a list of the court locations in each region, see the table: [Court Locations \(ON SCJ\)](#).

Procedure for Urgent Motions

This list provides a step-by-step guideline on how to prepare and bring an urgent family law motion during COVID-19:

- Review the practice directions from the Ontario Court of Justice and the Superior Court of Justice.
- Prepare court materials:
 - Consider the test for bring a motion prior to a case conference in Rule 14(4.2) of the FLR as a guide to what qualify as an urgent motion.
 - Determine if you need to issue an application together with the urgent motion or only the urgent motion materials.
 - Moving party:
 - Materials for new proceedings: [Application \(General\) \(Form 8\)](#); [Affidavit in Support of Claim for Custody or Access \(Form 35.1\)](#); and [Financial Statement \(Property and Support Claims\) \(Form 13.1\)](#) or [Financial Statement \(Support Claims\) \(Form 13\)](#).
 - Urgent motion materials: urgent [Notice of Motion \(Form 14\)](#); [Affidavit \(General\) \(Form 14A\)](#) (in support of your motion); draft [Order \(General\) \(Form 25\)](#); [Bill of Costs](#), if possible.
 - Responding party: responding materials to the new proceedings or motions are filed in the same manner as a moving party/applicant.
 - Caselaw and other sourced materials are hyperlinked.
 - Affidavits may be delivered unsworn, but the affiant must participate in the telephone or videoconference hearing to swear or affirm the affidavit.
 - Include prior orders or endorsements that were issued and relevant to the urgent matter.
 - Materials should be less than 10MB.
 - Materials should be brief for a fair, timely and summary disposition.
- Serve court materials:
 - You can serve materials by e-mail without obtaining consent or a court order, where e-mail service is permitted, subject to an order of the Court directing otherwise. See the practice note,

Urgent Family Law Motions During COVID-19

[Service Requirements During COVID-19](#) for more information on regular service and special service of court materials.

- Affidavits of service and related documents (e.g., e-mail confirmations) are required with all material filed with the court.
- File materials:
 - Follow the practice directions from each region on how to file urgent motion and application materials.
 - For urgent matters or matters identified in each region's Notice to the Profession, you can file court documents by e-mail at the specific e-mail addresses indicated in each region's notice. For example, the e-mail for the Superior Court of Justice in Toronto is: FamilyTrialOffice-SCJ-Toronto@ontario.ca. For non-urgent matters, counsel and parties should not physically attend courthouses to file the documents. Limited family proceedings can be filed electronically through the [Ministry of the Attorney General's website for filing divorce applications](#).
 - Generally, you are required to call the trial coordinator's office and explain your case, and subsequently e-mail your materials to the requisite e-mail, which is acting as a portal. The court staff review these e-mails regularly. In the last 2 weeks, the portal has been used for questions and information. This is not the purpose of the portal. The trial coordinator continues to monitor all applications and motions materials.
 - Follow the guidelines for the Correspondence with Court, Staff and Trial Coordinators paragraph below.
 - Materials are forwarded to the triage judge (generally a delegate of the Regional Senior Judge) who will review the materials to determine whether matter is urgent and should be scheduled for a hearing.
- Schedule hearing:
 - You will receive an Endorsement advising of the status of your urgent matter. The Endorsement will state whether the matter is urgent and whether you may proceed.
 - If you meet the threshold for urgency, you will be told in the Endorsement and the matter will be assigned to a date and time with a judge. You will receive further e-mails from court staff with the date and time, and the conference call lines.
 - For Toronto, no confirmation form is required prior to the hearing once the date and time is confirmed with the trial coordinator's office.
 - A hearing may be conducted in writing, teleconference or videoconference, unless the Court determines that an in-person hearing is necessary. If an in-person hearing is needed, coordination will occur between the Ministry of the Attorney General, the trial coordinator and the parties or counsel to find an appropriate physical facility for the hearing.
 - There is limited capacity for videoconference hearings. If one or more parties is represented by counsel, counsel may be asked to provide a teleconference number for the hearing.
- Appearance for hearing:
 - Wear appropriate business attire. There is no requirement to gown for an appearance in the Superior Court of Justice during this time.
 - Adhere to the strict time limits imposed for oral submissions.

Urgent Family Law Motions During COVID-19

- The hearing will be recorded. Counsel and parties may also record a proceeding if authorized by the judge, pursuant to s. [136](#)(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43.

For a list of urgent family law cases, see the table, Urgent Family Law Cases During COVID-19.

For the procedures to obtain an order on consent (14B motions) or family case conferences, see the Superior Court of Justice's [Notice to the Profession, the Public and the Media Regarding Civil and Family Proceedings – Update](#).

As a result of COVID-19, as an alternative solution to court proceedings, senior counsel has volunteered to become arbitrators for litigation management purposes. See the sample precedent, [Arbitration and Litigation Management Agreement](#) for more information.

Additional Tips Regarding Family Law Matters During Court Suspension

- Judgments, endorsements and court orders are effective as of the date they are made, unless stated otherwise in the court orders. Only issue and enter a formal order if it is necessary for enforcement purposes (e.g., family law restraining order). Orders related to urgent matters will be formally issued after court returns to regular operations.
- Self-represented parties can seek assistance from the Law Society of Ontario emergency family law referral line: 416-947-3310 (general) and 1-800-268-7568 (toll-free). Duty counsel through Legal Aid Ontario may also be available to provide legal advice for family law and children's aid society matters. See each region's Notice to the Profession for more information.

Correspondence with Court, Staff and Trial Coordinators

- Do not communicate with the judge, unless the court directs otherwise.
- Communicate with court staff and trial coordinators by e-mail pursuant to each region's Notice to the Profession. The general directions for e-mails are:
 - Subject line: include level of court (SCJ), type of matter (family), file number (indicate new if no court file number exists), type of document (e.g., motion, conference brief, other request).
 - Body of e-mail: court file number (if existing file); short title of proceeding; list of documents attached (attachments size: less than 10MB); type of request (include a short description regarding the urgent issues in the case); and name, role (lawyer, representative, party, etc.) and contact information (e-mail and phone number) of person submitting the request.

Responses from the Court

- The court staff are responsive and helpful.
- The judges are very responsive.
- The judges provide an Endorsement directly to counsel and court staff.
- Court staff assist in urgent matters such as issuing a CPIC restraining order.
- Court staff follow up with counsel to ensure contact information for both parties' order to provide the call-in information.

Urgent Family Law Motions During COVID-19

- There have been difficulties with the call-in numbers, as some numbers don't connect through. This seems to be a widespread problem with cell phones and call in numbers. Staff was very accessible by e-mail in those cases). Court staff was extremely prompt in addressing the problem and provided new numbers to everyone.

Ontario Court of Justice

- As of March 28, 2020, all urgent family proceedings will be conducted by telephone and/or video conferencing, unless otherwise ordered by a judicial official.
- Attendance in courtrooms for those matters will be restricted to the judicial official and essential court staff, unless a judicial official orders otherwise.
- Urgent family court matters include:
 - Matters under *Child, Youth and Family Services Act, 2017*, [S.O. 2017, c. 14, Schedule 1](#): place of safety hearings (s. [90](#)); temporary care and custody hearings (s. [94](#)), restraining orders (s. [137](#)), status review hearings (s. [113](#)), and secure treatment orders (s. [161](#)).
 - Domestic matters: urgent custody/access motions; motions for restraining orders; Hague applications and non-Hague abduction cases.
 - Matters under *Family Responsibility and Support Arrears Enforcement Act, 1996*, [S.O. 1996, c. 31](#): refraining motions (s. [35](#)).
- Non-urgent matters, including trials will be adjourned for 8-12 weeks.
- Filing urgent documents:
 - Determine if your motion, application or request relates to the urgent family court matter set out in the notice above.
 - Documents and requests should be sent by e-mail to the appropriate courthouse.
 - E-mail subject line should include: level of court (OCJ); type of matter (criminal, family), file number (indicate NEW if no court file number), and type of document (Urgent Motion, Urgent Application, Bring Forward Request, Consent Bail Variation, Other Request).
 - For example: OCJ – FAMILY – NEW – OTHER REQUEST
 - Body of e-mail should include: court file number (if existing file); short title of proceeding, list of documents attached (attachments cannot exceed 35MB); type of request (include a short description regarding the urgent issues in the case); and name, role (lawyer, representative, party, etc.) and contact information (e-mail and phone number) of person submitting the request.
 - The notice for service for the Ontario Court of Justice states materials sent by e-mail can indicate when and how service on the other party was made. Counsel should retain a copy of the relevant affidavit of service and related documents (e.g., e-mail confirmations) to produce it to the Court on request. This is not clear that rules regarding regular service have not been changed. See the practice note, [Service Requirements During COVID-19](#) for more information.
 - Affidavits may be delivered unsworn, but the affiant must participate in the telephone or videoconference hearing to swear or affirm the affidavit.
- Review the Ontario Court of Justice notice, [COVID-19 Pandemic – Scheduling of Family Matters in the Ontario Court of Justice \(March 28, 2020\)](#) for more information.

Urgent Family Law Motions During COVID-19

Divisional Court

- Effective April 6th, the Divisional Court will begin to schedule hearings of non-urgent matters, subject to available resources.
- If you wish to schedule a Divisional Court matter, contact the court by e-mail (with a copy sent to all other parties): scj-csj.divcourtmail@ontario.ca. Other parties should not respond to the request for scheduling until requested to do so by the court.
- Matters will be scheduled in the discretion of the Divisional Court Administrative Judge or his or her designate.
- Hearings are conducted electronically by teleconference or by video conference (using ZOOM).
- Review the [Notice to the Profession in the Divisional Court](#) for the practice direction for more information.

Court of Appeal

- Urgent family law appeals continue to be heard by the court and are not subject to any automatic time extensions by the court (O. Reg. 73/20: Order under Subsection 7.1(2) of the Emergency Management and Civil Protection Act, [R.S.O. 1990, c. E.9](#)).
- If you wish to schedule a Court of Appeal matter, you must identify the potential urgency by providing the information to the court by e-mail (with a copy sent to all parties): COA.SeniorLegalOfficer@ontario.ca. The matters will be referred to case management with the case management judge determining if the matter is urgent. See the practice note, [Service Requirements During COVID-19](#) for more information.
- Urgent matters may include:
 - Requests for urgent relief relating to the safety of a child or parent.
 - Urgent issues relating to the well-being of a child including essential medical decisions or issues relating to the wrongful removal or retention of a child.
 - All child protection appeals.
- Review the Court of Appeal's website for the [Practice Directions and Notices regarding COVID-19 \(April 6, 2020\)](#) for more information on urgent family law appeals.



[Video Conferencing Checklist \(COVID-19\)](#)

[Kathryn Hendrikx](#), Hendrikx Family Law

Created on: 04/14/2020

This checklist sets out the information and steps counsel should take when conducting a video conference with a client. Counsel can conduct a video conference with a client to identify and verify a client and to commission a document. Kathryn Hendrikx presented some of the information contained in this checklist during LexisNexis Canada's webinar, "Urgent Civil Motions During COVID-19".

You can view our webinar recording [here](#) and download the webinar presentation deck [here](#).

Before the Video Conference

Use the [Law Society of Ontario's FAQ](#) to:

- 1 consider whether client identification or client verification is required; and
 - if client verification is required
 - a. conduct the Law Society's pre-meeting risk assessment for fraud; and
 - b. consider requesting that the client send by secure means a high-resolution image of the identification document by secure means and asking that the client be prepared to show the original identification document during the videoconference.

During the Video Conference

When conducting face-to-face client verification by video conference, stay alert to fraud risks. Keep the red flags of fraud in mind. Refer to the [Law Society of Ontario's FAQ](#) and [AvoidAClaim](#) for fraud updates.

Use the below checklist when video conferencing with your client.

Date:	
Client info:	
Time of meeting:	Start time:

Video Conferencing Checklist (COVID-19)

	End time:
Method of communication:	Provide details:
Has the client consented to proceed in this manner?	Provide details:
Have you asked all individuals in the remote location to introduce themselves?	Name of all parties in remote location:
Ensure that there is no one else at the remote location who may be improperly influencing the client.	Provide details, if any:
Are audio and video feeds stable? Can you hear and see all parties?	Provide specifics, if any:
Do you need to conduct client ID (does not need to occur face-to-face) and/or client verification (must occur face-to-face)?	Type of document(s) reviewed:
	Provide details:
Client ID: Documentation provided? []	
Client verification:	
Obtain identification document (ID Doc) <u>prior</u> to the online meeting if possible	
Ask the client to show the original ID Doc during the video conference	
Ensure that reasonably satisfied that the ID Doc is valid and current	
Compare the image in the ID Doc to be reasonably satisfied that it is the same person	
If executing documents remotely:	Provide specifics:
How will you provide the client with copies of the document executed remotely?	
Have you confirmed your clients' understanding about documents they are executing?	
*Make sure you provide adequate opportunity for them to ask questions	
Have you kept detailed minutes of meeting?	

COVID-19 Update: Family Law Referral Line Set up by the LSO

Practical Guidance

Created on: *03/31/2020*

On March 24, the Law Society of Ontario ("LSO") launched an emergency family law referral telephone line in response to the COVID-19 pandemic. The referral service is offered by the LSO in "association with the Ontario Bar Association and Toronto's Family Law Advice and Settlement Counsel project with support from the Family Lawyers Association and the Federation of Ontario Law Associations".

The referral line was set up as an interim measure to help those individuals that are self-represented. It is meant to assist individuals in determining whether their family court matter falls under the criteria of matters to be heard by the court on an 'urgent' basis. It is also meant to indicate to those individuals how to make their request.

The referral line will provide individuals with 30 minutes of legal advice from family lawyers on a *pro bono* basis, with the possibility of additional services on a private retainer basis from Legal Aid Ontario, the Law Society Referral Service or the private unbundled family law roster. Individuals wishing to use this service may contact the law society by phone Toll-free at 1-800-268-7869 or via the general line at 416-947-3310.

End of Document

COVID-19 Update: B.C. Suspends Regular Provincial Court Operations

Practical Guidance

Created on: 03/31/2020

As of March 25, 2020, the regular operations of the Provincial Court of British Columbia have been suspended at all of its locations to protect the health and safety of court users and to help contain the spread of COVID-19. Members of the public who do not have urgent business before the Court are discouraged from attending any courthouse.

Family (Including Child Protection (CFCSA) and Maintenance Enforcement (FMEA))

Family case conferences, family management conferences and CFCSA case conferences scheduled between March 16 and May 4, 2020 will not proceed so the parties should not attend Court. The parties will receive notification by May 4, 2020 regarding the next date they must attend Court.

All non-urgent family matters, including trials, scheduled to proceed between March 18 and May 16, 2020 are adjourned without the parties having to attend Court. See Appendix "A" – Adjournment Details for more information.

Only urgent family, CFCSA and FMEA matters as determined by a judge will be heard, including:

- a requests for urgent relief relating to the safety of a child or parent;
- requests to obtain or set aside protection orders, or urgent orders involving parenting time, contact with a child or communication between parties;
- urgent issues that must be determined relating to the well-being of a child including essential medical decisions or issues relating to relocation, non-removal, wrongful removal or retention of a child;
- in a child protection case, all urgent or statutorily mandated matters, including the initial presentation hearing, the protection hearing, applications for supervision orders and for extension of time, and any other urgent motions or hearings; and
- applications to suspend, change or cancel any order for imprisonment or committal pursuant to the *Family Maintenance Enforcement Act*, R.S.B.C. 1996, c. 127.

Procedure for Determining Urgent Family Matters

Applications to a judge for determining on the record if a matter is urgent can be sent:

- by e-mail, phone or mail to the applicable local court registry; or

COVID-19 Update: B.C. Suspends Regular Provincial Court Operations

- by fax to fax filing registries (see [GEN 01 Practice Direction](#)).

The Provincial Court registries will not accept any new non-urgent family filings submitted between March 18, 2020 and May 16, 2020.

End of Document

COVID-19 Update: B.C. Supreme Court Registries Not Providing In-Person Registry Services during the Suspension of the Court's Regular Operations

Practical Guidance

Created on: *03/31/2020*

As of March 25, 2020, B.C. Supreme Court registries are no longer providing in-person registry services during the suspension of the Court's regular operations.

For requests for an urgent hearing where a person is unable to use the electronic process established by the Court; and for regular filings that are not defined as essential and urgent, documents may be submitted to the registry by one of the several methods.

For Civil or Family Law Matters

- E-filing using Court Services Online.
- Fax filing at a registry designated as a fax filing registry by Supreme Court Civil Rule 23-2 or Supreme Court Family Rule 22-3. See Appendix A for a list of fax-filing registries and the fax numbers.
- Mailing to any Supreme Court registry. Contact information for all Supreme Court registries is available [here](#).
- **NEW** — Using the Secure Drop Box available at Supreme Court registries. The drop box will be accessible to the public from Monday to Friday, between 9 a.m. and 4 p.m. and will be emptied at the end of the day and processed every 24 hours. The drop box will be monitored to ensure its contents are secure during the day. Parties who submit materials for filing using the drop box must provide a telephone number or e-mail address where they can be reached. Registry staff will contact parties only if their materials are not accepted for filing.

For Criminal Matters

- Mailing to any Supreme Court registry. Contact information for all Supreme Court registries is available [here](#).
- Faxing to a criminal registry. Fax numbers for all Supreme Court registries are available [here](#).
- **NEW** — Using the Secure Drop Box available at Supreme Court registries. The drop box will be accessible to the public from Monday to Friday, between 9 a.m. and 4 p.m. and will be emptied at the end of the day and processed every 24 hours. The drop box will be monitored to ensure its contents are secure during the day. Parties who submit materials for filing using the drop box must provide a telephone number or e-mail address where they can be reached. Registry staff will contact parties only if their materials are not accepted for filing.

COVID-19 Update: B.C. Supreme Court Registries Not Providing In-Person Registry Services during the
Suspension of the Court's Regular Operations

Appendix A – Fax Filing Registries

- Chilliwack
(604) 795-8397
- Cranbrook
(250) 426-1498
- Dawson Creek
(250) 784-2218
- Kamloops
(250) 828-4345
- Kelowna
(250) 979-6768
- Nelson
(250) 354-6133
- Penticton
(250) 492-1290
- Prince George
(250) 614-7923
- Rossland
(250) 362-7321
- Salmon Arm
(250) 833-7401
- Smithers
(250) 847-7344
- Terrace
(250) 638-2143
- Vernon
(250) 549-5461
- Williams Lake
(250) 398-4264

COVID-19 Update: Affidavits for Use in Civil and Family Proceedings

Practical Guidance

Created on: *03/31/2020*

The Provincial Court of British Columbia has issued a Notice to the Public Regarding Affidavits for use in civil and family proceedings. The Law Society of British Columbia has, until further notice, approved the following accommodations made for affidavits to be used in the Provincial Court, subject to the discretion of the Courts to apply the best evidence requirements to their use:

- 1 Any affidavit to be sworn using video technology must contain a paragraph at the end of the body of the affidavit describing that the deponent was not physically present before the commissioner but was linked with the commissioner utilizing video technology, and the process described below for remote commissioning of affidavits was utilized.
- While connected via video technology, the deponent must show the commissioner the front and back of the deponent's current government-issued photo identification, and the commissioner must compare the video image of the deponent and information in the deponent's government issued photo identity document to be reasonably satisfied that it is the same person and that the document is valid and current. The commissioner must also take a screenshot of the front and back of the deponent's government-issued photo identity document and retain it.
- The commissioner and the deponent are both required to have a copy of the affidavit, including all exhibits, before each of them while connected via video technology.
- The commissioner and the deponent must review each page of the affidavit and exhibits to verify that the pages are identical and, if so, must initial each page in the lower right corner.
- At the conclusion of the review, the commissioner will administer the oath, the deponent will state what needs to be said to swear or affirm the truth of the facts, and the commissioner must watch the deponent sign his or her name to the affidavit.
- The deponent will then send the signed affidavit with exhibits electronically to the commissioner.
- Before completing the affidavit, the commissioner must compare each page of the copy received from the deponent against the initialed copy that was before him or her in the video conference and may affix his or her name to the jurat only upon being satisfied that the two copies are identical.
- The two copies will then be attached together with a certificate signed by the commissioner stating that the commissioner was satisfied that the process was necessary because it was impossible or unsafe, for medical reasons, for the deponent and the commissioner to be physically present together.
- The completed package would then be permitted to be filed.

COVID-19 Update: Additional Matters to Be Heard Remotely by the Ontario Superior Court of Justice

Practical Guidance

Created on: *04/07/2020*

On April 2, the Ontario Superior Court of Justice, issued two notices to the profession regarding criminal, civil and family matters that will be heard by the court during the COVID-19 pandemic.

The notices came into effect on April 6 and expand the matters that can be heard during the pandemic beyond the “urgent” matters that chief justice Geoffrey Morawetz had limited the court to during the month of March.

Beyond urgent matters, in family court, the matters in most courts are expanded to include requests for consent orders submitted by 14b motions under the Family Law Rules, O. Reg. 114/99, and case conferences with a potential limit on the number of issues that can be addressed at the hearing.

The complete list of civil and family matters that may be heard in each region is contained in region-specific Notices to the Profession, issued April 2, 2020, which include the process to seek a hearing are available at. You may access each region’s Notice to the Profession at the following link on the Superior Court of Justice’s page, [Notice to the Profession, the Public and the Media Regarding Civil and Family Proceedings – Update](#).

In Toronto, the list of urgent and additional family matters that can be heard effective April 6, 2020 have been expanded to include the following:

- Urgent family law events as determined by and at the discretion of the presiding judge, or events that are required to be heard by statute will be heard during this emergency period, including but not limited to:
 - requests for urgent relief relating to the safety of a child or parent (e.g., a restraining order, other restrictions on contact between the parties or a party and a child, or exclusive possession of the home);
 - urgent issues that must be determined relating to the well-being of a child including essential medical decisions, issues relating to the wrongful removal or retention of a child, failure to comply with existing court orders and parenting plans;
 - issues regarding the financial stability of the family unit, including for example support or the need for a non-depletion order; and
 - in a child protection case, all urgent or statutorily mandated events including the initial hearing after a child has been brought to a place of safety, CAS appeals, and any other urgent motions or hearings.
- Consent Orders to be brought by way of 14B motions.
- Case conferences on any of the issues listed in subparagraph 1 above.

COVID-19 Update: B.C. Supreme Court Extends Adjournments until May 29

Practical Guidance

Current as of: **04/21/2020**

On April 16, the B.C. Supreme Court updated its procedures for family, civil and criminal matters. All trials, conferences and chambers applications or other hearings currently scheduled for hearing on or before May 29 are now subject to an automatic adjournment. While the court had previously adjourned matters until May 1, all family matters scheduled for hearing between March 19 and May 29 are adjourned, unless deemed essential or the court otherwise directs.

Filing and service deadlines under the Supreme Court civil and family rules are suspended until May 29, following which they will begin to run again. The suspension of regular operations and adjournment of trials scheduled on or before May 29 necessarily suspends the usual time frames under the rules for holding trial management conferences, for filing trial briefs, and for filing trial certificates, as these time frames all count back from the scheduled trial date.

The court will hear only essential and urgent family and civil matters. Essential or urgent family matters include:

- orders relating to the safety of a child or parent due to a risk of violence or immediate harm (e.g., a protection order, conduct orders, or exclusive possession of the home);
- orders relating to the risk of removal of a child from the jurisdiction (e.g., relocation, non-removal, wrongful removal, or retention of a child); and
- orders relating to the well-being of a child (e.g., essential medical decisions, urgent issues relating to parenting time, contact or communication with a child that cannot reasonably be delayed).

End of Document

COVID-19 Update: Video Conference Proceedings in the B.C. Court of Appeal

Practical Guidance

Current as of: 05/05/2020

On April 29, 2020, the B.C. Court of Appeal released a notice for individuals set to appear before the Court of Appeal for a video conference hearing beginning May 4, 2020. The notice provides a step-by-step guide to appearing in a Zoom video conference proceeding. It provides in depth information about the process and procedures to follow if there are technological issues during the hearing.

Step 1

Fourteen days prior to the hearing, counsel for the parties or self-represented litigants must complete and submit a [Court Proceedings by Video Conference Form](#) setting out who will be attending the hearing, any concerns about privacy or confidentiality involved in the video conference, and proposed steps to mitigate those concerns.

Step 2: Prepare for Zoom Video Conference

The notice includes a guide on how to download the Zoom application and prepare for a video-conference hearing.

Step 3: Join the Video Conference

Parties will receive a Zoom Video Conference link the day before the hearing. The link must not be shared with anyone other than co-counsel appearing at the hearing. Counsel should assist their client with submitting a [Request to attend Video Conference Proceedings Form](#) if their client wishes to observe the hearing from a different device.

The notice also provides direction on video conference decorum and etiquette. Lawyers or litigants making submissions to the court should wear business attire. Lawyers do not need to gown but should be dressed as if they were participating in an in-person chambers matter. Judges will gown.

Participants are not required to stand when they are addressing the court or when the hearing begins or ends.

Bowing is not required at any time during the hearing.

Participants should make reasonable efforts to find a quiet, neutral space to make their submissions. The court understands that interruptions from family and pets may be unavoidable.

All participants must mute their microphones when they are not speaking. During submissions, speakers should pause frequently to allow the Court to ask questions and should avoid speaking over others.

Execution of Wills, Affidavits, Assessing Capacity and Electronic Signatures in Response to COVID-19

Practical Guidance

Created on: 03/26/2020

The Law Society of Ontario has recently issued a corporate statement providing guidance for lawyers and paralegals as a result of the Coronavirus ("COVID-19") pandemic on issues surrounding the execution of Wills and other documents in the Wills and Estates area of practice.

Execution of Wills

The rules regarding execution of Wills in Ontario are strict and cannot be changed except by legislative action. The *Succession Law Reform Act*, [R.S.O. 1990, c. S.26](#), would have to be amended, and the Law Society of Ontario is not able to give permission to override these requirements.

The Law Society suggests that lawyers review their obligations and may wish to consider Ian Hull's perspective as set out in his blog post [Execution of Wills during COVID-19](#).

Affidavits

The Superior Court of Justice (Civil and Family) has modified its requirements relating to affidavits during COVID-19. See section B.6 of [Notice to the Profession, the Public and the Media Regarding Civil and Family Proceedings](#).

The Law Society will provide updates to the legal professions about virtual commissioning if legislative changes are introduced.

Assessing Capacity

In response to whether a lawyer or paralegal can use virtual means of assessing a client's capacity such as video conferencing or telephone, the Law Society has indicated as follows:

Lawyers and paralegals should continue to consult the relevant legislation and case law that govern capacity and consider whether or not they have the ability to adequately assess a person's capacity through remote means, such as on video conferencing or telephone.

Applicable legislation includes the *Substitute Decisions Act*, 1992, [S.O. 1992, c. 30](#); the Rules of Civil Procedure, R.R.O. 1990, Reg. 194; and/or other legislation and regulations, depending on the context of the matter. The legal requirement(s) for assessing a person's capacity to make a decision are not regulated by the Law Society and vary based on the task or decision at hand.

In using video conferencing or telephone as the exclusive means of communicating with a client, lawyers and

Execution of Wills, Affidavits, Assessing Capacity and Electronic Signatures in Response to COVID-19

paralegals should also assess whether there is a risk that the client may be subject to undue influence or duress.

Electronic Signatures

The Law Society has indicated that the question of whether electronic signatures can be used to execute documents is a substantive legal issue, is context specific, and the Law Society does not regulate how documents are executed.

Lawyers and paralegals should review applicable legislation to determine if electronic signatures are permitted in the context of their matters. For example, the Succession Law Reform Act includes provisions that govern the execution of testamentary documents. Lawyers and paralegals may also wish to review the *Electronic Commerce Act, 2000*, [S.O. 2000, c. 17](#).

End of Document

COVID-19 Update: Virtual Execution of Wills and Powers of Attorney

Practical Guidance

Created on: *04/14/2020*

On April 7, 2020 the Government of Ontario released an emergency Order temporarily allowing the virtual execution of wills and powers of attorney by means of “audio-visual communication technology”. This is defined as any electronic means of communication in which all participants can see, hear and communicate with each other in real time. This could be accomplished by meeting using services like Zoom, GoogleDuo, GoToMeeting, Facetime or Skype.

These changes were enacted under s. [7.0.2\(4\)](#) of the *Emergency Management and Civil Protection Act*, [R.S.O. 1990, c. E.9](#), and do not amend the *Succession Law Reform Act*, [R.S.O. 1990, c. S.26](#), or the *Substitute Decisions Act*, 1992, [S.O. 1992, c. 30](#). The Order applies as of April 7, 2020 and has no specified ending date. It is meant to apply for the duration of the COVID-19 emergency and is not retroactive.

Pursuant to s. [4\(1\)](#) of the *Succession Law Reform Act*, wills must be signed in the physical presence of two or more witnesses. Pursuant to the s. [10](#) of the *Substitute Decisions Act*, powers of attorney must be executed in the physical presence of two witnesses. However, the emergency Order permits the execution of wills and powers of attorney in the presence of witnesses by means of “audio-visual communication technology”. It also requires that at least one of the witnesses be an Ontario licensed lawyer or paralegal.

End of Document

