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Chambers Global Practice Guide

Insurance & Reinsurance
Canada Law & Practice

By Stuart Carruthers

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1. Basis of Insurance and Reinsurance Law

1.1 Sources of Insurance and Reinsurance Law

Canada has a federal system of government, whereby jurisdiction over insurance and reinsurance regulation is divided between the federal government and the governments of the ten provinces and three territories (collectively referred to herein as the "provinces"). Generally, the national regulator, the Office of the Superintendent of Financial Institutions (OSFI), conducts prudential regulation. OSFI is a robust, global-level regulator that plays a leading role in all the key international financial services regulatory organisations (the International Association of Insurance Supervisors (IAIS), Basel, etc).

The provincial regulators, which are similar to US state departments or commissioners of insurance, principally regulate market conduct and the licensing and supervision of insurance intermediaries such as agents, brokers and adjusters. The provincial regulators together comprise an umbrella group called the Canadian Council of Insurance Regulators (CCIR), similar to the National Association of Insurance Commissioners in the United States. There is also an umbrella group of insurance intermediary regulators, the Canadian Insurance Services Regulatory Organizations (CISRO).

Each of Canada's common law provinces (ie all provinces except Quebec) has enacted an Insurance Act governing the formation and content of many types of insurance contracts. These insurance statutes are relatively uniform. In addition, the application and interpretation of insurance contracts in all provinces except Quebec will be governed by common law principles.

In Quebec, the form and content of insurance contracts are governed by the Civil Code of Quebec. In an attempt to harmonise civil and common law principles, Quebec has enacted rules that are generally similar to those of the other provinces.

In general terms, all contracts of insurance and reinsurance are regulated. However, certain types of quasi-insurance contracts (for example, extended warranty contracts) are, at common law or by administrative practice, not regulated as insurance contracts in some provinces. In addition, the enrolment of individuals under group insurance contracts is, in most provinces, not regulated as an activity requiring licensing as an intermediary.

2. Regulation of Insurance and Reinsurance

2.1 Regulatory Bodies and Legislative Guidance

As noted in **1.1 Sources of Insurance and Reinsurance Law**, jurisdiction over insurance regulation is divided between a national prudential regulator, OSFI, and provincial regulators, who are principally market conduct regulators.

Most of the largest Canadian insurers are incorporated under a federal Canadian law called the Insurance Companies Act (the "Federal Act") and are prudentially regulated by OSFI, which also prudentially regulates licensed Canadian branches of foreign insurers. A number of smaller insurers are incorporated under provincial law and prudentially regulated by provincial regulators.

All insurers and reinsurers must be licensed, federally and provincially, subject to certain exceptions for foreign companies. Insurers and reinsurers are generally regulated in the same way, although certain exceptions apply for reinsurers, given their lack of direct interaction with consumers.

In the provinces of British Columbia, Saskatchewan and Manitoba, compulsory minimum private automobile insurance is provided by a monopoly government insurer.

Both OSFI and certain provincial regulators, particularly the Quebec Autorité des marchés financiers (AMF), are very active at the IAIS level and Canadian capital and market conduct requirements are broadly consistent with, and in many cases significantly exceed, international capital requirements and IAIS Insurance Core Principles (ICPs). There have been no insolvencies or bailouts of insurers in Canada since the onset of the global financial crisis in 2008.

The Federal Act imposes a comprehensive set of operating requirements and limitations for Canadian federal insurance companies, including in relation to corporate governance, investments, transactions with related parties, payment of dividends, issuance of shares for consideration other than cash, issuance of debt obligations and other material or fundamental transactions.

Canadian federal insurance companies and foreign branches must provide corporate and financial information to OSFI on an ongoing basis, including annual audited financial statements and quarterly and annual financial and business returns. OSFI's continuing supervision includes analysis of this information and regular examination of companies. OSFI has implemented a risk-based methodology for assessing Canadian federal insurance companies and branches, known as its Supervisory Framework. In applying the Supervisory Framework, OSFI considers the inherent risks of the business and the quality of risk management for each significant activity.

Other than in respect of private passenger automobile insurance rates in certain provinces, there is no rate or form filing/approval required in Canada.

In some provinces, insurance brokers and agents are regulated in the same fashion and by the same regulator. In other provinces — for example, Ontario — agents are regulated by a government regulator, the Financial Services Commission of Ontario (FSCO), while brokers are regulated by a self-regulatory body, the Registered Insurance Brokers of Ontario (RIBO). In some provinces, all regulation of intermediaries is carried out by self-regulatory organisations with delegated powers.

Insurers and reinsurers are generally subject to the same tax rules that apply to other Canadian corporations. However, in addition to standard corporate taxes, additional insurance-specific taxes apply.

2.2 The Taxation of Premium

One of the most significant additional types of tax on insurers is insurance premium tax. Each province administers its own insurance premium tax, although the administration of the tax is similar across the provinces. Generally, the tax is payable by insurers in respect of gross premiums receivable in a tax year for business transacted within the province. Business transacted within the province typically includes life insurance for residents of a province or insurance in respect of persons or property located in the province.

This assumes that the insurer is licensed in Canada, and insured parties who enter into insurance contracts with unlicensed providers of insurance can also be liable for the payment of premium taxes. Federally, a 10% excise tax applies to many types of premiums paid to unlicensed insurers. The excise tax does not apply to reinsurance, and exemptions may be available for types of insurance not otherwise available in Canada. Provincial premium taxes generally are payable by the insured for insurance from unlicensed providers, usually at rates higher than those for insurance from licensed providers.

In addition to the taxes above, some provinces also impose a sales tax on the purchase of certain insurance policies, which is generally payable by the purchaser of the policy.

3. Overseas Firms Doing Business in the Jurisdiction

3.1 Overseas-Based Insurers or Reinsurers

Overview

In order for a non-Canadian insurance company to carry on insurance business in Canada, it must comply with the licensing and other requirements of the Federal Act and the applicable insurance legislation in each province in which it wishes to carry on business. It is accordingly, in each case, a question of interpretation as to whether the proposed activities of the insurer in relation to Canada/the province fall within the applicable definition of carrying on insurance business in Canada/the province; put another way, whether there is a sufficient activity connection or nexus to Canada/the province to require licensing under the Federal Act or the applicable provincial insurance legislation. In some cases, a foreign insurer can readily insure, from outside Canada, a risk located in Canada, without being required to be licensed under the Federal Act or the applicable provincial legislation.

Insuring on an unlicensed basis – Canadian Federal Regime

Under the Federal Act, a non-Canadian insurance company "shall not insure in Canada a risk" unless it is authorised to do so pursuant to an order made by OSFI under the Federal Act. The extent to which a non-Canadian insurance company's activities in respect of Canada constitute the company "insuring in Canada a risk" is, as noted above, a factual matter dependent on all the facts and circumstances of the proposed arrangements.

In this regard, OSFI has published an Advisory (the "Advisory"), most recently revised in May 2009, which sets out detailed criteria for determining whether a company's business model would, in OSFI's view, constitute insuring in Canada a risk (thus requiring licensing). The Advisory focuses on the extent to which the insurance business activity (solicitation, underwriting, servicing, etc) occurs within Canada and not whether the risk is located in Canada.

Section 2 of the Advisory sets out the criteria to be considered, as follows.

To determine whether a foreign insurer is insuring in Canada a risk, consideration should be given to whether any person acting for, or on behalf of, the foreign insurer:

- promotes the foreign insurer or the foreign insurer's insurance products through a medium of communication that is primarily circulated, transmitted, broadcasted or otherwise accessible in Canada (other than in the course of the activity referred to in subparagraph 2(b) below);
- directly incites a person located in Canada to request insurance coverage (where that person is specifically identified and targeted), and that person is provided with the opportunity and/or means with which to make a request for insurance coverage in the course of that activity (for example, telemarketing, door-to-door solicitation, direct/targeted mail);
- receives in Canada a request for insurance coverage from a policyholder;
- negotiates from Canada the terms and conditions of insurance coverage;
- decides in Canada to bind the foreign insurer to insurance coverage;
- communicates from Canada an offer to provide insurance coverage, or the acceptance of a request for insurance coverage, to a policyholder;
- receives in Canada an acceptance of the foreign insurer's offer to provide insurance coverage from a policyholder;
- receives in Canada payment for insurance coverage from a policyholder; and
- interacts in Canada with the policyholder in the provision of services related to the insurance coverage (for example, providing information about the coverage and receiving claims).

Sections 4 and 5 of the Advisory set forth OSFI's view, as follows, of the mixes of those activities that would constitute "insuring in Canada a risk" (thus requiring licensing) versus "not insuring in Canada a risk" (thus not requiring licensing).

Section 4 – OSFI considers that a foreign insurer is insuring in Canada a risk where its business model encompasses the following:

- Scenario 1: two or more of the activities referred to in any of subparagraphs 2(b) to (h).
- Scenario 2: any one of the activities referred to in any of subparagraphs 2(b) to (h) and both of the activities referred to in subparagraphs 2(a) and (i).
- Scenario 3: reaching an agreement, actual or in principle, on most or all of the material terms and conditions of the insurance coverage in the course of its negotiations in Canada (ie this Scenario contemplates that, in addition to 2(d), at least one additional activity referred to in 2(e) through (g) would apply).

Section 5 – OSFI considers that a foreign insurer is not insuring in Canada a risk where its business model encompasses no more than one of the activities referred to in paragraph 2.

Thus, in certain cases, it is possible for a foreign insurer to structure its business model with sufficiently minimal connection to Canada such that, under the Advisory, it could insure a risk located in Canada without being required to be licensed under the Federal Act. This business model is quite common for the coverage of certain niche types of large commercial risks such as aviation and aerospace risks, and also quite common for reinsurance, and would entail effecting the solicitation, negotiation, binding, etc outside Canada.

Insuring on an unlicensed basis – Canadian Provincial Regimes (generally, and Ontario specifically)
The interplay between the Federal Act and the various provincial Insurance Acts is nicely summarised in Section 8 of the Advisory, as follows:

"In Canada, the federal and provincial governments share jurisdiction over foreign insurers. While a foreign insurer may, for the purposes of the Canadian Act, be considered not to be insuring in Canada a risk, its activities may cause that foreign insurer to require a licence under one or more of the insurance statutes of the provinces in Canada. For example, some of these statutes require a foreign insurer to obtain a licence merely to promote its products in, insure a person domiciled or resident in, or provide insurance coverage on a property situated in the province. Accordingly, OSFI recommends that foreign insurers consult these statutes and the agencies that administer them."

In Ontario, for example, under the Insurance Act, the scope of carrying on insurance business in Ontario is defined very broadly so as to encompass virtually any activity associated with the business of insurance. Those activities include if the insurer in Ontario:

- "maintains or operates, either in its own name or in the name of its agent or other representative, an office for the transaction of the business of insurance either in or out of Ontario;"
- "distributes or publishes or causes to be distributed or published any proposal, circular, card, advertisement, printed form or like document" (in respect of which, the Ontario regulator noted in a 2004 decision that "the Act does not specify the subject matter of the distributed or published documents, but we think it ought to be something that is in aid of, or in the hope or expectation of, the transaction of the business of insurance");
- "makes or causes to be made any written or oral solicitation for insurance;"
- "issues or delivers any policy of insurance;"
- "collects or receives or negotiates for or causes to be collected or received or negotiated for any premium for a contract of insurance;"
- "inspects any risk or adjusts any loss under a contract of insurance;" or
- "prosecutes or maintains an action or proceeding in respect of a contract of insurance."

That said, as under the federal test, it may be possible for a foreign insurer to structure its business model with sufficiently minimal connection to Ontario such that, under the Ontario Act, it could insure risk located in Ontario without being required to be licensed under the Ontario Act.

The licensing triggers in most provinces are similar to those in Ontario; however, in a number of provinces (particularly British Columbia, Alberta, Manitoba and Quebec) in certain circumstances, licensing is required to insure a risk or person located in the applicable provinces. Consequently, in order to determine whether licensing would be required at the provincial level, it is necessary to examine the type and circumstances of the risk and the relevant provinces in question. Even if no licensing is required in the applicable provinces, in some provinces only a specially licensed broker can place coverages with an unlicensed insurer and additional procedures/documentation may be required. Significant additional federal and provincial taxes can also apply on insurance placed with unlicensed insurers as opposed to licensed ones. Lastly, the provincial regulators have requested (through the CCIR) that foreign companies with licensed branches voluntarily undertake that, to the extent they write risks that would require provincial licensing, they will do so in a fashion that would constitute "insuring in Canada a risk" under the Advisory. By taking this approach, the business would be required to be reported in the licensed branch.

3.2 Fronting
See **3.1 Overseas-Based Insurers or Reinsurers**.

4. Transaction Activity

4.1 M&A Activities Relating to Insurance Companies
Consolidation of the Canadian property and casualty insurance market has continued in recent years, with major transactions including Aviva Canada's 2016 acquisition of RBC General and the entering into of a long-term distribution partnership with RBC Insurance. There have also been a number of significant brokerage transactions, including Wawanesa's 2017 acquisition of Western Financial Group from Desjardins.

Carrier and broker acquisitions are expected to continue over the next decade, driven by the need for scale, access to new distribution channels and emerging underwriting and distribution technologies powered by big data and advances in artificial intelligence (AI)/machine learning. Consolidation has also occurred as a result of global merger transactions (ACE/Chubb, XL/Catlin/AXA, Liberty/Ironshore, etc). The currently proposed acquisition of Genworth Financial by the China Oceanwide group would (subject to regulatory approval) result in an indirect change of control of Genworth's Canadian mortgage insurance subsidiaries, the first such acquisition of control of a Canadian financial institution by a PRC acquirer.

Major Canadian and international private equity funds and pension plans are also expected to continue to be active investors in and acquirers of Canadian insurers and distribution and services platforms.

There have also been a number of substantial life insurance sector M&A transactions in recent years, although these are much less frequent than in the property and casualty insurance sector.

5. Distribution

5.1 Distribution of Insurance and Reinsurance Products

Overview

A wide variety of distribution channels are utilised in the Canadian market, including a variety of broker models, independent life insurance agents, tied life and property and casualty agents, and direct distribution via the internet. Overall, the broker channel is more prevalent in retail lines than in other similar markets, such as the UK, and aggregators have much less market penetration than in other similar markets.

Several of the large Canadian banks have significant “bancassurance” models through regulated insurer subsidiaries, but Canadian banks are prohibited from distributing most property and casualty insurance products through their branches and, effectively, through their websites.

Licensing

Agents and brokers must be licensed by the applicable provincial insurance intermediary regulator. In most provinces, legal entities must be licensed, in addition to the individual brokers or agents they employ. For individuals, the application process includes, generally, passing qualifying examinations, obtaining the sponsorship of one or more insurers, meeting certain educational or experience credentials or qualifications, obtaining minimum errors and omissions insurance, and the completion of background or police checks.

In Ontario, wholesale brokers (that do not deal directly with the public) are not required to be licensed; however, most other provinces require licensing of all intermediaries, including wholesalers.

Insurance adjusters must also be licensed by provincial insurance regulatory authorities and, typically, are similarly required to pass certain qualifying examinations, have and maintain certain educational or experience requirements or credentials, and be sponsored, employed or supervised by an adjusting company. Individual adjuster employees of insurers are not required to be licensed.

Third-party administrators and other persons performing purely clerical, administrative or adjudicative functions are generally not required to be licensed in most provinces.

Reinsurance brokers are also not required to be licensed.

In Ontario, registered travel agents acting in respect of travel accident and sickness, baggage or trip cancellation insurance are also not required to be licensed. Certain other exemptions exist under the Ontario Insurance Act from the agent licensing requirements and similar exemptions are found in the licensing provisions of most of the other common law provinces, including:

- a collector of insurance premiums who does not solicit applications or act or aid in negotiating insurance contracts, if the collection fee does not exceed 5% of any amount collected;
- an officer or employee of the head office of an insurer who solicits life and accident and sickness insurance on behalf of the insurer and who does not receive any commission; and
- a transportation company, or officer or employee of a transportation company, when acting as an agent for an insurer with respect to travel insurance, accident and sickness insurance or baggage insurance.

In addition, in many provinces, the administrative practice is to not require licensing of persons enrolling individuals under group creditor insurance coverage.

Quebec law also provides an exemption from licensing for a unique category of market intermediaries known as “distributors.” A distributor is a person who offers or arranges for insurance as an accessory to the goods the distributor sells, including, in particular, travel insurance, vehicle rental insurance (if the rental period is less than four months), credit and debit card insurance, and replacement insurance (property insurance under which the insurer guarantees the replacement of the insured vehicle or insured parts). Insurers are permitted to offer insurance products through distributors, which include, among others, travel agents, banks and trust companies. The distributor and the insurer have disclosure obligations to the client and there are filing and approval requirements with the Quebec regulator.

Ownership limitations

In Quebec, financial institutions and their affiliates are prohibited from acquiring more than 20% of the voting shares of an intermediary firm that acts through individual damage insurance brokers.

Operating requirements

The key ongoing requirements for insurance brokers and agents are filing annual returns and/or renewal documentation, maintaining required levels of errors and omissions insurance, complying with minimum continuing education requirements (for individual registrants) and maintaining a designated broker or agent with certain education and experience qualifications or credentials (for corporate or partnership registrants).

There are similar requirements for adjusters.

There are no ongoing requirements for third-party administrators in most provinces.

6. Making an Insurance Contract

6.1 Obligations of the Insured and Insurer

Generally speaking, an insurance contract is subject to the same rules of formation as all other contracts. Accordingly, provided that there is an offer, acceptance of that offer, and agreement as to the important terms of the bargain, an insurance contract can be validly formed.

While oral insurance contracts are enforceable in the common law provinces pursuant to statute, an issued insurance policy must contain the name of the insurer, the name of the insured, the name of the person or persons to whom the insurance money is payable, the amount, or the method of determining the amount, of the premium for the insurance, the subject matter of the insurance, the indemnity for which the insurer may become liable, the event on the happening of which the liability is to accrue, the date upon which the insurance takes effect and the date it terminates or the method by which the latter is fixed or to be fixed.

Similar rules apply in Quebec; subject to evidentiary issues, an insurance contract, like other contracts, may exist only verbally. At the very least, however, the insurance policy must include the names of the parties to the contract and the names of the persons to whom the insured sums are payable or, if those persons are not determined, a means to identify them. It must also include the object of the insurance, the amount of coverage, the nature of the risks incurred, the time from which the risks are covered, the term of the coverage, the amount and rate of the premiums and the dates on which they are due. Because the insurance policy evidences, but does not create, the insurance contract, coverage is dependent only on the contract, even if the policy is received at a later date.

Insurance contracts are contracts of the utmost good faith and that principle has now been partially codified in some provincial insurance statutes. Both the insurer and the insured owe duties of the utmost good faith to the other. In addition to the express provisions in the policy and the statutorily mandated conditions, there is an implied obligation in every insurance contract that the insurer will deal with claims from its insured in good faith.

For the insured, this requires that it make full and fair disclosure to the insurer of the insured's circumstances prior to entering into the insurance contract. The insured is not, however, generally obliged to advise the insurer of matters that the insurer knows or ought to know.

If an insured misrepresents a material fact that is ultimately relied on by the insurer in issuing the policy, the insurer may have a basis for setting aside the contract. However, in Quebec, for damage insurance, a court may reduce the amount otherwise payable under the policy unless the bad faith of the insured is established or unless it is established that the insurer would not have covered the risk if it had known the true facts.

The scope of the duty of good faith has not been precisely delineated or definitely settled. An insurer's duty of utmost good faith requires the insurer to treat the insured fairly throughout the claims process, including, but not necessarily limited to, responding to claims in a timely fashion, remaining open-minded to the possibility of coverage for the claim, and conducting balanced and fair investigations into potential claims.

A breach of the duty of good faith by either party may bring with it remedies beyond those that are ordinarily available as a matter of contract law. In particular, a breach of the duty of good faith can result in the contract being voided by either party (with return of the premium paid), in an award of punitive damages as a means of deterring such conduct, or both.

Civil law, unlike common law, does not formally recognise the concept of punitive damages. As a result, punitive damages may be awarded in Quebec only where a legislative provision permits it. This would be the case, for example, where an insurer fails to respect its utmost good faith obligation in treating the insured fairly throughout the claims process, amounting to an abuse of right by the insurer.

6.2 Failure to Comply With Obligations

see **6.1 Obligations of the Insured and Insurer**.

7. Alternative Risk Transfer

7.1 ART Transactions

ART transactions are not common in the Canadian domestic market. Insurance-linked securities are commonly sold into Canada on a private placement basis.

8. Interpreting an Insurance Contract

8.1 Contractual Interpretation and Use of Extraneous Evidence

Generally speaking, insurance contracts are subject to the same principles of interpretation as all other contracts. Principally, contracts should be interpreted and applied:

- as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
- by determining the intention of the parties in accordance with the language they have used in the written document and based upon the presumption that they have intended what they have said;
- with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties;
- where the language of a contract is unambiguous, by the court not giving it a meaning different from that expressed in clear language, unless the contract is unreasonable or is contrary to the intention of the parties; and
- in a fashion that accords with sound commercial principles and good business sense, and that avoids a commercial absurdity.

These principles have been consistently applied in the context of interpreting insurance policies with the objective of determining, based on reading the contract as a whole, the interpretation that appears to promote or advance the true intentions of the parties as the time the policy was entered into. Canadian courts have also made clear that constructions that would result in a windfall to either the insurer or insured ought to be avoided.

Where the foregoing rules of construction do not prove satisfactory and two competing interpretations of the policy are advanced, the courts may also apply the doctrine of contra proferentem (the words of the agreement are to be construed against the party that drafted it) to resolve the dispute.

Most of the common law provinces have prescribed policy wordings (called statutory conditions) that are deemed to be part of the insurance policy for certain kinds of insurance, typically fire insurance and accident and sickness insurance, and these are deemed to part of the written insurance policy. In Quebec, the Civil Code does not provide for specific policy wordings but any clause in a non-marine insurance contract that purports to grant the insured fewer rights than are granted by the Civil Code is a nullity. Otherwise, policy wordings and forms are not prescribed by statute, except for automobile insurance, where wordings are set by statute.

The types of terms found in insurance policies vary widely, depending on the nature of the policy.

Insurance policies will contain a number of conditions, which will vary depending on the nature of the policy, but are generally intended to delineate the relationship between the insurer and insured. A policy will typically stipulate that coverage is dependent on the insured's compliance with the conditions set out in the policy.

However, legislation in each of the common law provinces expressly empowers the courts to grant relief against forfeiture of the policy where there has been imperfect compliance with the terms of the policy. In Quebec, an argument can be made that courts are similarly empowered, through the duty of good faith, in cases where the insurer did not suffer any prejudice.

9. Disputes

9.1 Disputes Over Coverage

In disputes between insurers and insureds, the most common venue for resolution is the courts. However, under Ontario auto insurance legislation, disputes involving claimants and insurers regarding entitlement to statutory accident benefits must first be mediated before the claimant can opt to arbitrate the matter or either the claimant or insurer can commence a proceeding in the Ontario courts.

Two independent "ombudservices" can also be of assistance. The General Insurance OmbudService (GIO) is an independent organisation that provides consumers of car, home and business insurance in Canada with a free process to resolve their complaints with insurers that are members of the GIO. The GIO mediates or adjudicates disputes relating to claims, interpretation of policy coverage and policy processing and handling. Similarly, the OmbudService for Life and Health Insurance (OLHI) is a national, independent complaint resolution and information service for consumers of life and health insurance products and services, including life, disability, employee health benefits, travel and insurance investment products such as annuities and segregated funds. The OLHI does not, however, provide services for complaints related to non-Canadian life and health insurance, claims that are proceeding before the courts or arbitrators or complaints brought by non-consumers (ie businesses).

9.2 Disputes Over Jurisdiction and Choice of Law

Jurisdiction, choice of law and arbitration clauses are generally recognised by Canadian courts and will be enforced.

However, in the common law provinces other than Alberta, British Columbia and Nova Scotia, legislation exists that may displace the choice of governing law set out in a policy in favour of domestic law where the subject matter of a contract of insurance is property in the province, or an insurable interest of a person resident within the province where the contract is signed, countersigned, issued or delivered in the province or committed to the post office or to any person to be delivered to the insured, its assignee or agent in the province.

In Quebec, a court has jurisdiction to hear an action based on a contract of insurance where the holder, the insured or the beneficiary of the contract is domiciled or resident in

Quebec, the contract is related to an insurable interest situated in Quebec or the loss took place in Quebec, unless the parties, by agreement, have chosen to submit all existing or future disputes to a foreign authority, including the authority of another province, or to an arbitrator.

9.3 Litigation Process

As noted in **9.1 Disputes Over Coverage**, the most common venue for resolution of disputes between insurers and insureds is the courts. Most disputes are commenced by way of civil action and, in the common law provinces, proceed through the following stages: (i) pleadings; (ii) pre-discovery motions; (iii) documentary and oral discovery; (iv) discovery-related motions; (v) pre-trial procedures; (vi) trial; and (vii) appeals (if any).

In Quebec, an action is commenced by means of an originating application, to which the defendant will generally respond with a filing in which it affirms its intention to defend. The parties must then prepare and file a case protocol that sets out the deadlines for all steps leading to a joint declaration of readiness for trial. These steps generally include (i) preliminary motions; (ii) oral discoveries; (iii) a written defence (or brief description of the defence to be presented at trial); and (iv) expert reports, with joint reports increasingly being encouraged by Quebec judges. Once these steps are complete and the joint declaration of readiness for trial is filed, the matter can proceed to trial and then potentially to an appeal.

Each province has a statute that governs the admissibility of evidence in a civil proceeding. Each province also has its own specific rules regarding how costs are to be dealt with at the conclusion of a civil proceeding. Some provinces, such as Ontario, have left costs largely to the discretion of the court, while other jurisdictions, such as Quebec, have established schedules pursuant to which costs may be calculated. In all provinces, however, the principle is that the "loser pays" a certain portion of the winner's costs, except in a limited number of circumstances.

It is also noteworthy that, with respect to liability insurance, the Civil Code of Quebec establishes that defence costs cannot erode policy limits, even if the parties expressly agree otherwise in the policy.

9.4 The Enforcement of Judgments

In Ontario (and other common law provinces), the applicable rules of civil procedure contain provisions for the enforcement of "domestic" judgments; ie judgments issued by the court in the respective province. For example, in Ontario, common mechanisms available for the enforcement of an order or judgment for the payment or recovery of money include: (i) a writ of seizure and sale; (ii) garnishment; (iii) a writ of sequestration; and (iv) the appointment of a receiver.

For the enforcement of monetary judgments issued by other provinces or countries, Ontario courts will either follow the provisions of reciprocal enforcement of judgment legislation which exist in respect of certain provinces and countries, or more generally apply principles that have derived from the common law. At common law, a foreign monetary judgment is evidence of a debt. All the enforcing court needs is proof that the judgment was rendered by a court of competent jurisdiction and that it is final, and proof of its amount. The enforcing court then lends its judicial assistance to the foreign or extra-provincial litigant by allowing him or her to use its enforcement mechanisms. In the absence of evidence of fraud or of a violation of natural justice or of public policy, the enforcing court is not interested in the substantive or procedural law of the foreign jurisdiction in which the judgment sought to be enforced domestically was rendered.

The enforcement of foreign non-monetary judgments raises different concerns and is subject to a different analysis. The Supreme Court of Canada has directed that care must be taken to ensure that recognition and enforcement are confined to cases where they are appropriate and do not create undue problems for the legal system of the enforcing state or unfair results for the parties. In conducting this analysis, Canadian courts are directed to consider the following criteria:

- Are the terms of the order clear and specific enough to ensure that the defendant will know what is expected from him or her?
- Is the order limited in its scope and did the originating court retain the power to issue further orders?
- Is the enforcement the least burdensome remedy for the Canadian justice system?
- Is the Canadian litigant exposed to unforeseen obligations?
- Are any third parties affected by the order?
- Will the use of judicial resources be consistent with what would be allowed for domestic litigants?

Accordingly, while non-monetary judgments are enforceable in Canada, whether a particular judgment will be enforced is a highly fact-specific exercise that very much depends on the nature and effect of the judgment.

9.5 The Enforcement of Arbitration Clauses

In Canada, arbitrations result from a contractual agreement between the parties to resolve disputes by arbitration and the parties are permitted, in large part, to agree the scope of the proceeding. Most common law provinces have commercial arbitration legislation that sets out some parameters for the proceeding and some of the procedures to be used. In Ontario, the Arbitration Act 1991 stipulates that arbitrations conducted pursuant to an agreement are subject to that Act unless the Act is excluded by law or the arbitration is subject to the International Commercial Arbitration Act. In Quebec, the relevant legislative provisions are found in the Civil Code and the Code of Civil Procedure.

Arbitration awards are enforceable by Canadian courts. Domestic arbitration statutes, such as Ontario's Arbitration Act 1991, contain specific provisions that enable persons who are entitled to enforce an arbitral award to do so by application to the Court in the particular province.

In Ontario, foreign arbitration awards can be enforced pursuant to the provisions of the International Commercial Arbitration Act 2017 (the "ICAA"). Among other things, the ICAA incorporates as schedules both the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted by the United Nations Conference on International Commercial Arbitration in New York on 10 June 1958 and the UNCITRAL Model Law on International Commercial Arbitration. While the ICAA, including through these schedules, provides a list of steps and factors that relate to the enforcement of foreign arbitral awards, in general they provide that an arbitral award, irrespective of the country in which it was made, shall be recognised as binding and shall be enforced, subject to certain limited exceptions.

9.6 Alternative Dispute Resolution

In some of the common law provinces, any dispute between the parties must be submitted to mediation before the matter may be tried in the civil courts. For example, in Ontario, mediation is mandatory for proceedings that are commenced in certain regions, including Toronto and Ottawa.

In Quebec, mediation may be initiated upon agreement by the parties prior to judicial proceedings or pursuant to a mediation clause in a contract. It is also possible, however, to begin mediation during a proceeding. In such cases, a judge, exercising authority as a mediator, presides over a dispute resolution conference.

10. InsurTech

10.1 InsurTech Developments

In general, the same products and trends (big data, AI/machine learning, blockchain, etc) are emerging in Canada as in other major markets, as described in the March 2017 IAIS Report on Fintech Developments in the Insurance Industry. In particular, aggregator sites, activity-based health insurance products and auto insurance telematics and usage-based insurance (UBI) offerings are slowly becoming more popular.

To date, Canadian fintech activity has focused more on the banking and payments sectors than on insurance. However, most of the leading life and P&C insurers are actively collaborating with or investing in fintech/InsurTech start-ups and a number of the leading P&C players have established or collaborate with innovative digital "garages" or accelerators. A number of leading Canadian insurers have also partnered with pre-eminent technology firms (Google, Uber, etc) in the launch of the Vector Institute, a global-scale AI research hub in downtown Toronto.

10.2 Regulatory Response

Canadian insurance and financial services regulators are keenly following fintech/InsurTech developments, although they face the types of challenges described in the IAIS report. The Canadian Securities Administrators (the umbrella organisation of the country's 13 securities regulators) has established a "regulatory sandbox" similar to those in the UK and other jurisdictions, and the Quebec AMF has an active fintech working group focused on analysing fintech innovations and anticipating regulatory and consumer protection issues. At the federal level, as noted below in Section 13, two of the key focuses of the recent federal financial sector review exercise are (i) fintech powers of financial institutions and (ii) fintech collaboration.

11. Emerging Risks and New Products

11.1 Emerging Risks

As in many advanced markets, in recent years a number of new insurance products have become available to protect against new and emerging threats, including:

- cyber threats: cyber and privacy breach coverages are now widely available and frequently placed;
- flood/water damage: a greatly increasing risk reflecting, among other things, the impact of extreme weather. Over the last few years, most major P&C carriers have begun offering personal lines overland water protection, in response to market demand and opportunity following a number of significant floods in major urban centres. As described below, the CCIR's Personal Property Insurance Working Group has recently released an initial Issues Paper and a follow-up Finding Reports and Position Paper outlining its expectations and recommendations relating to natural catastrophe risk and the Canadian personal property insurance marketplace;
- M&A representations and warranties: as in the US, representations and warranties coverage for M&A transactions is enjoying a notable resurgence in its current "Version 2.0" incarnation, with many carriers and managing general agents (MGAs)/brokers entering or re-entering the market;
- "sharing economy" and usage-based risks: a number of auto carriers have introduced specialised auto coverages for ride-sharing platforms and their drivers, and regulators in Ontario and Alberta have adopted new rules for such coverages/markets. Coverages focused on other sharing economy models (such as Airbnb) have also recently been introduced;

- in a related development, most private passenger auto carriers have introduced some form of telematics/usage-based coverage, although, to date, there has not been widespread take-up of such coverages. Such UBI coverages are tightly regulated and in Ontario, for example, can only be used for rate discounting purposes, not increases. Other "on-demand" property and casualty coverages increasingly available in other markets are also expected to be launched in Canada in the short- to medium-term;
- legal expenses risks: several years ago, a new, start-up monoline legal expenses insurance (LEI) carrier entered the market, which at that time was virtually undeveloped in comparison to European countries. This carrier (which recently restructured into an MGA), and several other MGAs, have recently been actively underwriting/distributing "after-the-event" LEI covering litigation plaintiffs; and
- longevity risks for pension plan sponsors: as in the UK, there has increasingly been interest from pension plan sponsors in "de-risking" their plans through longevity insurance/reinsurance solutions (as well as potentially through derivatives). OSFI has issued administrative guidance outlining its regulatory expectations in this regard. In by far the largest such transaction, in 2015, BCE, the parent company of the Bell Canada telecom group, entered into a CAD5 billion longevity insurance transaction with a Canadian life insurer, which was heavily reinsured to two locally licensed life reinsurers.

11.2 New Products or Alternative Solutions

See **11.1 Emerging Risks**.

12. Recent and Forthcoming Legal Developments

12.1 Developments Impacting on Insurers or Insurance Products

see **13.1 Additional Market Developments**.

13. Other Developments

13.1 Additional Market Developments

Over the past year, there have been a number of significant regulatory developments in Canada at the federal and provincial/CCIR levels.

Federal

Financial sector framework consultation

Under the federal financial institutions statutes (the Federal Act, the Bank Act, etc), sunset provisions historically automatically required Canadian federal financial institutions to cease carrying on business at the end of successive five-year periods, with the next such expiry occurring in 2017. In the 2016 federal budget, that expiry was extended until 2019 to facilitate a customary process of review and updating of the statutes, and in August 2016, the Department of Finance released a consultation paper, with comments due in November 2016. The consultation paper outlined three core policy objectives guiding financial sector policy and framed the review around those objectives: (i) stability, (ii) efficiency and (iii) utility. Submissions received were to inform the development of a policy paper for further consultation in 2017. The paper also surveyed the Canadian financial services landscape, including in respect of life insurers, and key trends and environmental factors, including:

- the macroeconomic backdrop;
- increased concentration;
- internationalisation of Canadian financial institutions; and
- fintech.

The paper also included five questions for consideration against that background and the policy goals.

In August 2017, the Department of Finance released its follow-up consultation paper, expressing the government's positions and requesting further input on a number of topics arising out of the first paper, including:

- fintech powers of financial institutions;
- fintech collaboration;
- infrastructure investment powers for life insurers;
- a number of corporate governance matters, including the possibility of adopting a "comply or explain" model to promote the participation of women on the boards of directors and in senior management of financial institutions;
- potential financial system-wide risks of an extreme earthquake;
- the insolvency regime for life insurers; and
- a number of miscellaneous technical statutory amendments.

In March 2018, the Budget Implementation Act 2018 introduced a number of priority amendments to the federal statutes (including the Federal Act), and the amendments received Royal Assent in June 2018. They will come into effect on a future date to be fixed, following the development of necessary regulations. Other amendments are expected to be introduced in fall 2018. The initial changes:

- extended the sunset of the statutes to June 2023;
- introduced a host of broad, new networking and technology-related powers, all subject to regulations to follow (which will be critical to the implementation of the new powers), which would allow institutions to:
  - (a) provide referrals of their customers to other entities;
  - (b) engage in collecting, manipulating and transmitting

(c) engage in technology activities without regulatory approvals;
(d) commercialise activities developed in-house and provide them to third parties;
(e) provide identification, verification and authentication services outside the financial services sector;
(f) invest in entities a majority of whose activities are financial services activities a financial institution can carry on; and

- expanded the ability of life insurance companies to acquire control of, or acquire or increase a substantial investment in, an entity that makes investments in infrastructure assets or engages in other infrastructure-related activities to be prescribed.

OSFI corporate governance review and branch guideline review

In September 2018, OSFI released the final version of its revised and updated Corporate Governance Guideline (the "Final Updated Guideline"). The Final Updated Guideline sets forth OSFI's current expectations for corporate governance of federally-regulated financial institutions, other than foreign bank branches and foreign insurance company branches. The release of the Final Updated Guideline followed a consultation process that included the release in November 2017 of a draft updated guideline (the "Draft Updated Guideline"). The changes from the Draft Updated Guideline were mostly limited to minimal fine-tuning in response to comments received. The main reason for the update was to reflect the continuing evolution of corporate governance standards since the previous Guideline was released in 2013. Over the years, OSFI had issued more than 60 documents dealing with board expectations and it was of the view that the time was right to consolidate and simplify access to those requirements by gathering them together in a single updated document. The update was intended to provide more principles-based and outcomes-based guidance and clearer delineation of board and senior management responsibilities.

As is OSFI's current practice, together with the Final Updated Guideline it released a summary of non-attributed public consultation comments on the Draft Updated Guideline and OSFI responses. Several respondents requested clarity regarding board independence and on a number of terms used in the Guideline, including "culture," "challenge," "satisfied," "sufficient stature and authority," "adopt" and "diversity." OSFI indicated that, in keeping with a principles and outcomes-based approach, the Final Updated Guideline does not define those terms, in order to ensure flexibility and avoid a prescriptive approach. Concurrently with the release of the Final Updated Guideline, OSFI:

- re-issued revised risk management and capital Guidelines and Advisories with the board requirements deleted;
- retired its previous Advisory on Changes to the Membership of the Board and Senior Management; and
- aligned its current Assessment Criteria for Boards with the Final Updated Guideline.

OSFI has for some time been in the process of significantly updating and revising its Guideline E-4A — Role of the Chief Agent and Record Keeping Requirements, which sets out OSFI's expectations for branch governance. However, that process has been on hold pending completion of the recent update of the Corporate Governance Guideline, which will then inform the branch process. For many years there has been a sense in the Canadian industry that branches had it much easier from a governance standpoint than Canadian-incorporated insurers and that there was consequently an uneven playing field that tended to favour branches. Perhaps unsurprisingly, most new entrants into the Canadian marketplace have established operations by way of a branch rather than a subsidiary.

It is expected that Guideline E-4A will be modernised to ensure that expectations for branch governance are consistent with governance principles found elsewhere in the OSFI Guidelines, including particularly the revised Corporate Governance Guideline. This update is also likely to address:

- heightened expectations for chief agents, including standards respecting competencies and expectations regarding time and resources;
- risk oversight and management; and
- new expectations for home offices of branches.

It is not expected that there would be many changes with respect to electronic record-keeping (ie cloud computing) as guidance on that topic still needs to be developed more generally for all federally regulated institutions.

Reinsurance discussion paper

In June 2018, OSFI released a landmark discussion paper that will shape the regulation of reinsurance in Canada for years to come. The long-awaited Discussion Paper on OSFI's Reinsurance Framework (the "Paper") is the product of a wide-ranging review of the Canadian reinsurance sector that OSFI has undertaken over the past few years. The Paper focuses primarily on the perceived risks in the business model of certain property and casualty (P&C) federally-regulated insurers (FRIs). These insurers, which include Canadian companies as well as branches of foreign insurers, are increasingly reliant on reinsurance provided by reinsurers outside Canada, with little capital or vested assets held in Canada to support the increased exposure. OSFI has significant concerns about this type of arrangement, which it calls the "leveraged business model". In the Paper, OSFI indicates that its continuing review and refashioning of the reinsurance framework will be completed in three phases over approximately five years. Although certain of the proposals would apply equally to life and P&C reinsurance, most of the Paper is focused on the P&C sector. Comments on the paper were due in September 2018.

The Paper centres on two important developments in OSFI's approach to reinsurance – a seeming lessening of enthusiasm for the principles-based approach that OSFI had previously championed, and a reduced comfort with reliance by FRIs on the worldwide assets of the global reinsurance industry to respond to Canadian claims. OSFI's proposed refashioning of the reinsurance regulatory regime arguably represents a pendulum swing back from the principles-based approach that OSFI has increasingly embraced over the last ten years. The Paper also reflects an increased emphasis by OSFI on ring-fencing sufficient assets in Canada, rather than relying on the global reinsurance industry to respond to claims, including potentially catastrophe claims, in Canada. It is taking this approach notwithstanding the global nature of the reinsurance industry, the vast capital available in the industry (including sufficient capital to meet a number of simultaneous large US catastrophes), and the fact that the reinsurance industry has, in general terms, honourably and fully responded to claims throughout its long history. OSFI's approach is also consistent with its approach to assets in Canada in connection with the recent insolvency of Maple Bank GmbH, a German bank that had a licensed Canadian branch.

In the Paper, OSFI indicates that all potential changes to its reinsurance framework will be measured against four guiding principles:

- Policyholders of FRIs must be adequately protected;
- OSFI regulation and supervision must be balanced and risk-based;
- OSFI must have the ability to effectively assess risk; and
- A level playing field among financial sector participants should be maintained where appropriate.

As noted above, OSFI intends to divide its process into three phases, as follows:

- Phase I includes a parallel consultation on reinsurance-related measures included in the Draft 2019 Minimum Capital Test (the minimum capital requirements test for P&C companies) Guideline, which was released in June 2018 and comments on which were due by August 2018;
- Phase II will entail amendments to various Guidelines pertaining to prudential limits and restrictions and sound business and financial practices. Revised drafts of the applicable Guidelines will be released in 2019 and OSFI expects to finalise them by 1 January 2020. In addition, revised Transaction Instructions for related party unregistered reinsurance approvals will be released during 2019; and
- Phase III will entail revisions to the P&C and life minimum capital guidelines (the MCT for P&C companies, and the Life Insurance Capital Adequacy Test, or LICAT, for life companies) for 2022 or later years.

The principal OSFI concerns and proposals are grouped into three categories, as follows.

Large exposure and counterparty concentration risks

As discussed above, OSFI is increasingly concerned about the so-called leveraged business model and the possibility that its use may contribute to overly concentrated credit risk and potential solvency issues. To address those concerns, OSFI proposes to:

- revise Guideline B-3 to enhance and clarify expectations related to the prudent management of reinsurance risks. This revision, which will occur in Phase II, will include an expectation that FRIs establish reasonable limits on their overall reinsurance exposure to any one reinsurance entity or group, particularly where the FRI relies on its reinsurers to write high-limit policies; and
- introduce a hard rule respecting the issuance of high-limit policies by P&C FRIs. The maximum policy limit would depend on the FRI's capital level and excess collateral and the diversity of its reinsurance counterparties. The calculation of the cap is set out in Annex I to the Paper, and includes detailed actuarial/algebraic formulae. This would be implemented in Phase II, in the form of revisions to OSFI's Guideline B-2 – Investment Concentration Limit for Property and Casualty Insurance Companies. Although this would only apply to P&C direct writer FRIs, OSFI is also considering a similar rule for FRI P&C reinsurers. That would be part of Phase III.

Capital framework for reinsurance

- Counterparty credit risk – the MCT Guideline applies a charge to P&C FRIs that reinsure with unassociated FRIs, but not to those that cede to associated FRIs. However, OSFI is of the view that the risks with respect to an associated FRI are the same as those with an unassociated FRI. Consequently, OSFI proposes to change the MCT Guideline to conform the counterparty credit risk factors for both associated and unassociated FRIs. Importantly, the counterparty credit risk charges would not apply to reinsurance under an OSFI-approved intercompany pooling arrangement. This change would be made in Phase I, as part of the 2019 MCT Guideline.
- Unregistered associated reinsurance funds withheld arrangements – the MCT Guideline prescribes the forms of acceptable collateral from unregistered reinsurers, but domestic and foreign P&C FRIs are subject to different restrictions on funds withheld arrangements with associated reinsurers. As part of the proposed Phase I changes,

OSFI will remove the funds withheld restriction from domestic P&C FRIs and recognise, for capital purposes, the amount of funds held to secure payment from associated and non-qualifying subsidiary reinsurers. In addition, as part of the proposed changes to the 2019 MCT and LICAT Guidelines, OSFI will prescribe conditions permitting the recognition of funds withheld payables for cessions to both registered and unregistered associated and non-associated insurers.

- MCT Guideline margin requirements for unregistered reinsurance – currently, for a P&C FRI to obtain full MCT credit for risks ceded to an unregistered reinsurer, the reinsurer must post collateral equal to 115% of the ceded unpaid claim reserves and unearned premium. As part of the Phase I changes for the 2019 MCT Guideline, OSFI proposes to increase the margin from 15% to 20% in order for the P&C FRI to obtain full credit. This will be consistent with a similar change made to the LICAT in 2018. This could require cedents to obtain significantly more collateral for their current books of ceded business, and may be problematic if historical treaty wordings are tied to the 115% level rather than a more generic level sufficient to result in complete MCT credit for the cedent.
- Financial resources supporting earthquake risk reserves – currently, domestic and foreign FRIs may include 10% of their consolidated/worldwide capital and surplus as an eligible financial resource to reduce the required earthquake risk reserve. OSFI is concerned regarding potential double counting of this capital, given that it is also included as part of an FRI's available capital. As part of Phase III, OSFI is seeking feedback on removal of the 10% amount as an eligible financial resource.
- Reinsurance concentration risk – OSFI has noted that certain FRIs have material reinsurance arrangements with a single or only a few insurers, or a few groups of related reinsurers. This raises counterparty credit risk and, as part of Phase III, OSFI is considering introducing a concentration risk charge/limit on reinsurance assets and is seeking feedback on the considerations relevant to such a potential change.

Clarifications to OSFI Guideline B-3 and other potential reinsurance framework adjustments

As part of Phase II, OSFI is considering clarifications to Guideline B-3 and a number of other potential reinsurance framework adjustments, and is seeking feedback on certain of the proposed adjustments, as follows:

- Worldwide treaties and flow of reinsurance funds – OSFI is inviting views on its plan to amend Guideline B-3 to provide additional guidance regarding worldwide treaties and to reflect OSFI's expectation that reinsurance payments will flow directly to an FRI in Canada. OSFI may also amend its regulatory data forms to require more information about the utilisation of worldwide treaties;
- Significant quota share treaties – as noted above, OSFI is particularly concerned about reinsurance concentrated with one reinsurer or reinsurance group, particularly large quota share arrangements. OSFI invites views on its intention to strengthen Guideline B-3 with respect to risk management related to such significant quota share treaties and with respect to the expectation that FRIs not cede substantially all of their risks. OSFI is particularly seeking views on the notion of "substantially all risks" and how the notion can be framed in a more objective fashion;
- Fronting arrangements – OSFI plans to clarify its expectations in Guideline B-3 relating to fronting arrangements and is likely to include an expectation that FRIs take reasonable measures to satisfy themselves that legal risks related to contract wording are appropriately managed in relation to reinsurance with captive unregistered unrelated foreign insurers. OSFI also expects to apply to fronting arrangements certain other measures described in the Paper. OSFI noted that while certain types of traditional fronting arrangements may be acceptable, it has become aware of other types of fronting arrangements that raise prudential concerns, and these are described in the Paper;
- Foreign FRIs ceding risks to their home office – OSFI indicates that it has observed situations in which licensed branches cede Canadian risks to an unregistered affiliated reinsurer, which then further reinsures the risks back to the branch's home office. OSFI notes that the cession by the branch is generally recognised for the purposes of determining required assets in Canada, even though the risk is ultimately economically retained within the FRI. OSFI is inviting comments on this practice, including with respect to its prevalence;
- Affiliated reinsurance approvals – OSFI plans to revise its transaction instructions for such approvals to capture additional information and also to expand the scope of information to be reported annually to OSFI in respect of such arrangements; and
- Insurance Linked-Securities (ILS) – OSFI intends to revise Guideline B-3 to include its expectations for FRIs that cede risks to reinsurers that rely upon ILS. OSFI expects an FRI to conduct an appropriately greater level of due diligence in respect of such a reinsurer, and in such circumstances to carefully consider the risks associated with relying on a reinsurer that is dependent on non-traditional funding sources.

Provincial/CCIR

Fair treatment of customers guidelines

Within a few months in 2018, Canadian provincial market conduct regulators released three overlapping, un-harmonised proposals regarding fair treatment of customers. The proposals were comprised of:

- draft guidance from umbrella groups the Canadian Council of Insurance Regulators (CCIR) and Canadian Insurance Services Regulatory Organizations (CISRO);
- a draft Guideline from the Financial Services Commission of Ontario (FSCO); and
- proposals from the British Columbia Ministry of Finance regarding reform of British Columbia's financial services regulatory regime, including regarding the insurance sector and fair treatment of customers.

The proposals resulted in a significant, burdensome process for the industry to respond to, and prepare for, new un-harmonised regimes. While much of what is contained in the proposals is common sense and unobjectionable, the proposals would nevertheless create additional and varied obligations. Further, the proposals do not differentiate well between different types of:

- distributors/distribution channels – agents, MGAs, independent brokers, carrier-controlled brokers, bank distribution, incidental distribution, etc; and
- products.

The proposals are, collectively, one example of an accelerating global shift in regulatory focus, from solvency regulation to market conduct regulation. As the worst of the global financial crisis continues to recede, insurance sector regulators are intensifying their focus on market conduct behaviour and expectations that insurers and distributors will treat customers fairly throughout the product life cycle, from initial design and pricing to claims settlement. That effort is perhaps the most advanced in the UK, in part as a result of issues arising from the PPI mis-selling scandal. The same regulatory effort is advancing in Canada, despite absence of any analogous scandals here. The CCIR/CISRO proposal was intended, among other things, to demonstrate CCIR/CISRO members' efforts to comply with international standards in advance of the next IMF Financial Sector Assessment Program (FSAP) in Canada, as the most recent FSAP had not assessed Canadian provincial regulators as favourably overall as OSFI.

CCIR/CISRO paper – May 2018

The CCIR paper applies to insurers and intermediaries, who are collectively responsible for ensuring customers are treated fairly. It takes a flexible approach – expectations can differ depending on the nature of the customer, type of insurance and distribution strategy – and gives insurers and intermediaries latitude on how best to implement the expectations in their circumstances. The paper is organised in two parts:

- conduct of an insurance business – how insurance businesses should respond at institutional level to fair treatment expectations; and
- fair treatment from the customer perspective.

Once finalised, it will be up to regulators in each jurisdiction to determine whether they choose to introduce a guideline or other measures in conformity with the paper.

The CCIR paper was built upon certain defined terms, including "Intermediary," "Distribution Firm" and "Agent Firm." The "Agent Firm" title is not currently found in the Canadian insurance regulatory regime or used in common industry language, and describes what is typically called an MGA. Overall, the definitions were highly reflective of Quebec regulatory terminology and style, which is distinct from that in use in the rest of Canada, and the CCIR/CISRO received much perplexed feedback on the definitions.

Key themes of the paper included:

- fairness across the life cycle of products;
- importance of corporate culture;
- relationships between insurers and distributors;
- desired outcomes and how to achieve them, including:
  (a) design of insurance products – to ensure appropriate for target audience and preventing/limiting access where inappropriate; and
  (b) distributors to inform insurers about types of customers purchasing products.

- The final version of the Guidance was released towards the end of September 2018, and included moderate changes from the consultation draft, some reflecting certain industry comments:
- intermediary-related definitions clarified – "Intermediary" broadened; "Distribution Firm" and "Agent Firm" dropped;
- some increased clarification of intermediary responsibilities independent of insurers;
- increased focus/clarification on insurers'/intermediaries' obligation to put customers' interests ahead of their own;
- requirements for "high quality" advice softened to "relevant" advice;
- insurers' obligation to "ensure" contracted intermediaries are authorised softened to "assess" intermediaries are authorised; and
- expectation that product disclosure contain information on key features expanded to include "(for example, conditions, exclusions, restrictions and fees)".

FSCO Paper – April 2018

The FSCO Paper was a draft Superintendent's Guideline intended to clarify FSCO's expectations for provincially-regulated organisations, including (among others) insurance companies, insurance agents and agencies, credit unions and caisse populaires, loan and trust companies and mortgage brokers. The expectations – set out under eight headings – went beyond legal compliance to the establishment of a consumer-focused business culture meeting consumer needs across the product life cycle. The Guideline allows for some flexibility in applying expectations to licensees' unique circumstances, but the expectations apply to all licensees, including those with little or no direct contact with consumers and in respect of products of all levels of complexity. Where licensees work together to provide financial products, or work with non-licensed third-party contractors, they are expected to ensure that all involved understand and comply with the Guideline's principles.

Key expectations and themes from the Guideline include:

- the importance of culture;
- having regard to the target market and the risks products can pose to the wrong markets – selling only to target markets;
- the same rules apply to online distribution vs other methods;
- documenting a customer's intentions/needs and whether advice/recommendations sought;
- licensees responsible for product are to monitor suitability of advice;
- incentives should take fair treatment into account by avoiding promotion of particular products and de-emphasising sales volumes; and
- treating customer relationships as ongoing until all customer obligations fulfilled.

The final version of the Guideline was released in September 2018 and contained only minor changes from the consultation draft.

BC finance consultation – March 2018

The BC consultation set out preliminary recommendations arising from a review of the province's Financial Institutions Act and Credit Union Incorporation Act. The review is mandated by statute every ten years, to ensure that those Acts remain aligned with objectives. The 2018 consultation built on 2016 stakeholder submissions to an earlier public comment process on review/updating of those Acts.

Key insurance sector recommendations included:

- an FTC code of conduct (ideally adopted pursuant to the CCIR/CISRO process);
- extending the restricted licensing regime beyond just travel agencies to all incidental sellers (similar to as in other Western Canadian provinces);
- increasing insurers' oversight responsibilities for exempt/restricted sellers of their products (FICOM to be able to issue enforceable guidelines);
- new restrictions on post-claim underwriting products sold by exempt/restricted sellers – could include a number of changes;
- development of new legal framework for online sales of financial products (following a 2013 CCIR e-commerce report);
- allowing credit unions to promote insurance sales on their websites;
- adjusting rebate caps to the lesser of 25% of the first year's commission and 25% of the first year's premium; and
- enhancing referral commission disclosure (with the proposed enhancements not specified).

Financial Services Commission of Ontario restructuring into the Financial Services Regulatory Authority of Ontario

In June 2016, the Ontario Minister of Finance released the Final Report of an expert review panel considering the mandate of the FSCO and the Ontario Financial Services Tribunal. The final recommendations of the panel were generally similar to those in a November 2015 preliminary position paper. Principally, the FSCO was proposed to be replaced by a new body, the Financial Services Regulatory Authority of Ontario (FSRA) and the panel believed "radical change is required".

The proposed FSRA is to operate on a cost recovery basis, with the ability to recruit outside the public service collective agreements, more like provincial securities commissions, particularly the Ontario Securities Commission. The FSRA is to be headed by a chief executive officer with three divisional superintendents (market conduct, prudential oversight and pensions) and its governance structure is to include a board of directors. Each of its three divisions is to publish an annual "statement of approach" outlining how it intends to fulfil its mandate. There is intended to be a focus on consumer protection, with an "Office of the Consumer" created to encourage market transparency. Enforcement is also intended to be emphasised. The FSRA will continue to be responsible for auto insurance rate review/approval — ideally to de-politicise a politicised process — but additional government input and legislation will be required to address improved auto rate regulation. Finally, the Financial Services Tribunal would have increased authority, resources and independence. The process of establishing the FSRA is underway, with the necessary legislation passed in June 2017 and launch targeted for April 2019. An initial, very experienced board and CEO (a former OSFI deputy superintendent) have been appointed and FSRA is currently recruiting for senior staff and developing its implementation plans and priorities. FSRA will continue to regulate P&C and life insurance agents, with independent P&C brokers continuing to be regulated by the Registered Insurance Brokers of Ontario (RIBO), a self-regulatory body.

Saskatchewan Insurance Act updating

Extensive amendments to The Saskatchewan Act are expected to come into force in 2018. The main focus of the updated Act is to enhance consumer protection by aligning Saskatchewan's insurance legislation with the regulatory framework in Alberta and British Columbia. Notable changes in the new Act include:

- specific market conduct rules regarding payments, disclosure and the role of intermediaries with respect to the insurance contract;
- a requirement to identify provisions in an insurance policy where the amount payable for a loss will be reduced, in contrast to current wording, "this policy contains a clause which may limit an amount payable";
- limits on an insurer's ability to void a policy for alleged fraud after the first two years following issuance of the policy;
- a prohibition on the sale or trade-in of a policyholder's life insurance policy (viatical settlements), unless specifically permitted by the regulations;
- a new regulatory regime for intermediaries, including separate licensing categories for managing general agents and third-party administrators;
- additional requirements for insurers and managing general agents to carry out screening of any applicants that they recommend for an agent's licence; and
- a licensing exemption for employers and unions that offer extended health benefit plans, subject to certain regulatory requirements.

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Quebec Bill 140/150 and related draft regulations

In fall 2017, two massive omnibus financial services regulatory overhaul/modernisation bills, Bill 141 and 150, were introduced in the Quebec legislature. Key features of the bills included:

- a new Insurers Act would replace the Act respecting insurance;
- group P&C insurance would be permitted for the first time, bringing Quebec into line with the rest of Canada;
- significant changes to Act respecting the distribution of financial products and services, including changes designed to facilitate e-commerce/internet distribution (although online distributors must have a licensed individual available to speak to clients requesting live advice);
- the P&C adjusters' self-regulatory body, the ChAD, was to be abolished, replaced by AMF oversight;
- brokers would be required to be able to offer products from four independent markets, or else convert to being licensed as agents; and
- the current 20% prohibition on financial institution ownership of insurance brokers was to be maintained.

Many of the proposals were heavily debated and lobbied, and the most contentious were dropped from later drafts, including the ChAD transition to the AMF, group P&C insurance and certain broker/agent differentiations. The remaining Bill 140 provisions were passed in June 2018. In October 2018, draft regulations were introduced regarding online distribution and distribution of insurance products sold incidentally to a non-insurance product (such as creditor insurance or travel insurance).

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