The 2023 update reflects legislative amendments, new case law, and changes in practice. Except where otherwise noted, each checklist is current to approximately September 1, 2023. The following highlights are not exhaustive; see the checklists for more details.

I. Law Society

Refer to the Law Society Notable Updates List (A-3).

II. General

Arbitration Act. The *Arbitration Act*, S.B.C. 2020, c. 2, came into force on September 1, 2020. It is strongly recommended that practitioners review the new legislation prior to drafting or revising arbitration clauses in agreements.

Land Owner Transparency Act. The *Land Owner Transparency Act,* S.B.C. 2019, c. 23 (the "*LOTA*") came into force on November 30, 2020 (except for certain specified provisions that came into force on April 30, 2021). The *LOTA* includes the Land Owner Transparency Regulation, B.C. Reg. 250/2020, also made effective November 30, 2020. The *LOTA* requires a transparency declaration, or report (if applicable), to be filed in the new Land Owner Transparency Registry (the "LOTR") any time an application is made to register or transfer an interest in land under the *Land Title Act*, R.S.B.C. 1996, c. 250. The LOTR will be administered by the Land Title and Survey Authority of British Columbia. A reporting body under the *LOTA*—which includes most corporations, trusts, and partnerships, subject to limited exemptions—will have to file a transparency report any time there is a change in interest holders or beneficial owners, even if legal title is not transferred. For further information, see the Land Owner Transparency Registry website and also the course presentation and materials by S. Carter, R. Danakody, and C.R. MacDonald, "Land Title and Survey Authority of British Columbia: Land Owner Transparency Registry", in *Residential Real Estate Conference 2020* (CLEBC, 2020), and by R. Danakody and T. Norman, "Land Owner Transparency Registry (LOTR)" in *Real Estate Development Update 2021* (CLEBC, 2021), available through CLEBC Courses on Demand.

Transparency register. The operative provisions of the *Business Corporations Amendment Act, 2019*, S.B.C. 2019, c. 15 came into force on October 1, 2020 (B.C. Reg. 77/2020). The Act requires private companies incorporated under *BCA* to create and maintain a "transparency register" of information about "significant individuals". Individuals will be considered "significant individuals" if: they directly or indirectly own, or indirectly control 25% or more of the issued shares of the company, or shares that carry 25% or more of the voting rights of the company; or they are able to exercise rights or influence, directly or indirectly, that would result in the election, appointment or removal of the majority of the company's directors. If two or more individuals meet the above criteria by jointly holding the prescribed interest or right, then each will be deemed a "significant individual". Similarly, two or more individuals who are acting in concert, or who meet the definition of "associate" in s. 192(1) of the *BCA*, must add their interests together. If the group meets the above criteria, the company must list every member of the group as significant individuals in its transparency register. The transparency register must contain the following information for each significant individual: full name, date of birth, and last known address; whether the individual is a Canadian citizen or permanent resident of Canada and, if not, a list of every country of which the individual is a citizen; whether the individual is a resident of Canada for tax purposes; the date on which the individual became or ceased to be a significant individual; a description of how the individual meets the definition of a significant individual; and any further information that may be required by regulation. Access more information at www2.gov.bc.ca/gov/content/employment-business/business/bc-companies/transparency-register

Exemptions on additional property transfer tax on foreign entities. The Property Transfer Tax Regulation, B.C. Reg. 74/88 provides for relief, in certain circumstances, from the additional 20% property transfer tax on transfers of residential property in the Metro Vancouver Regional District, Capital Regional District, Regional District of Central Okanagan, Fraser Valley Regional District, and Regional District of Nanaimo to "foreign entities". Effective June 1, 2020, see s. 22 for the "Exemption for general partner or bare trustee of limited

partnership". See also ss. 17.1 to 20 for the exemption for a foreign national who has confirmation as a worker under the Provincial Nominee Program and s. 21 regarding the refund of the extra tax paid by a transferee who became a Canadian citizen or permanent resident within one year of the registration date.

Purpose-built rental exemption. Effective January 1, 2024, certain new purpose-built rental buildings will be exempt from the further two% property tax applied to residential property values that exceed $3,000,000 and meet the eligibility requirements. Updates to the tax exemption and eligibility requirements can be found at https://www2.gov.bc.ca/gov/content/taxes/property-taxes/property-transfer-tax/exemptions/purpose-built-rental-exemption.

Money laundering—companies, trusts and other entities. The prevalence of money laundering in British Columbia (particularly in the area of real estate) continues to be a concern. The provincial government established the Commission of Inquiry into Money Laundering in British Columbia, which was led by Austin Cullen J. as the commissioner. The Cullen Commission's final report was publicly released on June 15, 2022. For more information on the Cullen Commission, and the link to the full report, see law society notable updates list (A-3). In addition, consult the Law Society's resources related to anti-money laundering including guidance for the profession: www.lawsociety.bc.ca/priorities/anti-money-laundering/. As a means of laundering money, criminals use ordinary legal instruments (such as shell and numbered companies, bare trusts, and nominees) in the attempt to disguise the true owners of real property, the beneficial owners. These efforts can be hard to detect. As such, lawyers must assess the facts and context of the proposed retainer and financial transactions. Lawyers should be aware of red flags, and if a lawyer has doubts or suspicions about whether they could be assisting in any dishonesty, crime, or fraud, they should make enough inquiries to determine whether it is appropriate to act (*BC Code* rules 3.2-7 and 3.2-8 and Law Society Rules 3-103(4), 3-109, and 3-110). See the resources on the Law Society's Client ID & Verification resources webpage, such as the Source of Money FAQs, Risk Assessment Case Studies for the Legal Profession in the context of real estate, trusts, and companies, and the Red Flags Quick Reference Guide. Also see the Risk Advisories for the Legal Profession regarding real estate, shell corporations, private lending, trusts, and litigation; "Forming Companies and Other Structures—Managing the Risk" (*Benchers' Bulletin*, Spring 2021); and the Discipline Advisories including country/geographic risk and private lending. Lawyers may contact a Law Society practice advisor at practiceadvice@lsbc.org for a consultation about the applicable *BC Code* rules and Law Society Rules and obtain guidance.

Updated practice directions for sealing orders and applications to commence proceedings anonymously in Supreme Court. Litigants seeking a sealing order in a civil or family law proceeding must follow the guidelines as set out in Supreme Court Family Practice Direction PD-58—Sealing Orders in Civil and Family Proceedings. For the procedure to commence proceedings using initials or a pseudonym in civil or family law proceedings, see Supreme Court Family Practice Direction PD-61—Applications to Commence Proceedings Anonymously. Practice Directions 58 and 61 were updated on August 1, 2023.

Forms of address. The Supreme Court of British Columbia provides instruction on how counsel, litigants, witnesses, and others are to address a justice in a courtroom by Supreme Court Civil Practice Direction PD-60—Forms of Address. Supreme Court Civil Practice Direction PD-59—Forms of Address for Parties and Counsel in Proceedings provides clarification on how parties and counsel ought to introduce themselves with their preferred pronouns to be used in the proceeding.

Communicating with the Court. Supreme Court Civil Practice Direction PD-27—Communicating with the Court was updated on February 10, 2023 and sets out the guidelines for appropriate communications with the court for the limited circumstances in which it is permitted.

III. Corporate/Commercial

Enhanced scrutiny under the *Investment Canada Act, R.S.C. 1985, c. 28 (1st Supp.)*. On April 18, 2020, in response to COVID-19, the Minister of Innovation, Science and Industry (the "Minister") announced a new policy under which the Government of Canada will subject certain foreign investments to additional scrutiny. The policy targets foreign investments in Canadian businesses that are related to public health or involved in the supply of critical goods and services. On October 28, 2022, the Minister announced strategic policy surrounding

foreign direct investment in Canadian Critical Mineral sectors in response to the Critical Minerals List announced on March 11, 2021. Under the *Investment Canada Act*, the Minister must approve proposed acquisitions of control from foreign investors, including state-owned entities, where the value of the Canadian business is above the defined threshold. An application by a foreign state-owned entity will only be approved on an exceptional basis. Furthermore, effective August 2, 2022, a new filing option gives non-Canadian investors the ability to obtain pre-implementation regulatory certainty with respect to a national security review of investments that do not require a filing under the Act. See the full policy statement and voluntary filing information.

Electronic meetings. On May 20, 2021, the majority of the provisions of the *Finance Statutes Amendment Act (No. 2), 2021*, S.B.C. 2021, c. 14 came into effect by royal assent. The Act amends the *Business Corporations Act*, S.B.C. 2002, c. 57 (the "*BCA*"), as well as the *Cooperative Association Act*, S.B.C. 1999, c. 28; *Financial Institutions Act*, R.S.B.C. 1996, c. 141; and *Societies Act*, S.B.C. 2015, c. 18 to expressly permit virtual AGMs and board meetings. The legislation now provides that, unless the memorandum or articles provide otherwise, a company may hold its AGM by telephone or other communications medium if all shareholders and proxy holders attending the meeting are "able to participate in it". This replaces the previous requirement that shareholders and proxy holders be "able to communicate with each other". The rules further provide that if a company holds a meeting of shareholders that is an electronic meeting, the company must "permit and facilitate participation in the meeting". Companies should consider whether they may want to require in-person meetings (which will now require an explicit restriction on holding an AGM by telephone or other communications medium in the company's articles).

Business Corporations Act. Between October 28, 2021 and July 7, 2023, the amendments to the *BCA* incorporated language changes to reflect greater inclusivity. Section 124(2)(b.1) addresses a person's qualification to become a director if a certificate of incapability had been issued under the *Adult Guardianship Act*, R.S.B.C. 1996, c. 6 (providing they are not qualified unless such certificate is cancelled). Otherwise, no substantive amendments were made.

Benefit companies. The legislation governing benefit companies came into force on June 30, 2020 with changes to the *BCA*. A benefit company is a for-profit company that conducts business in a sustainable and responsible manner, while promoting one or more public benefits. For more information on benefit companies, see "Incorporating a Benefit Company" at www2.gov.bc.ca/assets/gov/employment-business-and-economic-development/business-management/permits-licences-and-registration/registries-packages/information_package_for_benefit_company.pdf (PDF) and Part 2.3 of the *BCA*.

Canada Business Corporations Act. Amendments to the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"), which took effect August 31, 2022, require distributing corporations (generally only public companies which are governed under the *CBCA*) to comply with new requirements with respect to the election of directors. Note the amendments in s. 106 of the *CBCA*, with respect to "majority voting" and "individual election" requirements. Accordingly, if a *CBCA* company is being incorporated, and particularly if it may become a reporting issuer, particular attention should be given to the company's articles with respect to electing and appointing its directors. On June 23, 2022 *CBCA* amendments received royal assent that require private *CBCA* corporations to report beneficial ownership information to Corporations Canada on a regular basis. Bill C-42 now presents a second series of amendments to the *CBCA* proposing further corporate transparency and accountability by making certain information public within the individuals with significant control ("ISC") register. Under the proposed amendments, the name, residential address, date of birth, and citizenship of each ISC would have to be included in the register.

MRAS. The Multi-Jurisdictional Registry Access Service (the "MRAS") was introduced on June 29, 2020. The MRAS allows for the sharing of information under the New West Partnership Trade Agreement (the "NWPTA"). Extraprovincial registration (or cancellation thereof) under the NWPTA is no longer made through the home jurisdiction; it must now be made through each extraprovincial jurisdiction. For instance, prior to June 29, 2020, when a British Columbia company wanted to be extraprovincially registered in Alberta, the filing was made through BC Online. Now the extraprovincial filing must be made through the Alberta Corporate Registry.

Manitoba joins the NWPTA. Pursuant to the *Trade, Investment and Labour Mobility Agreement Implementation Act*, S.B.C. 2008, c. 39 (the "*TILMA Act*"), the Extraprovincial Companies and Foreign Entities from a Designated Province Regulation, B.C. Reg. 88/2009, and by operation of the NWPTA, an enterprise meeting the requirements of any of the provinces of British Columbia, Alberta, Saskatchewan, and Manitoba are deemed to meet the requirements of the other participating provinces. This eliminates the requirement by British Columbia companies extraprovincially registered in those provinces to make separate filings there for annual returns or changes of directors (it does not eliminate the need for extraprovincial registration). For information about corporate registry procedures pursuant to the NWPTA, visit the NWPTA page on the Corporate Registry website at www.bcregistryservices.gov.bc.ca.

Competition Act. Amendments to the *Competition Act*, R.S.C. 1985, c. C-34, effective June 23, 2023, include provisions prohibiting agreements for mutual conduct to not hire or solicit each other's employees.

Revocability of a shotgun offer. In *Blackmore Management Inc. v. Carmanah Management Corp*., 2022 BCCA 117, supplementary reasons 2022 BCCA 235 the court applied the principles of contractual interpretation to a shotgun clause in a shareholders' agreement. The court reversed the trial decision and held that an offer made under a shotgun clause will not be irrevocable in the absence of express language in the agreement to the contrary. Revocability is an important consideration in the drafting of shotgun clauses. These clauses are typically included in shareholders' agreements to provide the parties with a dispute resolution mechanism that will result in one shareholder selling its shares to the other shareholder at a price that is determined under a construct that promotes fairness. This is achieved by the triggering party making two offers: one offer to buy the shares of the other shareholder at a specified price, and a second offer to sell the triggering party's shares to the other shareholder at the same price per share. To achieve the intended result of a shotgun mechanism, typically the offer must be irrevocable. Consistent with this notion, the court concluded that it would be inconsistent with the purpose of shotgun clauses if parties could revoke an offer they have come to regret. As a result of this decision, in the atypical situation where the parties intend for a shotgun offer to be revocable, this intention should be expressly set out in the agreement. In all other circumstances, it is best practice to expressly state that the offer is irrevocable. Note that the Court of Appeal granted a stay of its order pending an application for leave to the Supreme Court of Canada; counsel should stay apprised of further updates.

***Force majeure* and unavoidable delay.** For recent caselaw arising out of the COVID-19 pandemic, see *Hudson's Bay Co. ULC v. Pensionfund Investment Ltd.*, 2020 BCSC 1959 (Chambers); *Cherry Lane Shopping Centre Holdings Ltd. v. Hudson's Bay Co. ULC Compagnie De La Baie D'Hudson Sri*, 2021 BCSC 1178; and *Anthem Crestpoint Tillicum Holdings Ltd. v. Hudson's Bay Co. ULC Compagnie de la Baie D'Hudson SRI*, 2021 BCSC 2108, overturned on a separate issue 2022 BCCA 166.

Proposed amendments to the *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.). On December 7, 2022, the Minister introduced amendments to the *Investment Canada Act* to specifically address national security concerns. The bill is currently at Second Reading in the House of Commons. The amendments, if passed, include: new filing requirements in prescribed business sectors; extensions on the national security review of investments; potential conditions on investments; and required undertakings to address national security concerns.

COVID-19 pandemic. Counsel should keep apprised of developments related to COVID-19 (and response measures) that may affect transactions. Note that:

- The Land Title Survey Authority will retire temporary COVID-19 practice changes under the *Land Title Act*, R.S.B.C. 1996, c. 250, on September 30, 2023, which include remote witnessing of affidavits for use in land title applications. Further information may be accessed at https://ltsa.ca/covid-19-resources/.
- Counsel conducting due diligence searches must be mindful of the impact of the COVID-19 pandemic on the due diligence process. Response times for search requests may be delayed, and accordingly, such delays should be accounted for in the due diligence timeline. Counsel should be aware that search results may not disclose certain actions, fines, levies, or administrative penalties that have been delayed but are otherwise permitted to be filed or issued beyond the typical limitation period.

Aboriginal law. Special considerations apply to businesses involving Indigenous persons and lands belonging to First Nations. While significant tax and other advantages may be available under the *Indian Act*, R.S.C. 1985, c. I-5, such advantages are affected by the following: the type of business; transaction nature; business entity

(sole proprietorship, partnership, joint venture, trust, or incorporated company); location of business activity (either on or off First Nations lands); and the specific First Nation and its applicable governance. Effective May 11, 2023, the *Budget Measures Implementation Act, 2023* came into force, amending the *Treaty First Nation Taxation Act*, S.B.C 2007, c. 38, and the *Nisga'a Final Agreement Act*, S.B.C. 1999, c. 2. These legislative amendments allow taxing treaty First Nations and the Nisga'a nation, respectively, to implement tax exemptions for property on their lands. If the transaction involves First Nations land, consider seeking the advice of a lawyer who has experience in Aboriginal law matters. Further information on Aboriginal law issues is available on the "Aboriginal Law" page on the "Practice Areas" section of the Continuing Legal Education Society of British Columbia website (www.cle.bc.ca) and in other CLEBC publications. See also *Negotiating & Structuring Business Transactions with First Nations 2011* (CLEBC, 2011).

IV. Criminal

Calculation of delay. The Supreme Court of Canada clarified that the presumptive ceilings set out in *R. v. Jordan*, 2016 SCC 27 do not include verdict deliberation time and apply from the date of the charge to the actual (or anticipated) trial end date (i.e., when evidence and argument has concluded and the case is given to the trier of fact (*R. v. K. (K.G.)*, 2020 SCC 7)). The court considered the characterization and attribution of delay in: *R. v. Hanan*, 2023 SCC 12 (transitional exceptional circumstance); *R. v. Boulanger*, 2022 SCC 2 (timing of a defence application); *R. v. J.F.*, 2022 SCC 17 (calculation of delay in re-trials and timing of s. 11(b) applications); and *R. v. Lai*, 2021 SCC 52 (delay involved with the timing of a re-election). In British Columbia, the court considered the calculation of delay in *R. v. Shlyk*, 2021 BCCA 472 (discrete events-third party disclosure); *R. v. Eheler*, 2021 BCCA 316 (discrete events); *R. v. Pugh*, 2021 BCCA 293 (discrete events); and *R. v. Kanda*, 2021 BCCA 267 (gap period).

Self-defence. The Supreme Court of Canada in *R. v. Khill*, 2021 SCC 37 provides guidance on the application and interpretation of the self-defence provisions in s. 34 of the *Criminal Code*, R.S.C. 1985, c. C-46.

Self-induced extreme intoxication. In response to the decisions in *R. v. Brown*, 2022 SCC 18 and the companion cases of *R. v. Sullivan* and *R. v. Chan*, 2022 SCC 19, s. 33.1 of the *Criminal Code* was amended effective June 23, 2022 (see Bill C-28).

Stare decisis. For discussion on the principles of judicial comity, horizontal stare decisis, vertical stare decisis, and the application of *Re Hansard Spruce Mills*, 1954 CanLII 253 (BC SC), see *R. v. Sullivan*, 2022 SCC 19.

Sexual offences. The Supreme Court of Canada considered the meaning of consent in *R. v. A.E.*, 2022 SCC 4 and *R. v. Kirkpatrick*, 2022 SCC 33. In *R. v. D.R.*, 2022 SCC 50, the court considered impermissible stereotypical reasoning. See also *R. v. Tsang*, 2022 BCCA 345, leave to appeal granted 2023 CanLII 6098 (SCC).

Voyeurism. The Supreme Court of Canada clarified the elements of the voyeurism offence (s. 162(1)(a) of the Criminal Code) in *R. v. Downes*, 2023 SCC 6.

Admissibility of records relating to the complainant in the possession of the accused. The Supreme Court of Canada upheld the constitutionality of ss. 278.92 to 278.94 of the *Criminal Code* and discussed when the scheme is engaged, the timing of applications (generally pre-trial), and the procedure to be followed in *R. v. J.J.*, 2022 SCC 28.

United Nations Declaration on the Rights of Indigenous Peoples. *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, S.C. 2021, c. 14 came into force on June 21, 2021. Section 5 of the *Act* provides that the Government of Canada must, in consultation and cooperation with Indigenous Peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration. The Action Plan was released on June 21, 2023.

Official language rights. For a review of official language rights (s. 530 of the *Criminal Code*), see *R. v. Tayo Tompouba*, 2022 BCCA 177, leave to appeal granted 2023 CanLII 568 (SCC).

Vukelich hearings. The Supreme Court of Canada outlined the threshold required for the summary dismissal of applications in a criminal context in *R. v. Haevischer*, 2023 SCC 11.

Amicus. The appointment and role of amicus was recently considered in *R. v. Kahsai*, 2023 SCC 20.

Amendments to bail provisions of the *Criminal Code*, R.S.C. 1985, c. C-46. On May 27, 2023, an additional condition available for release orders was added to s. 515 of the *Criminal Code*, providing that an accused wear an electronic monitoring device if the Attorney General makes the request (s. 515(4.2)(a.2)). The additional conditions available under s. 515(4.2) pertain to offences set out in s. 515(4.3) and include an offence in the commission of which violence against a person was used, threatened, or attempted, including against the accused's intimate partner (s. 515(4.3)(c).

Substantial changes to bail provisions. Bill C-48 puts forth substantial changes to the bail provisions of the *Criminal Code* and has been referred to committee in the Senate. Lawyers should review the status of Bill C-48 for these changes.

Conditional sentence orders ("CSO") availability. Bill C-5 received Royal Assent on November 17, 2022, which removed most of the restrictions on CSO availability (see *Criminal Code,* s. 742.1). Thirteen days earlier, the Supreme Court of Canada held in *R. v. Sharma*, 2022 SCC 39 that the previous restrictions were constitutional.

***Sex Offender Information Registration Act* regime.** In *R. v. Ndhlovu*, 2022 SCC 38, the court held that mandatory registration provisions under the *Sex Offender Information Registration Act*, S.C. 2004, c. 10 (the "*SOIRA*") regime are overbroad and therefore of no force and effect. The decision, rendered on October 28, 2022, suspended the declaration of invalidity of s. 490.012 for one year to allow Parliament to redraft the section for constitutional compliance. However, the court immediately struck down s. 490.013(2.1), which required lifetime registration for repeat offenders.

Sentencing judges to notify the parties of their intention to impose a sentence above the range suggested by the Crown. In *R. v. Nahanee*, 2022 SCC 37, the court refused to extend the *Anthony-Cook* public interest test to contested sentencing hearings. However, if the sentencing judge intends to impose a harsher sentence than the Crown proposal, they should notify the parties and allow further submissions, otherwise they risk appellate intervention. Failure to give this notice would only result in a successful appeal if there is information the accused could have provided that impacts the sentence or if the reasons for judgement are unclear, insufficient, or erroneous. The sentencing judge providing this notice does not justify the withdrawal of the guilty plea.

Credit may be granted for pre-sentence driving prohibitions. In *R. v. Basque*, 2023 SCC 18, the court held that judges have the discretion to credit time spent under a release document driving prohibition toward a mandatory criminal driving prohibition. Note that, in British Columbia, s. 99 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 may limit the effect of this. (C-3)

Mandatory minimum sentences for reckless discharge of a firearm but not robbery with a firearm. In *R. v. Hills*, 2023 SCC 2, the court struck down the four-year mandatory minimum sentence ("MMS") for recklessly discharging a non-restricted firearm contrary to s. 244.2(3)(b) of the *Criminal Code*. Parliament had already amended the section to remove the MMS on November 17, 2022. However, in the companion case of *R. v. Hilbach*, 2023 SCC 3, the court upheld the five-year MMS for robbery with a restricted or prohibited firearm contrary to s. 344(1)(a)(i) of the *Criminal Code* and the former four-year MMS for robbery with an ordinary firearm contrary to s. 344(1)(a.1) of the *Criminal Code*.

Impact of COVID-19 pandemic on sentencing: The impact of COVID-19 on sentencing is governed by the "collateral consequences" framework, pursuant to *R. v. Suter*, 2018 SCC 34. In British Columbia, the courts have held that "there must be some evidence from which the sentencing judge can conclude that the offender faces heightened vulnerability to the COVID-19 virus before the pandemic will be considered as a factor that may justify a departure from the usual range of sentence" (*R. v. Goodell*, 2021 BCSC 735 at para. 52; *R. v. McKibbin,* 2020 BCCA 337; and *R. v. Chen*, 2021 BCSC 697 at paras. 111 to 114).

Consecutive parole ineligibility periods for multiple murders. In *R. v. Bissonnette*, 2022 SCC 23, the court struck down s. 745.51 of the *Criminal Code*, finding it violated s. 12 of the *Charter* and could not be justified under s. 1. Accordingly, offenders who commit multiple murders can no longer be sentenced to consecutive periods of parole ineligibility.

Minimum sentences for certain offences where the Crown proceeds summarily. In *R. v. Penner*, 2022 BCSC 175, the court struck down the four-year mandatory minimum sentence ("MMS") for manslaughter using a firearm under s. 236(a) of the *Criminal Code*. Similarly, in *R. v. C.B.A.*, 2021 BCSC 2107, the 90-day MMS for sexual interference under s. 151(b) was struck.

Application of sentencing ranges and "starting points". In *R. v. Parranto*, 2021 SCC 46, the court explained that sentencing ranges and starting points are tools "best understood as 'navigational buoys' that operate to ensure sentences reflect the sentencing principles prescribed in the *Criminal Code*." However, "[n]either tool relieves the sentencing judge from conducting an individualized analysis taking into account all relevant factors and sentencing principles" (at para. 16).

***Criminal Code* amendments.** Counsel who do not regularly practice in the area of impaired driving and other driving offences are reminded to review Part VIII.1 of the *Criminal Code* (ss. 320.11 to 320.4) as these provisions significantly changed the investigation and prosecution of these offences.

Valid roadside screening demands. In *R. v. Breault*, 2023 SCC 9, the police did not have an Approved Screening Device ("ASD") present at the scene when they demanded that the accused provide a roadside breath sample. The accused refused and was charged with failing to comply with the demand. The accused was convicted at trial but acquitted by the Quebec Court of Appeal on the basis that the demand for a roadside sample was not valid, because it could not be carried out immediately. The Supreme Court of Canada dismissed the Crown's appeal, confirming that the word "forthwith" in what was then s. 254(2)(b) of the *Criminal Code* means "immediately and without delay", absent unusual circumstances. Note that s. 320.27(1) uses the word "immediately". The court further held that the burden was on the Crown to establish that there were unusual circumstances, and that such circumstances cannot arise from budgetary considerations or considerations of practical efficiency. The absence of an ASD at the scene is not in itself an unusual circumstance.

Credit may be granted for pre-sentence driving prohibitions. In *R. v. Basque*, 2023 SCC 18, the court held that judges have discretion to credit time spent under a release document driving prohibition toward a mandatory criminal driving prohibition. Note, however, that this decision was rendered on the basis of statutory interpretation of what was then s. 259 of the *Criminal Code*, which has since been repealed and replaced by s. 320.24. Whether the rule in *Basque* applies to driving prohibitions under the latter provision may the subject of future court rulings. (C-4)

Breathalyzer results admissible despite arbitrary detention. In *R. v. McColman*, 2023 SCC 8, the court restored a conviction for driving over the legal limit. The accused was subject to a roadside sobriety check while on private property. The court held that such a stop was not authorized under Ontario's *Highway Traffic Act*, R.S.O. 1990, c. H.8 and therefore amounted to an arbitrary detention under s. 9 of the *Charter*. Despite this, on a s. 24(2) analysis, the court held that on balance, the reliability and importance of the evidence was such that the admission of the breathalyzer results better served the truth-seeking function of the trial process and would not bring the administration of justice into disrepute.

The presumption of accuracy and evidence of the alcohol standard. In *R. v. Goldson*, 2021 ABCA 193, leave to appeal refused 2022 CanLII 10371 (SCC), the court held that the *viva voce* or certificate evidence of a qualified technician as to the certification of the alcohol standard by an analyst is inadmissible hearsay. The court held that to rely on the presumption contained in s. 320.31(1), the Crown must lead evidence from the analyst, either *viva voce* or in certificate form, to establish that fact. However, in *R. v. MacDonald*, 2022 YKCA 7, the court (with a panel including two members of the Court of Appeal for British Columbia) considered the decision in *Goldson* and came to a different conclusion. In *MacDonald*, the court held that it was not necessary for the Crown to call evidence from the analyst (either by certificate or otherwise) and that s. 320.32(1) provides a statutory exception to the rule against hearsay, allowing the Crown to rely on the statements contained in the Certificate of the Qualified Technician as sufficient proof of the certification of the alcohol standard. Note that decisions of the Court of Appeal of Yukon are persuasive, but not binding on courts in BC (see *R. v. Romanchych*, 2018 BCCA 26 at paras. 10 and 11, though the reasoning in *MacDonald* has also found favour with summary conviction appeal courts in Ontario: *R. v. Hepfner*, 2022 ONSC 6064; *R. v. Gault*, 2023 ONSC 2994). Note also that s. 320.34(1)(e) requires that the Crown disclose to the accused a copy of the certificate of analyst, and s. 320.32(2) requires that the Crown give reasonable notice of its intention to rely on a certificate.

Credible evidence to the contrary as to the reliability of an ASD result. A police officer is entitled to rely on a "fail" result on an ASD in the absence of "credible evidence to the contrary". In *R. v. McGuire*, 2023 YKCA 5, the court considered what is required to constitute such evidence to the contrary. The court held that "the inquiry is … focused on what is known to the police officer at the time they choose to rely on the ASD result, and the impact of that knowledge on the objective reasonableness of their subjective belief in grounds for an arrest and/or breathalyzer demand" (at para. 42).

The "read back" presumption for breath samples is mandatory and must be applied. In *R. v. Tweedie*, 2023 NSCA 11, leave to appeal refused 2023 CanLII 76809 (SCC), the court held that the trial judge had erred by not applying the presumption in s. 320.31(4). That s. provides that if a breath (or blood) sample is taken more than two hours after the person ceased operating a conveyance, the person's blood alcohol content ("BAC") is conclusively presumed to be that reflected by the test plus an additional 5 mg of alcohol in 100 ml of blood for every 30 minutes in excess of those two hours. The Crown called expert evidence from a toxicologist regarding the accused's BAC, but this evidence was not accepted by the trial judge. The Nova Scotia Court of Appeal held that the presumption was mandatory and should have been applied by the trial judge, notwithstanding that the Crown had not relied on it.

Constitutionality of mandatory alcohol screening upheld. While decided in the context of a regulatory offence, in *McLeod v. British Columbia (Superintendent of Motor Vehicles)*, 2023 BCSC 325, the court found that mandatory alcohol screening ("MAS") under s. 320.27(2) did not infringe on *Charter* rights, and even if it did, such infringement was justified under s. 1 of the *Charter*. Note that similar constitutional challenges to MAS have also been dismissed in other provinces: *R. v. Dylan Alexander Pratt*, 2022 ABQB 407; *R. v. Kortmeyer*, 2021 SKPC 10; *R. v. Brown*, 2021 NSPC 32; and *R. v. Blysniuk*, 2020 ONCJ 603.

Police can choose between a MAS demand and one based on reasonable suspicion. In *R. v. Bradley*, 2022 NBQB 31, the accused argued that the officer should have proceeded with an ASD demand based on reasonable suspicion (*Criminal Code*, s. 320.27(1)), rather than making a MAS demand (s. 320.27(2)) when there was evidence the accused had consumed alcohol. The court disagreed, finding police are free to choose between the two demands (paras. 81 to 96).

Refusal to comply with a demand under s. 320.15 is an offence of general intent. In *R. v. Doiron*, 2023 BCPC 127, the court followed several recent cases from across Canada finding that the offence of refusal under s. 320.15 is an offence of general intent. This means the Crown must prove knowledge of a lawful demand and a refusal (or failure) to comply. It then falls to the accused to establish a reasonable excuse.

Interference with an accused's right to counsel is not a reasonable excuse for refusing a breath sample. In *Gordon v. British Columbia (Superintendent of Motor Vehicles)*, 2022 BCCA 260, the Court held that in both the criminal and regulatory context, police interference with the accused's right to counsel cannot provide a reasonable excuse to refuse a breath sample. According to the decision, this was an issue that had not previously been considered by the Court of Appeal for British Columbia, and the court adopted a 1992 decision of the Ontario Court of Appeal with approval (*R. v. Williams*, 1992 CanLII 7657 (ONCA)). The *Williams* case suggests that any alleged breach of *Charter* rights must be dealt with by an application under s. 24(2), not in the context of alleging a reasonable excuse for refusing a breath sample.

V. Family

Supreme Court Family Rules, B.C. Reg. 169/2009 (the "SCFR"). Amendments to the SCFR came into effect on September 1, 2023 (B.C. Reg. 176/2023). The changes are primarily focussed on trial management conferences, case planning conferences, trial briefs, and trial certificates. See Supreme Court Family Practice Direction PD-63—Trial Management Conferences, Trial Briefs and Trial Certificates – Transitional Guidance for transitional guidance on the changes. Note that if available, an email address for service is required of counsel and unrepresented parties alike.

***Family Law Act*, S.B.C. 2011, c. 25 ("*FLA*").** Amendments to the *FLA* received Royal Assent on May 1, 2023, including amendments to: rules applying to the presumption of advancement or presumption of resulting trust (s. 81.1); exclusions applying to excluded property (ss. 85(3) and 96); designations of limited members (s. 113(2)); disability benefits (s. 122); and calculation of a limited member's proportionate share on death of a member prior to pension commencement (s. 124). The applicability of certain amendments may depend on whether the family law proceeding is a "pre-existing proceeding", meaning a proceeding under the *FLA* respecting property division or to set aside or replace an agreement respecting property division, commenced before May 11, 2023. Amendments that will come into force at a later date by regulation pertain to: pets as "companion animals" (s. 97); commuted value transfer options (s. 113(2)(b)); Locked-in Retirement Accounts and Life Income Funds (s. 117.1); annuities (s. 118.1); survivor benefits payable under pension plans (s. 126.1); and administrative fees relating to pension division (s. 140).

***Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).** Amendments to the *Divorce Act* came into force on March 1, 2021. The amended provisions on care of children are similar to the regime under the *FLA*. Family law practitioners are advised to familiarize themselves with the amendments.

Provincial Court Family Rules, B.C. Reg. 120/2020 ("PCFR"). On May 16, 2022, new Rules 123.1 to 130 of the PCFR became effective and set out the procedure for an "informal trial" as part of a pilot project between the Ministry of Attorney General and Provincial Court of British Columbia. The "informal trial" pilot project takes place in Kamloops. More information is available at: www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/divorce/family/options/court/informal-trial/informal-trial-explainer.pdf

Retroactive adjustment of child support. Child support may be varied retroactively in some circumstances, even when the children are no longer "children" for the purposes of support (*Michel v. Graydon*, 2020 SCC 24; *Colucci v. Colucci*, 2021 SCC 24).

Communicating with the Court. Supreme Court Family Practice Direction PD-27—Communicating with the Court was updated on February 10, 2023, which sets out the guidelines for appropriate communications with the court for the limited circumstances in which it is permitted.

***CFCSA* amendments.** Amendments to the *CFCSA* became effective November 24, 2022, and were made to help implement and align the *CFCSA* regime with the *Act Respecting First Nations, Inuit, and Métis Children, Youth and Families* ("*ARFNIM*") and the United Nations Declaration on Indigenous Peoples. The amendments updated definitions, including: "Indigenous child", "First Nation child", "Indigenous authority", "Indigenous child and family services", "Indigenous governing body", and "Indigenous law". The amendments are to be interpreted and administered in accordance with the following principles:

1. Indigenous peoples have an inherent right of self-government;
2. the inherent right of self-government includes jurisdiction in relation to Indigenous child and family services, including law making; and
3. Indigenous laws have the force of law in British Columbia.

Arbitration provisions under the *Family Law Act*, S.B.C. 2011, c. 25 ("*FLA*"). Provisions relating to arbitration under the *FLA* came into force on September 1, 2020 (B.C. Reg. 160/2020). It is strongly recommended that practitioners review the new provisions before drafting or revising arbitration clauses in agreements, or commencing any arbitration proceeding.

***ARFNIM*.** This Act came into force on January 1, 2020 and has three declared purposes:

1. to affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services;
2. to set out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children; and
3. to contribute to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

In pursuing these purposes, the Act sets out minimum standards that must be met by provincial child protection legislation, including the *CFCSA*. It emphasizes the need for the system to shift from apprehension to prevention and give priority to services that promote preventive care to support families. The Act gives priority to services such as prenatal care and support to parents. In addition, it clearly indicates that no Indigenous child should be apprehended solely on the basis or as a result of the child's socio-economic conditions, including poverty, lack of housing or related infrastructure, or state of health of the child's parent or care provider. The Act has been considered in *British Columbia (Child, Family and Community Service) v. S.H.*, 2020 BCPC 82, and *British Columbia (Child, Family and Community Service) v. M.J.K.*, 2020 BCPC 39. The court has used the *ARFNIM* to define an Indigenous grandmother as a care provider and therefore able to be added as a party to *CFCSA* proceedings, as it is in the best interests of the child pursuant to s. 10 of the *ARFNIM* and s. 4 of the *CFCSA* (*Director and R*, 2022 BCPC 15).

Alternative dispute resolution. The Attorney General and the Ministry have funded initiatives to divert child welfare matters away from court and into alternative dispute resolution venues. These alternatives to litigation involve early efforts to identify families for participation in the family conference process (*CFCSA*, s. 20), in mediation (*CFCSA*, s. 22), and in informal collaborative meetings. These resolution processes are used for cases already before the courts and to prevent cases from coming before the courts. In most areas, a request by a parent or parent's counsel for a family conference, mediation, or collaborative meeting will be received favourably by the local Ministry office. Social workers and director's counsel will also often suggest mediation over litigation when an application is contested. The Legal Services Society, as part of the child protection legal aid tariff, may fund counsel to participate in mediation between a parent or guardian and the director. Also see the *Code of Professional Conduct for British Columbia* (the *"BC Code*"), s. 5.7 and Appendix B regarding the role of lawyers in family law mediation.

Aboriginal law. If the client or the other party has ties to an Indigenous community, special considerations may apply (e.g., see items 1.13 and 2.18.6 in this family practice interview (D-1) checklist). Note the requirements of Part 10, Division 3 of the *FLA*, which sets out standing and notice in cases concerning Nisga'a and treaty First Nations children and treaty lands. The *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013, c. 20, (the "*FHRMIRA*") applies to married couples or common-law partners living on-reserve lands, where at least one spouse is a First Nation member. The *FHRMIRA* provides mechanisms for First Nations to create laws pertaining to matrimonial real property and also sets out provisional federal rules for use until First Nations establish their own laws. Consider seeking the advice of a lawyer with experience in Aboriginal law. Further information on Aboriginal law issues is available on the "Aboriginal Law" page in the "Practice Areas" section of the CLEBC website (www.cle.bc.ca) and in other CLEBC publications. (D-1—D-5)

Aboriginal law. The Provincial Director of Child Protection has delegated authority to a number of Aboriginal agencies throughout the province to administer all or parts of the *CFCSA*. The degree of responsibility undertaken by each agency is the result of negotiations between the Ministry of Children and Family Development (the "Ministry") and the Indigenous community served by the agency. As of the date of this checklist, 117 of the approximately 202 First Nations in British Columbia are represented by agencies that either have or are actively planning for delegation agreements to manage their own child and family services. Currently, there are 24 delegated agencies with various levels of delegation: three can provide voluntary services and recruit and approve foster homes; seven have the additional delegation necessary to provide guardianship services for children in continuing care; and fourteen have the delegation required to provide, in addition, full child protection, including the authority to investigate reports and remove children. In addition, two agencies are delegated to arrange adoptions. The Vancouver Aboriginal Child and Family Services Society, an Indigenous non-profit society, has authority for child protection, family services, and guardianship for all Indigenous children and families within the municipal boundaries of Vancouver, with the exception of Métis, Musqueam, and Nisga'a children. The provincial government's authority to enter into agreements with a First Nation or other legal entity representing an Indigenous community arises under *CFCSA*, Part 7. Other special considerations may apply to children who have ties to an Indigenous community. For example, notice of various hearings may be required to be sent to a First Nation (e.g., *FLA*, ss. 208 and 209, address standing and notice in hearings for guardianship of Nisga'a children and treaty First Nations children, respectively). Note that a child's culture is one of the factors to be considered with all others in determining a child's best interests (see *H. (D.) v. M. (H.)*, 1999 CanLII 20555 (SCC), and *CFCSA*, s. 4(2)). One of the guiding principles of the *CFCSA* states that the

cultural identity of Indigenous children should be preserved. For further information, see the articles published in the "Aboriginal Law" page in the "Practice Areas" section of the Continuing Legal Education Society of British Columbia website at www.cle.bc.ca. (D-6)

VI. Litigation

Supreme Court Civil Rules. Changes to the SCFR came into effect on September 1, 2023 (B.C. Reg. 176/2023). The changes are primarily focused on trial management conferences, trial briefs, and trial certificates. See Supreme Court Civil Practice Direction PD-63—Trial Management Conferences, Trial Briefs and Trial Certificates – Transitional Guidance for transitional guidance on the changes. Note that if available, an email address for service is required of counsel and unrepresented parties alike.

***Court of Appeal Act,* S.B.C. 2021, c. 6 and Court of Appeal Rules, B.C. Reg. 120/2022.** Effective July 18, 2022, the new *Court of Appeal Act* and Rules came into force. Counsel should review the updated Act and Rules and familiarize themselves with the changes.

Sealed bids in foreclosure proceedings. On August 12, 2022, the Supreme Court of British Columbia set out Supreme Court Civil Practice Direction PD-62—Sealed Bid Process for Foreclosures and Other Matters Involving Sales of Land, which sets out the process for submitting sealed bids in foreclosure proceedings. Within a reasonable period of time after filing an application for approval of sale, seller's counsel must forward a copy or link of PD-62 to the listing agent for distribution to any interested buyer(s) and/or their agent(s).

Communicating with the Court. Supreme Court Civil Practice Direction PD-27—Communicating with the Court was updated on February 10, 2023 and sets out the guidelines for appropriate communications with the court for the limited circumstances in which it is permitted.

Motor vehicle claims. The *Attorney General Statutes (Vehicle Insurance) Amendment Act, 2020*, S.B.C. 2020, c. 10, came into force on May 1, 2021, setting out significant changes to B.C.'s auto insurance scheme, including a move to a "case-based" model for accident compensation. Under this model, compensation for injuries will be dictated by amounts and categories set by regulations and policy. The Civil Resolution Tribunal has jurisdiction to include all motor vehicle personal injury disputes and accident benefits relating to accidents occurring on or after May 1, 2021.

Limit on expert reports. Effective August 10, 2020, the *Evidence Act*, R.S.B.C. 1996, c. 124 imposes limits on expert evidence. The corresponding Disbursements and Expert Evidence Regulation, B.C. Reg. 210/2020 limits disbursements payable to a party, including the amount per expert report ($3,000), and the amount payable as a percentage of the total amount recovered in the action (6%) (s. 5(1)(a)). Note that this limit on disbursements was found to be unconstitutional in *Le v. British Columbia (Attorney General)*, 2022 BCSC 1146, with reasons issued on July 8, 2022. The appeal was dismissed on May 17, 2023 (2023 BCCA 200).

COVID-19 pandemic. For guidelines on the impact of the suspension on limitation periods during the state of emergency in British Columbia, see the Law Society of British Columbia guidance document available at Guidelines for calculating BC limitation periods | The Law Society of British Columbia www.lawsociety.bc.ca/about-us/covid-recovery/guidelines-for-calculating-bc-limitation-periods/.

Aboriginal law. Special considerations apply to First Nations lands. If a mortgage or foreclosure involves First Nations lands, consider seeking the advice of a lawyer with experience in Aboriginal law matters. The Framework Agreement on First Nation Land Management (the "Framework Agreement") was as the central authority by the *Framework Agreement on First Nation Land Management Act*, S.C. 2022, c. 19, s. 121, which came into force on December 15, 2022. The Framework Agreement recognizes First Nations' inherent right to govern their lands, and signatory First Nations assume the administration and law-making authority over their lands. Consider the following searches when ascertaining interests and priorities in First Nations lands:

- First Nations Land Management Resource Centre (www.labrc.com) for First Nation signatories operating under a land code and maintaining their own register of interests in their lands;

- Self-Governing First Nations Land Register for First Nations operating under the terms of self-government agreements;
    - the Nisga'a Nation created their own land title system based on the Torrens system;
- Land Title Survey Authority of British Columbia
    - the Tsawwassen First Nation negotiated to have their lands registered under the provincial land title system as part of their treaty, though special sections of the Land Title Act, R.S.B.C. 1996, c. 250, apply to these lands;
- Indian Land Registry System ("ILRS") for records on interests in reserve and surrendered lands, pursuant to and as defined under the Indian Act, R.S.C. 1985, c. I-5;
    - the Crown-Indigenous Relations and Northern Affairs Canada supports some First Nations in British Columbia in managing their lands and through maintaining the ILRS, although the ILRS is an information system only and does not create priority (except in the case of a registered assignment having priority over an unregistered assignment by s. 55(4) of the Indian Act).

If a leasehold interest in First Nations lands subject to the *Indian Act* will be mortgaged, note that a lease on First Nations lands to a First Nations person can only be mortgaged and seized if the land is designated (*Indian Act*, s. 89(1.1)). A lease to a First Nations person on lands that are held by a First Nations person under a certificate of possession does not have the same exemption from the protective effect of s. 89(1) of the Act. Further information on Aboriginal law issues is available on the "Aboriginal Law" page in the "Practice Areas" section of the Continuing Legal Education Society of British Columbia website (www.cle.bc.ca) and in other CLEBC publications. (E-1 & E-6)

Aboriginal law. Real or personal property of a First Nation or First Nations person (still defined by the *Indian Act*, R.S.C. 1985, c. I-5 as a "band" or "Indian") is protected under *Indian* Act, ss. 89 and 90, if situated on First Nations lands. Typically, such property is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress, or execution in favour of any person other than a First Nations person or First Nation. If the creditor is a First Nations person or First Nation, the *Indian Act protections* do not apply. Note that a leasehold interest in designated land is not protected, nor is personal property sold under conditional sales agreements: see s. 89(1.1) and (2). In addition to *Indian Act* considerations, some First Nation entities have entered into treaties or have special land-tenure agreements in place that may affect collection efforts against personal and real property. Also, there may be special agreements in place for individual First Nations persons to opt out of treaties or reserve tenures (for example, in the Treaty 8 area). If collection efforts are to be made against a First Nation or an Indigenous person's assets on First Nations lands (including funds in a financial institution), consider seeking advice from a lawyer who has experience in Aboriginal law matters. Further information on Aboriginal law issues is available on the "Aboriginal Law" page in the "Practice Areas" section of the Continuing Legal Education Society of British Columbia website (www.cle.bc.ca) and in other CLEBC publications. (E-4 & E-5)

VII. Real Estate

Remote witnessing of affidavits. The temporary measures authorized by the Registrar in Practice Bulletin 01-20 to permit the remote witnessing of affidavits as a result of the COVID-19 pandemic will be retired effective September 30, 2023. See https://ltsa.ca/retirement-of-covid-measures-effective-september-30/. Although the blanket authorization due to COVID medical concerns will be retired, s. 49 of the *Land Title Act*, R.S.B.C. 1996, c. 250 remains available if the circumstances warrant use of an affidavit of execution in lieu of officer certification. Any request for remote witnessing of affidavits must be made directly to the LTSA.

***Prohibition on the Purchase of Residential Property by Non-Canadians Act*, S.C. 2022, c. 10 ("*PPRPNCA*").** The *PPRPNCA* came into force January 1, 2023. It will prohibit the purchase of residential property by non-Canadians until January 1, 2025. There are limited exceptions for certain non-Canadians and certain residential properties.

Prohibition on rental restriction bylaws. Effective November 24, 2022, strata corporations may no longer pass bylaws restricting rentals, and current bylaws restricting rentals are no longer enforceable (*Strata Property Act*, S.B.C. 1998, c. 43).

LTSA web filing. Effective September 12, 2021, PDF versions of the following were retired: Form A Freehold Transfer; Form B Mortgage; Form C Release; and Form C Charge. These forms must now be submitted using Web Filing in myLTSA. PDF versions of these retired land title forms will only be accepted if they were executed or e-signed before September 12, 2021. Accordingly, Web Filing will now be mandatory for the vast majority of conveyancing matters. See https://help.ltsa.ca/myltsa-enterprise/web-filing. Effective December 14, 2020, property transfer tax ("PTT") must be filed using the new web-based version of the Property Transfer Tax Return (the "PTT Webform"). The PTT Webform replaces the following PDF forms, which are no longer accepted: Property Transfer Tax Return (FIN 530); Additional Property Transfer Tax Return (FIN 532); and Property Transfer Tax Calculator for Residential (FIN536). For more information, visit www2.gov.bc.ca/gov/content/taxes/property-taxes/property-transfer-tax/file/legal-professionals and see ltsa.ca/new-property-transfer-tax-ptt-return-now-available-in-web-filing/. Also see the course presentation and materials by L. Pritchard, "Property Transfer Tax" in *Conveyancing Basics for Legal Support Staff 2021* (CLEBC, 2021).

LTSA fee increases. Most LTSA fees increased slightly on April 1, 2023.

Exemption on additional property transfer tax on foreign entities. The Property Transfer Tax Regulation, B.C. Reg. 74/88, provides for relief, in certain circumstances, from the additional 20% property transfer tax on transfers of residential property in the Metro Vancouver Regional District, Capital Regional District, Regional District of Central Okanagan, Fraser Valley Regional District, and Regional District of Nanaimo to "foreign entities". Effective June 1, 2020, see s. 22 for the "Exemption for general partner or bare trustee of limited partnership". See also ss. 17.1 to 20 for the exemption for a foreign national who has confirmation as a worker under the Provincial Nominee Program and s. 21 regarding the refund of the extra tax paid by a transferee who became a Canadian citizen or permanent resident within one year of the registration date.

Standard undertakings. Standard CBA undertakings have been updated to facilitate electronic transfer of funds; see www.cbabc.org/Publications-and-Resources/Resources/Standard-Forms/Standard-Undertakings-Real-Property (CBA member login required).

New mortgage stress test. As of June 1, 2021, with a down payment of 20% or more, the minimum qualifying rate for insured and uninsured residential mortgages is either the contracted rate plus two percentage points or 5.25%, whichever is higher. The Office of the Superintendent of Financial Institutions (the "OSFI") said it would review and communicate the qualifying rate at least once a year, every December. In December 2021, OSFI confirmed that the minimum qualifying rate would remain the greater of the mortgage contract rate, plus 2% or 5.25%.

BC Financial Services Authority. In the summer of 2021, the Real Estate Council of British Columbia, Office of the Superintendent of Real Estate, and BC Financial Services Authority ("BCFSA") amalgamated under the umbrella of the BCFSA. The BCFSA now regulates real estate agents, credit unions, trust companies, pension funds, insurance companies, and mortgage brokers.

Aboriginal law. Special considerations apply to First Nations lands. If a mortgage or foreclosure involves First Nations lands, consider seeking the advice of a lawyer with experience in Aboriginal law matters. The Framework Agreement on First Nation Land Management (the "Framework Agreement") was ratified as the central authority by the *Framework Agreement on First Nation Land Management Act*, S.C. 2022, c. 19, s. 121, which came into force on December 15, 2022. The Framework Agreement recognizes First Nations' inherent right to govern their lands, and signatory First Nations assume the administration and law-making authority over their lands.

Consider the following searches when ascertaining interests and priorities in First Nations lands:

- First Nations Land Management Resource Centre (www.labrc.com) for First Nation signatories operating under a land code and maintaining their own register of interests in their lands;
- Self-Governing First Nations Land Register for First Nations operating under the terms of self-government agreements;
    - the Nisga'a Nation created their own land title system based on the Torrens system;
- Land Title Survey Authority of British Columbia;

  - the Tsawwassen First Nation negotiated to have their lands registered under the provincial land title system as part of their treaty, though special sections of the Land Title Act apply to these lands;
- Indian Land Registry System ("ILRS") for records on interests in reserve and surrendered lands, pursuant to and as defined under the Indian Act, R.S.C. 1985, c. I-5;
  - the Crown-Indigenous Relations and Northern Affairs Canada supports some First Nations in British Columbia in managing their lands and through maintaining the ILRS, although the ILRS is an information system only and does not create priority (except in the case of a registered assignment having priority over an unregistered assignment by s. 55(4) of the Indian Act).

If a leasehold interest in First Nations lands subject to the *Indian Act* will be mortgaged, note that a lease on First Nations lands to a First Nations person can only be mortgaged and seized if the land is designated (*Indian Act*, s. 89(1.1)). A lease to a First Nations person on lands that are held by a First Nations person under a certificate of possession does not have the same exemption from the protective effect of s. 89(1) of the Act.
Further information on Aboriginal law issues is available on the "Aboriginal Law" page in the "Practice Areas" section of the Continuing Legal Education Society of British Columbia website (www.cle.bc.ca) and in other CLEBC publications.

Money laundering, fraud, and real estate. The prevalence of money laundering in British Columbia (particularly in the area of real estate) continues to be a concern. The provincial government established the Commission of Inquiry into Money Laundering in British Columbia, which was led by Austin Cullen J. as the commissioner. The Cullen Commission's final report was publicly released on June 15, 2022. For more information on the Cullen Commission, and the link to the full report, see Law Society Notable Updates List (A-3). As a means of laundering money, criminals use ordinary legal instruments (such as shell and numbered companies, bare trusts, and nominees) in the attempt to disguise the true owners of real property, the beneficial owners. These efforts can be hard to detect. As such, lawyers must assess the facts and context of the proposed retainer and financial transactions. Lawyers should be aware of red flags, and if a lawyer has doubts or suspicions about whether they could be assisting in any dishonesty, crime, or fraud, they should make enough inquiries to determine whether it is appropriate to act (*BC Code* rules 3.2-7 and 3.2-8 and Law Society Rules 3-103(4), 3-109, and 3-110). See the resources on the Law Society's Client ID & Verification resources webpage such as the Source of Money FAQS, Risk Assessment Case Studies for the Legal Profession in the context of real estate, trusts, and companies, and the Red Flags Quick Reference Guide. Also see the Risk Advisories for the Legal Profession regarding real estate, shell corporations, private lending, trusts, and litigation; "Real Estate Transactions—Know Your Client Primer (*Benchers' Bulletin*, Summer 2021), and the Discipline Advisories including country/geographic risk and private lending. Lawyers may contact a Law Society practice advisor at practiceadvice@lsbc.org for a consultation about the applicable *BC Code* rules and Law Society Rules and obtain guidance.

VIII. Wills & Estates

COVID-19 pandemic. Counsel should keep apprised of developments related to COVID-19 (and response measures) that may affect wills and estates practice.

Virtual witnessing and electronic wills. In response to the COVID-19 pandemic, amendments were made to the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 ("*WESA*") to allow witnessing of wills by videoconference (s. 35.2).

Probate forms. Forms under Part 25 of the Supreme Court Civil Rules, B.C. Reg. 168/2009, have undergone several recent updates. Ensure you are using the latest versions of the forms.

Probate rules. Part 25 of the Supreme Court Civil Rules includes forms and procedures for all estate proceedings, both contested and uncontested. References in this checklist to "Rules" are to the Supreme Court Civil Rules, unless otherwise specified.

Aboriginal law. Special considerations apply to wills made by Indigenous persons. The *Indian Act*, R.S.C. 1985, c. I-5, applies to wills made by First Nations persons who ordinarily reside on First Nations land and to their estate. The Minister of Indigenous Services has broad powers over testamentary matters and causes (*Indian Act*, ss. 42 to 50.1). Sections 45 and 46 of the *Indian Act* govern the formalities of execution of a will. Also see Indian Estates Regulations, C.R.C., c. 954 (s. 15). The Minister may accept a document as a will even if it does not comply with provincial laws of general application. It is good practice, however, to ensure that a will or testamentary document governed by the *Indian Act* is executed in the presence of two witnesses, with those witnesses signing after the will-maker in the will-maker's presence. A will governed by the *Indian Act* is of no legal effect unless the Minister accepts it, and property of the deceased cannot be disposed of without approval (*Indian Act*, s. 45(2) and (3)). The Minister also has the power to void a will, in whole or in part, under certain circumstances (*Indian Act*, s. 46(1)(a) to (f)). If part or all of a will is declared void, intestacy provisions in the *Indian Act* will apply (*Indian Act*, ss. 46(2) and 48). Should an executor named in a will be deceased, refuse to act, or be incapable of acting, a new executor can be appointed by the Minister (*Indian Act*, s. 43; Indian Estates Regulations, s. 11). The Minister has similar powers in intestacy situations. A provincial probate court may be permitted to exercise jurisdiction if the Minister consents in writing (*Indian Act*, ss. 44 and 45(3)). The Minister is also vested with exclusive jurisdiction over the estates of Indigenous persons with mental and/or physical incapacity (*Indian Act*, s. 51). The *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013, c. 20 applies to married and common-law spouses living on First Nations land where at least one spouse is a First Nations person. Sections 13 to 52 apply to First Nations who have not enacted their own matrimonial real property laws. Sections 14 and 34 to 40 pertain to the consequences of the death of a spouse or common-law partner. Other statutory restrictions may apply to estates governed by the *Indian Act*. For example, a person who is "not entitled to reside on a reserve" (still defined as "reserve" under the *Indian Act)* may not acquire rights to possess or occupy land on that First Nation under a will or on intestacy (*Indian Act*, s. 50), and no person may acquire certain cultural artifacts situated on First Nations land without written consent of the Minister (*Indian Act*, s. 91). As some First Nations have entered into treaties (e.g., the *Nisga'a Final Agreement Act*, S.B.C. 1999, c. 2, and the *Tsawwassen First Nation Final Agreement Act*, S.B.C. 2007, c. 39) that may have governance, property, and other related implications, consider the status of an Indigenous person instructing on a will and that of the First Nation in which a deceased was a member. *WESA*, Part 2, Division 3 allows for the intervention of the Nisga'a Lisims Government and treaty first nations where the will of a Nisga'a or treaty first nation citizen disposes of cultural property. Further information on Aboriginal law issues is available on the "Aboriginal Law" page in the "Practice Areas" section of the Continuing Legal Education Society of British Columbia website (www.cle.bc.ca) and in other CLEBC publications. If acting with respect to a will or estate governed by the *Indian Act,* consider seeking advice from a lawyer who has experience in Aboriginal law matters.

IX. Human Rights

Backlog strategy. In order to address the Tribunal's current backlog, it has implemented three plans:

(1) COVID Case Project;

(2) Outstanding Dismissal Applications Project; and

(3) Screening Inventory Project.

The COVID Case Project establishes a group dedicated to processing COVID-related cases that are in the initial stages of the Tribunal's process, with those cases at the later stages continuing as normal. The Outstanding Dismissal Applications Project focusses resources on clearing the backlog of applications to dismiss. The Tribunal has adjourned the majority of 2023 hearings filed in 2020 or later, such that hearings will be scheduled based on the date the complaint was filed (from oldest to newest). The Screening Inventory Project will address any cases that do not fall under the COVID Case Project and are awaiting a decision as to whether the Tribunal will proceed with the complaint.

Case path pilot. Effective May 6, 2022, the Tribunal launched a one-year pilot project with respect to applications to dismiss under s. 27 of the *Human Rights Code*, R.S.B.C. 1996, c. 210. Instead of allowing

respondents to make an application to dismiss as of right, the Tribunal will now sort cases into two paths: the Hearing Path and the Submissions Path. Only cases under the Submissions Path will have the option to make an application to dismiss. If respondents are placed on the Hearing Path, they can submit a request to file an application to dismiss based on new information or circumstances that the Tribunal had not previously considered. This project was extended until November 2023, but as of July 2023, the Tribunal paused its review of complaints to address the Tribunal's backlog. The Tribunal is reviewing this pause in November 2023.

New legal test for family status. In *British Columbia (Human Rights Tribunal) v. Gibraltar Mines Ltd*, 2023 BCCA 168, the court revised the test for family status discrimination under s. 13 of the *Code*. The revised test broadens the scope by requiring a complainant prove they suffered an adverse impact arising from a term or condition of employment, and the term or condition of employment amounted to a serious interference with a substantial parental or family obligation. This revision means the test no longer requires "a change" in a term or condition of employment. The court asserted that it was not overturning *Health Sciences Assn. of B.C. v. Campbell River and North Island Transition Society*, 2004 BCCA 260 ("*Campbell River*"), as the facts in that case dealt with a change to the complainant's work schedule. As a result, the court found that *Campbell River* did not preclude a finding that family status discrimination could arise in other circumstances, including from a change in an employee's circumstances or family status.

Amendments to the *Human Rights Code*. Amendments to *the Human Rights Code* were made effective in April and September 2020. Counsel should review these changes. Effective March 30, 2023, two provisions of the *Code* were amended to make them more gender inclusive. Section 12 (Discrimination in wages) was amended to "an employee of another sex", from "an employee of the other sex" Section 44(2) (Style of cause for proceedings) replaced "his or her authority" with "the person's authority."

Expectations of counsel regarding historical trauma and discrimination. On April 28, 2021, the Tribunal issued a notice to counsel encouraging all lawyers with cases involving Indigenous Peoples and those who have experienced historical trauma and discrimination to develop their competencies in those areas. Counsel are reminded of their obligation to conduct themselves in a respectful, trauma-informed manner when appearing before the Tribunal, as set out in the Tribunal's Rules of Practice and Procedure, ss. 4 and 5 of the Mediation Policy respecting trauma-informed processes and Indigenous justice, truth, and reconciliation, and the *Code of Professional Conduct for British Columbia*. For more information, see https://www.bchrt.bc.ca/notice-to-counsel/.

X. Immigration

Virtual hearings. During the pandemic, the IRB has moved largely to a virtual hearing model. All IRB hearings are scheduled as virtual hearings by default. Individuals can request the use of IRB premises and equipment to participate in virtual hearings. In-person hearings may be scheduled upon request or at the discretion of the IRB. See "Practice Notice: Scheduling of virtual, hybrid and in-person hearings at the IRB". Also see "Refugee Protection Division: Practice Notice on the resumption of in-person hearings", which sets out highlighted changes to content as of November 18, 2022.

Time limits for perfecting an appeal. The Refugee Appeal Division ("RAD") extended the time limit for perfecting an appeal to 45 days following the receipt of the written reasons for RPD decisions.

Immigration and Refugee Board Chairperson's Guidelines. The IRB issued several revised Chairperson's Guidelines:

- "Guideline 3: Proceedings Involving Minors at the Immigration and Refugee Board" (effective October 31, 2023);
- "Guideline 4: Gender Considerations in Proceeding before the Immigration and Refugee Board" (effective October 31, 2023);
- "Guideline 8: Accessibility to IRB Proceedings—Procedural Accommodations and Substantive Considerations" (effective October 31, 2023); and
- "Guideline 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics" (effective December 2021).

Presence of children at RPD hearings. In September 1, 2017, the RPD had a national pilot project regarding the presence of accompanied minor refugee claimants in the hearing room. On March 19, 2019, the IRB issued "Practice notice: Presence of children at RPD hearings", which states that children who were under the age of 12 on the date of the hearing are not required to appear before the RPD unless the presiding member required their attendance. Children 12 years or older are still required to attend the hearing. The updated Guideline 3 at s. 6.3.1 provides that a minor can be excused from the hearing in appropriate circumstances, and a minor's interests must be protected when they are excused. It refers to three categories of children, which include accompanied minor, separated minor, and unaccompanied minor.

Suspension of practice notice on voluminous disclosure. In 2018, the RPD introduced procedures to address the problem of voluminous disclosure of country conditions evidence filed at the RPD. Under that directive, parties were required to make a formal application to submit country conditions evidence that exceeded 100 pages. That practice notice has been suspended until further notice. This means that parties no longer need to make an application to have voluminous disclosure accepted by the RPD. See "Refugee Protection Division: Practice Notice on the resumption of in-person hearing" at s. 3.4.

My Case online accounts. Counsel should ensure they open a My Case online account with the IRB (see https://my-case-mon-dossier.irb-cisr.gc.ca/en-US/) and are fully registered to file and receive documents. My Case is now in Phase 3 and counsel can now add up to four delegates to their account, such as legal assistants, paralegals, and associates, as well as articling students. Lawyers must create either Sign-In Partner or GCKey accounts for themselves with the federal government to facilitate registration. Counsel should also ensure they are ready for online hearings, including having adequate high-quality internet access, arrangements available for witnesses, and the ability to participate in online hearings from their personal computers enabled with the necessary hardware and software.

Electronic exchange of documents using My Case. Effective 2020, the RPD allows the exchange of documents electronically using IRB's self-service Web Portal, My Case. My Case allows parties to provide documents to the IRB and to receive documents from the IRB. Electronic exchange of documents permitted through other processes such as email or epost ConnectTM continue unchanged. See "Refugee Protection Division Practice Notice: Exchange of documents through Canada Post epost Connect".

Communicating by email with the IAD. Effective January 31, 2020, the IAD allows submission of documents or other correspondence by email in all IAD registry offices. On consent, the IAD will communicate with a party by email. Providing an email address is considered consent. The IAD will not transmit documents by email if it contains Protected B (which includes solicitor-client privileged information) or higher or if it has been declared confidential or subject to publication restriction.