



# Canada

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## MARKET TRENDS AND REGULATORY FRAMEWORK

### 1. Please give a brief overview of the insurance and reinsurance markets in your jurisdiction, identifying market trends.

Canada is a sophisticated, mature market for insurance and reinsurance products.

The life insurance sector is highly consolidated and is dominated by three large groups (Manulife, Sun Life and Great-West Life), which are Canada's "International Champions" in the insurance industry and together control about 75% of the net written premium.

In comparison, the property and casualty sector is highly fragmented, and includes:

- Local subsidiaries of the large global groups.
- Subsidiaries of the large Canadian banks.
- A number of mutual/co-operative organisations.

Reinsurance is dominated by Canadian branches or subsidiaries of the large global reinsurance groups.

There is a multi-level broker environment comprising:

- A large number of small, often family-owned, "main street" brokers.
- A number of larger regional brokers.
- All of the largest international brokerage groups.

### 2. What is the regulatory framework for insurance/reinsurance activities?

Canada has a federal system of government in which insurance/reinsurance regulation is divided between the federal government and the governments of each of the 13 provinces and territories of Canada. In general terms, the national regulator, the Office of the Superintendent of Financial Institutions (OSFI) ([www.osfi-bsif.gc.ca](http://www.osfi-bsif.gc.ca)), conducts prudential regulation. OSFI is a robust, global-level regulator, which plays a leading role in all of the key international financial services regulatory organisations.

The provincial regulators, which are similar to US state Departments or Commissioners of Insurance, 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 ([www.ccir-ccrra.org](http://www.ccir-ccrra.org)), somewhat similar to the National Association of Insurance Commissioners in the US. 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, while brokers are regulated by a self-regulatory organisation. In some provinces, all regulation of intermediaries is carried out entirely by self-regulatory organisations with delegated powers.

The insurance regulatory laws of the provinces other than Québec are relatively uniform and are based on common law principles. The laws of Québec are typically different from the rest of Canada and are based on a civil code system.

Most of the largest Canadian insurers are incorporated under a federal Canadian law known as the Insurance Companies Act (Canadian Act) and regulated by OSFI as to solvency and soundness. OSFI also regulates the solvency and soundness of licensed Canadian branches of foreign insurers. A number of smaller insurers are incorporated under provincial law and regulated as to solvency and soundness by provincial regulators.

The responses contained in this chapter in relation to insurers relate only to federally regulated insurers (which comprise the vast majority of Canadian insurers).

## REGULATION OF INSURANCE AND REINSURANCE CONTRACTS

### 3. What is a contract of insurance for the purposes of the law and regulation in your jurisdiction? How does it differ from a contract of reinsurance?

The definition under the Ontario Insurance Act (Ontario Act) is a contract (which includes a policy, certificate, interim receipt, renewal receipt, writing evidencing the contract, whether sealed or not, and binding oral agreement) in relation to the undertaking by one person to either:

- Indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed.
- Pay a sum of money or other thing of value on the happening of a certain event.

This definition includes life insurance. The definitions in the other common law provinces are substantially similar.



In Québec, a contract of insurance is defined in the Civil Code of Québec as a contract where the insurer undertakes, for a premium or assessment, to make a payment to the client or a third person if an event covered by the insurance occurs.

Certain types of contract, such as extended warranties, which would arguably fall within the definition of a contract of insurance, are, at common law or by administrative practice, typically not considered as falling within the scope of an insurance contract in certain provinces (see *Question 4*).

Generally, reinsurance contracts are regulated in the same way as insurance contracts.

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#### 4. Are all contracts of insurance/reinsurance regulated in your jurisdiction?

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

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### REGULATION OF INSURERS AND REINSURERS

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#### 5. Are all insurers and reinsurers regulated in the same way in your jurisdiction?

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Generally insurers and reinsurers are regulated in the same way, although this is subject to certain exceptions. For example, reinsurers are not subject to quantitative limits on reinsurance and reinsurance with unlicensed reinsurers, imposed on property and casualty primary insurers under the Canadian Act (although these are proposed to be repealed, probably in late 2011 or in 2012) (see *Question 7, Indemnity reinsurance*). In addition, given the lack of consumer interaction, reinsurers are also exempt from requirements that otherwise apply under the Canadian Act with respect to consumer financial disclosure, consumer complaints and the publication of public accountability statements.

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#### 6. Can insurers or reinsurers carry on non-insurance business? Please summarise any restrictions on their business activities.

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Insurers and reinsurers are prohibited from engaging in or carrying on any business other than such business “generally as appertains to the business of providing financial services” (*Canadian Act*). Reinsurers’ licences typically limit their business to the reinsurance of risks.

The Canadian Act further provides that, for greater certainty, an insurer can:

- Act as a financial agent, receiver, liquidator and so on.
- Provide investment counselling services and portfolio management services.

- Issue payment, credit or charge cards and, in co-operation with others including other financial institutions, operate a payment, credit or charge card plan.

In addition, an insurer can perform certain other additional activities, including (*Canadian Act*):

- Acting as an agent for vendors, purchasers, mortgagors, mortgagees, lessors or lessees of real property and providing consulting or appraisal services in respect of real property.
- Holding, managing and otherwise dealing with real property.
- Providing certain information processing services in Canada.
- Providing certain information technology services outside Canada.
- Promoting merchandise and services to the holders of any payment, credit or charge card issued by the insurer.
- Acting as a custodian of property.

Certain other activities require the consent of the Minister of Finance. Other than as permitted under the Canadian Act, an insurance or reinsurance company must not deal in goods, wares or merchandise or engage in any trade or other business.

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#### 7. Are there any statutory limits or other restrictions on, or requirements relating to, the transfer of risk by insurance or reinsurance companies?

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Certain limitations and restrictions apply to both:

- Indemnity reinsurance (ordinary course reinsurance).
- Assumption reinsurance (“transfer and assumption” or “block of business” transactions similar to a UK Part VII transfer).

#### Indemnity reinsurance

In relation to indemnity reinsurance, certain quantitative limits are placed on property and casualty insurers under the Canadian Act. These limits are proposed to be repealed, probably in late 2011 or in 2012. In addition, OSFI approval is required for reinsurance with an unlicensed affiliate.

For the Canadian ceding company or branch to obtain Canadian regulatory capital credit for amounts reinsured with unlicensed reinsurers, the unlicensed reinsurer must typically also post assets in trust with a Canadian financial institution trustee under a standard form of trust agreement promulgated by OSFI, and to which OSFI is a party. (This arrangement will be replaced effective 1 July 2011 by a more typical commercial security agreement regime.) Ceding companies can also obtain letters of credit as security for certain of their reinsurer’s obligations.

#### Assumption reinsurance

In relation to assumption reinsurance:

- The Minister of Finance’s approval is required under the Canadian Act for assumption reinsurance of all, or substantially all, of a Canadian company’s Canadian business.
- The Superintendent’s approval is required for assumption reinsurance of less than substantially all of a Canadian company’s Canadian business.



Assumption reinsurance of Canadian business by a licensed Canadian branch of a foreign insurer requires Superintendent approval. In all cases, the assuming reinsurer must be a Canadian federally regulated entity, or, in certain cases, a Canadian provincially regulated entity. In the case of a Canadian company, under the Canadian Act, shareholder and/or policyholder approval may be required. In the case of a true novation (a “transfer” in Canada), no approval is required and only notice to the Superintendent is required. Unlike the UK, there is no “statutory novation” under Canadian law and, as a result, the transferring company technically remains residually liable to its policyholders, although Canadian regulatory treatment and generally accepted accounting principles (GAAP) permit the policy liabilities to be removed from the books of the transferring company and instead recorded on the books of the assuming company.

OSFI is currently in the process of implementing significant changes to the Canadian regulatory regime for reinsurance (see *Question 31*).

## OPERATING RESTRICTIONS

### Authorisation or licensing

#### 8. Does the entity or person have to be authorised or licensed in your jurisdiction? If so, please outline the key steps involved in this process and the requirements that must be satisfied.

##### Insurance/reinsurance providers

The formation and licensing of a new Canadian federal insurance company entails an application to the Minister of Finance, through OSFI, for issuance of Letters Patent of Incorporation, followed by the issuance by the Superintendent of an authorising order to commence and carry on business. Following this, the new company must also be licensed to carry on insurance business in each province and territory in which it intends to carry on business. The establishment of a licensed Canadian branch of a foreign insurer entails application to the Superintendent for an order to insure in Canada a risk, followed, similarly, by provincial licensing applications in all applicable provinces.

OSFI has published detailed administrative guidance on its website in relation to the various filings, documentation and other requirements associated with the application for establishment of a new Canadian company or a licensed Canadian branch. In each case, the core requirements are:

- A comprehensive business plan, including detailed financial statement and capital (company) or asset (branch) adequacy projections.
- Compliance with detailed minimum capital (company) or asset (branch) requirements, and corporate governance requirements.

If the applicant is not Canadian, additional approvals or filings can also be required under Canadian foreign bank regulatory legislation and foreign investment control legislation.

##### Marketing insurance/reinsurance services

Both agents and brokers must be licensed by the applicable provincial insurance intermediary regulator. In most provinces, corporate entities or partnerships must be licensed in addition to the individual brokers and/or agents they employ. The application process includes, generally:

- Passing qualifying examinations.
- Obtaining the sponsorship of (or a contract or contracts with) one or more insurers.
- Meeting certain educational or experience credentials or qualifications.
- Obtaining minimum errors and omissions insurance.
- Meeting minimum capitalisation requirements (in some cases).
- The completion of background and/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).

##### Other providers of insurance/reinsurance-related activities

Insurance adjusters must also be licensed by provincial insurance regulatory authorities and, typically, are similarly required:

- To pass certain qualifying examinations.
- To have and maintain certain educational and/or experience requirements and/or credentials.
- To be sponsored, employed or supervised by an adjusting company.

However, individuals adjusting on behalf of insurers are not required to be licensed.

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

#### 9. Please summarise the main exemptions or exclusions from authorisation or licensing that are available in your jurisdiction, if any.

##### Insurance/reinsurance providers

Even if they are covering risks located in Canada, foreign insurance companies do not have to be licensed under the Canadian Act if they are not carrying on “insurance business” in Canada for the purposes of the Canadian Act, and in accordance with the criteria set out in a regulatory Advisory published by OSFI in 2009. Provincial licensing can still be required.

##### Marketing insurance/reinsurance services

In Ontario, brokers are not required to be licensed if they do not directly deal with the public (that is, if only acting as “wholesale” brokers). Reinsurance brokers or registered travel agents acting in respect of travel accident and sickness, baggage or trip cancel-



lation insurance are also not required to be licensed in Ontario. In addition, in Ontario, certain other exemptions exist under the Ontario Act from the agent licensing requirements and these are also, to some extent, found in the licensing provisions of the other common law provinces. These include:

- 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.
- A transportation company, or officer or employee of a transport 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, administrative practice does not require licensing of individuals performing the activity of enrolling individuals under group creditor insurance coverage.

In Québec, there are exemptions from the licensing requirements for:

- Persons who, on behalf of an employer, a union, a professional order or an association or professional syndicate, sign up employees or a member of the union, professional order, association or professional syndicate in respect of a group contract in insurance of persons or a group annuity contract.
- The members of a mutual benefit association who offer policies for the mutual benefit association if the association does not guarantee the payment of a benefit on the occurrence of a risk.
- Actuaries who, in pursuing activities as an actuary, offer insurance products in group insurance of persons or group annuities.

Québec legislation also provides an exemption from the licensing for a unique category of market intermediary known as “distributors”. A distributor is a person who offers or arranges for insurance as an accessory to the goods he sells and, in particular:

- Travel insurance.
- Vehicle rental insurance, if the rental period is less than four months.
- Credit card and debit card insurance.
- Replacement insurance, that is, property insurance under which the insurer guarantees the replacement of the insured vehicle or insured parts.

These insurance categories are listed as fitting within the type of insurance that can be offered by distributors. Insurers are expressly permitted to offer insurance products through distributors, which will include, among others, travel agents, banks and trust companies. The distributor and the insurer have obligations of disclosure to the client, and there are approval and filing requirements with the Québec regulatory authority.

#### Other providers of insurance/reinsurance-related activities

Third-party administrators and others performing similar purely administrative, clerical or adjudicatorial functions generally do not require a licence.

#### Restrictions on ownership or control

#### 10. Are there any restrictions on the ownership or control of insurance-related entities in your jurisdiction (for example, age, nationality, qualification or other restrictions)?

#### Insurance/reinsurance providers

No person can, without the approval of the Minister of Finance, purchase or otherwise acquire any share of a Canadian insurance company, or otherwise acquire control of any entity that holds any share of a Canadian insurance company if either (*Canadian Act*):

- The acquisition would cause the person to hold 10% or more of any class of shares of the company.
- The person already holds more than 10% of a class of shares of the company and the acquisition would increase the percentage interest of the person in that class of shares.

There is an exemption in relation to a non-voting class of shares if the book value of shares of that class is less than 30% of the book value of all shares, although this exemption does not apply in the case of the two large demutualised life insurance companies (Manulife and Sun Life) and their holding companies.

The Minister of Finance's prior written approval is required for any acquisition of de facto control of a Canadian insurance company.

An additional exemption applies for up to a 5% acquisition/increase above an existing 10% or greater interest previously approved by the Minister of Finance, but, again, this exemption does not apply in respect of Manulife or Sun Life or their holding companies. Further, this exemption does not apply if the up to 5% acquisition/increase would result in control of the Canadian company or more than 50% of the voting rights.

If a Canadian insurance company has more than Can\$2 billion in equity, shares carrying at least 35% of the voting rights must be both (*Canadian Act*):

- Listed on a Canadian stock exchange.
- Not beneficially held by a major shareholder of voting shares. In this context, a major shareholder is a person who holds beneficial ownership of 20% or more of any class of voting shares.

(As at 1 January 2011, Can\$1 was about EURO.7.)

Certain additional provisions apply in respect of Manulife and Sun Life:

- Other than their current widely-held holding companies, they cannot have a major shareholder (meaning anyone holding beneficial ownership of 20% or more of any class of voting shares or 30% or more of any class of non-voting shares).



- Their widely-held holding companies also cannot have a major shareholder.

The Minister of Finance has the discretion to remove the above restrictions in respect of Sun Life or Manulife. However, in addition, no person can de facto control Manulife or Sun Life, except their existing widely-held holding companies, which must de facto control the operating company (*Canadian Act*). No person can de facto control the existing widely-held holding companies.

In connection with an application for the required approval of the Minister of Finance, the Minister must take into account all matters that the Minister considers relevant to the application, including, subject to certain exceptions:

- The nature and sufficiency of the financial resources of the applicant or applicants as a source of continuing financial support for the company.
- The soundness and feasibility of the plans of the applicant or applicants for the future conduct and development of the business of the company.
- The business record and experience of the applicant or applicants.
- The character and integrity of the applicant or applicants or, if the applicant or any of the applicants is a body corporate, its reputation for being operated in a manner that is consistent with the standards of good character and integrity.
- Whether the company will be operated responsibly by persons with the competence and experience suitable for involvement in the operation of a financial institution.
- The impact of any integration of the businesses and operations of the applicants with those of the company on the conduct of those businesses and operations.
- The best interests of the financial system in Canada.

If the transaction would cause a Canadian insurance company to become a subsidiary of a foreign financial institution that is engaged in the insurance business, which does not have any other Canadian insurance company as a subsidiary and is resident in a non-World Trade Organization member country, the Minister of Finance must not approve the transaction unless the Minister is satisfied that treatment as favourable for Canadian insurance companies exists, or will be provided, in the jurisdiction in which the foreign financial institution principally carries on business, either directly or through a subsidiary (*Canadian Act*).

Further, as a matter of administrative practice, the Minister will generally not approve an acquisition of a Canadian insurance company by a governmental or sovereign entity.

If the applicant is not Canadian, additional approvals or filings can also be required under applicable Canadian foreign bank regulatory legislation and foreign investment control legislation. If applicable, Canadian approvals can also be required under Canadian anti-trust legislation.

### Marketing insurance/reinsurance services

In Québec, 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.

### Other providers of insurance/reinsurance-related activities

There are no ownership or control restrictions.

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### 11. Do owners or controllers have to be pre-approved by or notified to the relevant authorities before taking, increasing or reducing their control or ownership of the entity?

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### Insurance/reinsurance providers

See *Question 10*. In addition, notice of a change of control must be provided and/or is customarily provided as a courtesy, to the applicable provincial insurance regulators.

### Marketing insurance/reinsurance services

Owners or controllers do not have to be pre-approved. However, notice must be provided, and/or is customarily provided as a courtesy, to the applicable provincial insurance intermediary regulators.

### Other providers of insurance/reinsurance-related activities

There are no pre-approval or notification requirements.

### *Ongoing requirements for the authorised or licensed entity*

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### 12. Please summarise the key ongoing requirements that the authorised or licensed entity must comply with.

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### Insurance/reinsurance providers

The Canadian Act imposes a comprehensive set of operating requirements, including in relation to:

- Corporate governance.
- Investments.
- Transaction with related parties.
- Payment of dividends.

Canadian insurance companies must provide corporate and financial information to OSFI on an ongoing basis, including copies of 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 insurance companies, 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.

### Marketing insurance/reinsurance services

The following comprise the key ongoing requirements for those marketing insurance/reinsurance services:

- Filing annual returns and/or renewal documentation.
- Maintaining required levels of errors and omissions insurance.



- Complying (for individuals) with minimum continuing education requirements.
- Maintaining a designated broker or agent with certain education and experience qualifications and/or credentials.

#### Other providers of insurance/reinsurance-related activities

In relation to adjusters, this is similar to the requirements for brokers and agents (*see above, Marketing insurance/reinsurance services*).

There are no ongoing requirements for third-party administrators.

#### Penalties for non-compliance with legal and regulatory requirements

- 13. Please outline the possible consequences of an entity failing to comply with applicable legal and regulatory requirements (including the disciplinary powers any relevant regulators have, as well as possible customer remedies). What recourse do policyholders have if they have done business with a non-approved entity?**

#### Insurance/reinsurance providers

The consequences under the Canadian Act and applicable provincial legislation can include:

- Fines.
- Mandatory prudential agreements.
- Compliance and court orders.
- Ultimately, licence revocation.

In addition, under the Canadian Act, the Superintendent has the power to remove individual directors and officers (or the Chief Agent of a branch), and, if necessary, to take control of a Canadian company or foreign branch.

#### Marketing insurance/reinsurance services

The possible consequences vary by province, but, in general terms, include a combination of:

- Fines.
- Disciplinary sanctions or penalties.
- Compliance or court orders.
- Ultimately, licence revocation or prohibition. In addition, in many provinces, an agent or broker is personally liable to the policyholder on all policies unlawfully made by or through the agent or broker directly or indirectly with any insurer not licensed in the province, as if the agent or broker were the insurer.

#### Other providers of insurance/reinsurance-related activities

In respect of adjusters, this is similar to the requirements for brokers and agents (*see above, Marketing insurance/reinsurance services*).

This does not apply to third-party administrators.

#### Restrictions on persons to whom services can be marketed or sold

- 14. Are there any restrictions on the persons to whom insurance/reinsurance services and contracts can be marketed or sold?**

There are no restrictions on the persons to whom insurance/reinsurance services and contracts can be marketed or sold.

#### REINSURANCE MONITORING AND DISCLOSURE REQUIREMENTS

- 15. To what extent can/must a reinsurance company monitor the claims, settlements and underwriting of the cedant company?**

The cedant and reinsurer can agree in the reinsurance treaty or contract on the extent to which claims, settlements and underwriting are monitored.

There are no mandatory legal provisions in relation to this.

- 16. What disclosure/notification obligations does the cedant company have to the reinsurance company?**

The parties can agree on disclosure/notification obligations.

There are no mandatory legal provisions in relation to this.

#### POLICIES – CONTENT REQUIREMENTS AND IMPLIED TERMS

- 17. Please outline the main general form and content requirements for insurance policies in your jurisdiction, including a description of the most commonly found clauses.**

In provinces other than British Columbia, Saskatchewan and Manitoba, compulsory automobile insurance coverage is provided by private insurers in a competitive market. In those private automobile insurance market provinces, the forms of auto insurance coverage are set by statute.

In addition, the insurance legislation of most provinces contains certain prescribed wordings (statutory conditions), which are deemed to comprise part of each insurance policy for certain classes of insurance, typically fire and accident and sickness insurance, and are deemed to be printed on the contract.

Otherwise, policy wordings and forms are not prescribed by statute.

- 18. Please identify any terms found in insurance policies in your jurisdiction that are implied by law or regulation (identifying the applicable laws or regulations and any mandatory provisions).**

See *Question 17*. In addition, at common law (and now partially codified in certain insurance statutes), both the insured and



insurer owe duties of the utmost good faith. For the insured, this duty requires that the insured make full and fair disclosure to the insurer of the insured's circumstances before the execution of the insurance contract. Insurers are under a corresponding obligation to treat the insured fairly throughout the claims process, including by responding to a claim in a timely manner, remaining open-minded regarding the possibility of coverage and conducting balanced investigations of potential claims.

A breach of the duty of good faith brings with it remedies beyond the ordinary remedies available as a matter of contract law. Specifically, a breach of the duty of good faith can result in an award of punitive damages as a deterrent to the conduct.

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**19. Please identify customer protections which are generally included in insurance policies to supplement relief available under general law.**

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There are no specific customer protections generally included in insurance policies to supplement relief under general law.

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**20. Please identify examples of standard policies or terms produced by trade associations or relevant authorities, if any, and explain how these can be obtained.**

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The Insurance Bureau of Canada (IBC) (*see box, Main insurance/reinsurance trade organisations*) has developed certain standard policy wordings and endorsements for the use of IBC members. These are available to IBC members through the IBC, including through the IBC website.

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**21. Please identify common clauses in reinsurance policies, including follow the form and follow the fortune reinsurance, and standard provisions concerning choice of law, arbitration, and right to take part in the underlying adjustment. Is facultative or treaty reinsurance more common in your jurisdiction?**

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Wordings vary considerably, although most policies include follow the form provisions, which have been applied in the relatively limited Canadian case law regarding reinsurance agreements. Facultative reinsurance appears to be more common in Canada.

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**INSURANCE AND REINSURANCE POLICY CLAIMS**

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**22. What must be established to trigger a claim under an insurance policy?**

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Generally, a claim under an insurance policy is triggered when a loss occurs that is covered by the policy. The insurer is then notified of the loss through the completion and filing of proof of loss in the required form and the loss is established as having been sustained.

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**23. Please provide brief circumstances in which third parties can claim under an insurance policy.**

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Insurance policies may provide rights to a third party in two main ways:

- A third party can gain rights under the policy by a valid assignment of rights under the contract.
- A third party can be able to claim a benefit under the policy either under the terms of the policy or by operation of statute.

In relation to the second category, the most direct way in which a third party is entitled to claim under an insurance policy is if the third party is named as the beneficiary under, for example, an accident or life insurance policy. In some circumstances, third parties can also claim under an insurance policy as unnamed insureds. For example, in common law provinces, anyone driving a vehicle with the insured owner's consent is covered under the insurance policy as though that third party was named in the policy. Similarly, the property of family members living in the same home can be covered under a homeowner's policy even though the family members are not the named insureds.

In addition, third parties may also be entitled to claim under an insurance policy as the insured's judgment creditors. In relation to liability insurance (other than automobile insurance), a third party can obtain a judgment against the insured and then subsequently start an action against the insurer to recover under the relevant policy. For automobile insurance, legislation in Ontario and the other common law provinces allows third parties to bring claims directly against an insurer in certain circumstances.

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**24. Is there a time limit outside of which the insured/reinsured is barred from making a claim?**

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The limitation periods for contract claims vary by province. In Ontario, under the Limitations Act 2002, a claim must generally be brought within two years of the date on which it was discovered.

However, there are also a number of specific statutory limitation periods for particular kinds of insurance claims. For example, claims under a policy of fire insurance in Ontario must be brought within one year after the loss or damage occurs. In addition, under Ontario auto insurance legislation, there is a one-year limitation period for loss or damage to a vehicle, which runs from the date of the occurrence of the loss or damage. However, claims for loss or damage to persons and for payment of statutory accident benefits remain subject to the two-year limitation period.

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**25. Can the original policyholder or other third party enforce the reinsurance contract against a reinsurer?**

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Generally, the original policyholder or other third party cannot enforce a reinsurance contract against a reinsurer, unless the policy wording provides for a "cut-through" clause or other similar contractual entitlement in favour of the policyholder. However,



Canadian insurers must be members of either the Property and Casualty Insurance Compensation Corporation (PACICC), or Assuris, the industry compensation schemes for the property and casualty, and life, respectively, insurance industries in Canada.

PACICC is an industry-funded, non-profit corporation that responds to claims of policyholders under most policies issued by Canadian property and casualty insurers. Assuris is an industry-funded, non-profit organisation that protects Canadian policyholders in the event of the insolvency of their life insurance company. Assuris' role is to protect policyholders by minimising the loss of benefits and ensuring a quick transfer of their policies to a solvent company, where their benefits will continue to be honoured.

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## 26. What remedies are available for breach of an insurance policy?

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Typically, the remedy for breach of an insurance policy is an award of damages. In some circumstances, it is possible for the insurer to seek rescission or termination of the policy based on the policyholder's breach.

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## INSOLVENCY OF INSURANCE AND REINSURANCE PROVIDERS

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### 27. Please outline the regulatory framework for dealing with distressed or insolvent insurance or reinsurance companies, or other persons or entities providing insurance or reinsurance related services. Can excess coverage "drop down" to provide coverage at levels concerning which the existing coverage is insolvent?

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The primary insolvency and restructuring statutes in Canada are the:

- Bankruptcy and Insolvency Act (Canada) (BIA).
- Companies' Creditors Arrangement Act (Canada) (CCAA).
- Winding-Up and Restructuring Act (Canada) (WURA).

While all three statutes can be used by distressed companies to either liquidate and wind-up or restructure their affairs, insurance companies must wind-up their affairs under the WURA and are explicitly excluded from the definitions of "corporation" under the BIA and CCAA.

An application for a winding-up order can be made by the company or a shareholder of the company if, among other reasons, the company is insolvent or the capital stock of the company is impaired to the extent of 25% and the lost capital is not likely to be restored within one year. The Attorney General of Canada can also seek an order that the insurer be placed under the jurisdiction of the WURA if the Superintendent of Financial Institutions has taken control of the company or of the company's assets because, among other reasons, it has concerns regarding either:

- The insurer's solvency.
- The sufficiency of the insurer's assets to adequately protect its creditors.

The basis for taking control by the Superintendent is set out in more detail in the Canadian Act. After the court grants a winding-up order, there is a stay of proceedings in the company's favour. A liquidator is appointed to take custody of all company's property. The liquidator can seek to liquidate the assets and distribute the proceeds to the company's creditors or continue to administer the policies of insurance.

Non-insurers such as brokers, agents or adjusters intending to wind-up or restructure their affairs can do so under the BIA or the CCAA. However, to seek relief under the CCAA, the entity must be a corporation with total claims of Can\$5 million or more (as at 1 January 2011, Can\$1 was about EURO.7). Under both the BIA and the CCAA, a corporation can either:

- Propose a compromise of claims to its creditors so that it can reorganise its affairs.
- Liquidate its assets for the purpose of winding-up its operations.

After the bankruptcy order under the BIA, a proposal under the BIA, or an initial order under the CCAA is granted, there is a stay of proceedings in favour of the corporation. If a bankruptcy order is granted, the debtor corporation ceases to have control of its property and a trustee is appointed to take custody of all of the debtor corporation's property for the purpose of liquidating the company's assets and distributing the proceeds to the company's creditors. In a CCAA restructuring or BIA proposal scenario, the debtor maintains control and possession of its business and property while it restructures or reorganises its business and affairs. However, the court appoints a monitor (in the case of a CCAA proceeding) or proposal trustee (in the case of a BIA proposal) to oversee the corporation's activities while the company is under creditor protection.

There does not appear to be any Canadian case law directly concerning whether excess insurers can be found responsible to "drop down" and provide coverage where the primary insurer is involved in insolvency proceedings. Therefore, this probably depends on the policy wordings. The commentary available draws a distinction between:

- Cornerstone policies.
- Follow the form policies.

Arguably (although there is no again no case law on this issue) the cornerstone policy has a greater chance of being required to "drop down" into the place of a policy of the insolvent primary insurer, when the primary insurer is unable to satisfy its commitments. However, a compensation fund covers losses up to certain limits in the event of an insurer's insolvency (see *Question 25*). The fund's involvement can assist the primary insurer in being able to continue to satisfy its obligations, and therefore delay the question of whether excess insurers must provide coverage.



## TAXATION OF INSURANCE AND REINSURANCE PROVIDERS

### 28. Briefly describe the tax treatment for insurers, reinsurers, and other persons or entities providing insurance and reinsurance-related services in your jurisdiction.

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. This summary provides an overview of only the most significant of these additional taxes on insurers.

One of the most significant additional types of tax on insurers is the 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. In Ontario, the premium tax is generally 2% on life, accident, and sickness premiums received and 3% on all other premiums received, although some exemptions can apply. Ontario insurers are also subject to an additional 0.5% tax on property insurance premiums received. Other provinces have very similar schemes, with tax rates ranging from 2% to 4.4%. A number of provinces (although not Ontario) also levy a fire insurance tax on insurers, calculated as a percentage (currently either 1% or 1.25%) of premiums received in respect of property in the province.

Life insurers are also generally subject to a federal capital tax on taxable capital employed in Canada at a rate of 1.25%. This tax applies to capital above a specified threshold amount, and the amount of capital tax can be reduced by numerous provisions, depending on the company's particular facts.

Provincial capital taxes also generally apply to taxable capital employed by insurers in Manitoba, Québec and Nova Scotia. However, all of these provinces have proposed to phase out these taxes during 2011/2012. Manitoba plans to phase out its capital tax by 31 December 2010, followed by Québec on 1 January 2011 and Nova Scotia on 1 July 2012.

The issuing of insurance policies, and most other insurance services, are generally exempt from the 5% goods and services tax (GST), and the 12%, 13% or 15% harmonised sales tax (HST) in those provinces where the HST applies. However, insurers are generally not able to claim input tax credits (in effect, refunds) for any GST/HST payable by them.

The above rules presume the insurer is licensed in Canada. 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, including insurers not resident or not carrying on business in Canada. Exemptions to the excise tax may be available for reinsurers and 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, some provinces also impose on the insured person additional sales tax on certain types of insurance policies.

## MAIN INSURANCE/REINSURANCE TRADE ORGANISATIONS

### Insurance Bureau of Canada (IBC)

**Main activities.** The IBC is the national industry association representing Canada's private home, car and business insurers. Its member companies represent nearly 95% of the property and casualty insurance market in Canada. IBC's role is to be active on behalf of its members by:

- Forecasting and responding to issues that may arise in the industry.
- Anticipating opportunities to identify, shape and influence change in support of members' business needs.
- Lobbying the federal and provincial governments to secure changes in public policy and in the business-operating environment that will benefit insurance companies and their customers.

W [www.ibc.ca](http://www.ibc.ca)

### Canadian Life and Health Insurance Association (CLHIA)

**Main activities.** The CLHIA is a voluntary trade association that represents the collective interests of its members, life and health insurers. The Association's membership accounts for 99% of the life and health insurance in force in Canada and administers about two-thirds of Canada's pension plans.

W [www.clhia.ca](http://www.clhia.ca)

### Insurance Brokers Association of Canada (IBAC)

**Main activities.** The IBAC is the national trade organisation that brings together and represents the 11 regional and provincial associations of property and casualty insurance brokers in Canada. These associations represent approximately 30,000 insurance brokers in virtually every community across the country.

W [www.ibac.ca](http://www.ibac.ca)

### Advocis, The Financial Advisors Association of Canada

Advocis is the oldest and largest voluntary professional membership association of financial advisers in Canada. It has more than 10,000 members across Canada who service the financial interests of millions of Canadians.

Advocis is a voluntary organisation whose members adhere to an established professional Code of Conduct, uphold standards of best practice, participate in ongoing continuing education programmes, and maintain appropriate levels of professional liability insurance.

W [www.advocis.ca](http://www.advocis.ca)



## INSURANCE AND REINSURANCE DISPUTE RESOLUTION

### 29. Are there special procedures or venues for dealing with insurance or reinsurance complaints or disputes in your jurisdiction?

In some common law provinces, particularly Ontario, British Columbia and Alberta, a person affected by certain decisions of the Superintendent of Insurance can appeal the decision to an independent, specialised tribunal. In Ontario, this review function is performed by the Financial Services Tribunal and appealable matters generally relate to the insurance licensing process, and the terms and conditions imposed on insurers in respect of the distribution of insurance to consumers. Other common law provinces also provide appeal rights from certain decisions of the Superintendent of Insurance, but recourse lies either to the courts or the Lieutenant-Governor of the province.

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.

The General Insurance OmbudService (GIO) offers an alternative to litigating disputes between property and casualty insurers and insureds in Canada. The 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. Specifically, the GIO mediates or adjudicates disputes relating to claims, interpretation of policy coverage and policy processing and handling.

Similarly, the OmbudService for Life & 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 (that is, businesses).

### 30. Please give a brief overview of the main dispute resolution methods used to settle reinsurance claims.

Reinsurance disputes in Canada are typically resolved through private arbitration and recourse to the courts is uncommon.

## REFORM

### 31. Please summarise any proposals for reform of the law, regulation or rules in your jurisdiction relating to the provision of insurance or reinsurance services.

OSFI is currently in the process of significantly modernising the regulatory regime in Canada for reinsurance. In April 2010, it

released a paper which proposed a number of significant changes to that regime, including replacing a number of quantitative limits with principles-based guidance relating to sound practices and governance. The proposed changes are also intended to result in enhanced and more equitable capital requirements, greater disclosure requirements and increased supervisory and regulatory scrutiny of reinsurance arrangements and contracts. In August 2010, OSFI released a related draft Guideline on sound reinsurance practices and governance and guidance on the proposed replacement of the use of trust agreements to collateralise non-admitted reinsurance with more typical commercial security agreements and related legal opinions. This was followed in December 2010 by the release of final versions of the Guideline and guidance, which must be complied with, in the case of the guidance, by 1 July 2011, and in the case of the Guideline, in part by 1 July 2011 and in part by 1 July 2012.

In addition, the umbrella group of Canadian provincial insurance regulators, the Canadian Council of Insurance Regulators (CCIR) is, through its various committees, considering a number of regulatory issues on an ongoing basis, including the regulation of incidentally sold insurance and the regulation of managing general agencies and wholesale agencies. Additional information is contained in the CCIR Strategic Plan available on the CCIR website at [www.ccir-ccira.org](http://www.ccir-ccira.org).

## CONTRIBUTOR DETAILS



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#### Recent transactions

- Can\$264 million acquisition by The Westaim Corporation of JEVCO Insurance Company, 2010. (Counsel to Alberta Investment Management Corporation in connection with Can\$148 million investment in Westaim.)
- Sale by American International Group, Inc. of AIG United Guaranty Mortgage Insurance Company Canada to a private investor group led by Ontario Teachers' Pension Plan Board, 2009. (Co-counsel.)
- Can\$2.163 billion sale by ING International Insurance B.V. of its majority interest in ING Canada Inc., 2009. (Counsel to underwriters.)
- Can\$375 million sale by American International Group, Inc. of AIG Life Insurance Company of Canada to Bank of Montreal, 2009. (Co-counsel.)



# Distinctively Canadian

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Members of Stikeman Elliott's Insurance & Reinsurance Group have been recognized as leaders by such respected authorities as the *Guide to the World's Leading Insurance and Reinsurance Lawyers*, *The Best of the Best for Insurance*, *The International Who's Who of Insurance and Reinsurance Lawyers* and *PLC's Cross-border Insurance Handbook*. A member of the group is founder and editor-in-chief of Butterworths' *Canadian Insurance Regulation Reporter*, a quarterly journal that is the leading Canadian publication in the field.

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