Stikeman Elliott

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Quick reference guide enabling side-by-side comparison of local insights into fintech innovation and government / regulatory support; regulatory bodies and regulated activities; cross-border regulation; regulation of sales and marketing and of changes of control; financial crime; peer-to-peer and marketplace lending; artificial intelligence, distributed ledger technology and crypto-assets; data protection and cybersecurity; outsourcing and cloud computing; intellectual property, competition, tax and corporate immigration considerations; and recent trends.

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FINTECH LANDSCAPE AND INITIATIVES

General innovation climate

What is the general state of fintech innovation in your jurisdiction?

Canadian fintech industries, particularly digital payments, digital trading, robo-advising and open banking, continued to experience significant growth until 2022. The pace of innovation had been accelerated by expansive fintech-supportive regulation at the provincial and federal level, changing consumer patterns during the covid-19 pandemic, and investment in fintech start-ups and in-house 'labs' by leading Canadian financial institutions. While Canadian financial institutions have led the charge in many cases, fintech start-ups are now a key component of the fintech ecosystem across the country. Developments included major investments in AI-driven fintech solutions, blockchain, regtech, and – in the insurance industry where Canada is a significant global player – in insurtech.

As in other jurisdictions globally, headwinds in the tech market and the broader post-pandemic inflationary pressures and economic downturn have created a more challenging environment for fintech innovation in the Canadian market.

In the cryptocurrency sector, Canadian regulators have shown leadership in mapping a framework and pathway to regulation designed to address both high-stakes industry developments and investor protection by issuing Staff Notice 21-329 - Guidance for Crypto-Asset Trading Platforms: Compliance with Regulatory Requirements (SN 21-329) and approving crypto-based retail investment fund launches subject to novel terms and conditions. The full impact of the current turmoil in the crypto market, which has recently been amplified by the collapse of FTX and the bankruptcies of crypto lenders BlockFi, Voyager Digital and Celsius Network, and other dominant stakeholders, has yet to fully play out in the Canadian crypto ecosystem. However, the expectation is that Canadian regulators will shift the focus more squarely onto investor protection over innovation until the market stabilizes and stakeholders become fully regulated or exit the market.

Law stated - 23 December 2022

Government and regulatory support

Do government bodies or regulators provide any support specific to financial innovation? If so, what are the key benefits of such support?

Canadian governments, major financial market stakeholders and key regulators recognise the importance of fintech and, as detailed below, have actively encouraged investment and innovation in the sector. Regulatory initiatives to date include:

- regulatory sandbox and launchpad programmes administered by securities regulators that allow fintech start-ups to test products and business models without the usual regulatory restrictions, and more flexibility to raise capital through new and more flexible prospectus exemptions, including crowdfunding exemptions;
- fintech cooperation agreements with several foreign jurisdictions;
- retail payments oversight and a licensing framework under the Retail Payments Activities Act (RPAA) (Bill C-30, An Act Respecting Retail Payment Activities, 2nd Sess, 43rd Parl, 2021, cl 177 (assented to 29 June 2021 and partly in force);
- federal regulatory and support initiative for open banking/consumer-driven finance;
- notices and an actionable roadmap by the Canadian Securities Administrators guiding the services and uses related to cryptocurrency and cryptoassets; and
- where applicable, derivatives law requirements in the cryptocurrency sector.

There continues to be a focus across the country on collaboration between Canadian core financial institutions, fintech start-ups and regulators. Regional governments in Canada's major cities have developed AI hubs and 'super-clusters', such as in Montreal, where the Quebec government has earmarked C$100 million over five years for the development of AI and fintech industry growth. Additional academic and local government funding initiatives have also multiplied across the country.

Law stated - 23 December 2022

FINANCIAL REGULATION

Regulatory bodies

Which bodies regulate the provision of fintech products and services?

Canada's provincial and territorial securities administrators are the primary regulators of fintech financial products and services relating to capital markets (including crypto assets). They work together under one umbrella as the Canadian Securities Administrators (CSA), together with the Canadian self-regulatory organisation that governs securities dealers, the Investment Industry Regulatory Organization of Canada (IIROC), which has been restructured to become the New Self-Regulatory Organization of Canada (New SRO), effective 1 January 2023. At the federal level, the Office of the Superintendent of Financial Institutions (OSFI) is responsible for the supervision and regulation of banks, insurance companies, and trust and loans companies and has highlighted the need for resilient technology infrastructures. The Canada Revenue Agency and its various provincial counterparts have also developed and published policies or guidance on fintech-related matters. The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), Canada's federal anti-money laundering (AML) authority, also regulates certain fintech products and services, including 'money services businesses' (MSBs) dealing in fiat and/or virtual currencies. The Bank of Canada (BoC), Canada's central bank, closely monitors fintech developments and distributed ledger technologies and has been appointed as the oversight body for the new retail payments regime under the Retail Payments Activities Act (RPAA). As with other leading central banks, it is developing a cash-like central bank digital currency as a further contingency given the rapid decline in the use of cash and the explosive growth of digital payments. A number of other fintech initiatives are also administered at the local level by various municipal governments.

Law stated - 23 December 2022

Regulated activities

Which activities trigger a licensing requirement in your jurisdiction?

Fintech businesses may be subject to various provincial licensing requirements under applicable provincial securities and derivatives laws to the extent that they engage in activities or facilitate transactions in securities or derivatives. These rules also govern trading in crypto-assets that are regulated as securities and those that are not but where the manner in which these assets are traded and held constitute 'crypto contracts', such that the instruments are treated as 'investment contracts' and therefore 'securities'. The rules include dealer and adviser registration for entities/persons considered to be trading or advising in securities or derivatives for a 'business purpose' and related compliance obligations. The management of investment funds also triggers the application of investment fund manager registration requirements in certain situations. Businesses undertaking initial coin offerings (ICOs) or initial token offerings may also be subject to prospectus or product qualification requirements or compliance with related exemptions.

Associated regulations require compliance with know-your-client (KYC) and know-your-product rules, suitability, insurance, financial and customer reporting, custody requirements and cybersecurity risk management protocols, among other requirements. Given the traditional definition of 'exchange' or 'marketplace' (ie, an entity that brings

together multiple buyers and multiple sellers of securities or derivatives), the CSA requires that fintech businesses involved in cryptocurrencies also consider whether they must be registered as exchanges or alternative trading systems.

In addition, both foreign and domestic MSBs must register with FINTRAC and comply with KYC, reporting, record-keeping, travel rule and compliance programme requirements. MSBs include businesses that deal in fiat and virtual currencies and foreign exchange. MSB registration may also be required in Quebec under MSB legislation in that province.

A number of other fintech-related activities, including lending, factoring, invoice discounting, secondary market loan trading, providing yield-generating products, and deposit-taking and trust company-type activities may be subject to a number of different regulatory requirements, depending on the relevant features of the business.

Law stated - 23 December 2022

Consumer lending

Is consumer lending regulated in your jurisdiction?

Consumer lending is not as highly regulated in Canada as in certain other jurisdictions. Nevertheless, aspects of consumer lending are regulated in Canada at both the federal and provincial level. At the federal level, the regulation depends on the regulated status of the entity providing consumer credit. Banks and other financial institutions have cost-of-borrowing disclosure obligations for mortgages, credit cards and certain other types of credit. Criminal interest rate provisions in the Criminal Code (RSC 1985, c C-46) preclude the effective annual interest rate for an advance of credit from exceeding 60 per cent per year. No distinction is drawn between commercial and consumer contracts in this regard, though certain low-value (payday) loans are exempt.

Provincially, payday lenders are subject to a licensing requirement in most provinces. In addition, provincial consumer protection legislation in New Brunswick, Nova Scotia, Quebec and Saskatchewan imposes a lender licensing requirement (or permit or registration requirement) for consumer lending. A number of provinces have implemented or are in the process of implementing high-cost credit legislation, which can impose a licence or registration requirement.

Law stated - 23 December 2022

Secondary market loan trading

Are there restrictions on trading loans in the secondary market in your jurisdiction?

The regulation of trading loans in the secondary market depends on whether the loan instruments would be regarded as securities (ie, under a multi-factor test to determine if the particular loan instrument is an ‘investment contract’ or ‘a bond, debenture, note or other evidence of indebtedness’). Loans acquired on the secondary market are much more likely to be characterised as securities than are originated loans.

Law stated - 23 December 2022

Collective investment schemes

Describe the regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would fall within its scope.

Collective investment schemes, generally referred to as ‘investment funds’ under Canadian securities regulations, are primarily subject to provincial securities laws. Investment funds include non-redeemable (or closed-end) funds as well

as mutual funds. Primarily, persons operating or administering collective investment structures (including those that hold or invest in virtual currencies or that provide alternative finance products or services) may also be subject to investment fund manager registration requirements, in addition to dealer, adviser and prospectus or private placements requirement. The structures themselves may also be subject to the reporting and conduct requirements that apply to investment funds, including under National Instrument 81-102 – Investment Funds (NI 81-102), and National Instrument 81-104 – Alternative Mutual Funds (NI 81-104) (which applies specifically to retail alternative funds), National Instrument 81-106 – Investment Fund Continuous Disclosure (NI 81-106), and a number of other instruments, including, depending on the nature of the regulated intermediary, IIROC rules and, in the case of mutual fund dealers, the rules of the Mutual Fund Dealers Association of Canada, which, effective 1 January 2023, will be merged with IIROC into the New Self-Regulatory Organization of Canada (New SRO).

Law stated - 23 December 2022

Alternative investment funds

Are managers of alternative investment funds regulated?

Yes. Any person or company acting as a manager of an investment fund must register as an investment fund manager and comply with registration and related requirements, or rely on certain exemptions. This requirement is triggered in the provinces of Ontario, Quebec, and Newfoundland and Labrador if the fund has investors resident in that province. Across Canada, investment by Canadian investors in investment funds is subject to provincial prospectus requirements and, in the case of private placements, related exemption requirements, as well as dealer registration requirements and regulations that govern the content and delivery of offering documents and post-trade reports. Under securities legislation, these obligations apply to both managers of conventional investment funds, as well as alternative investment funds (AIFs). Domestic retail funds are also subject to additional regulations under NI 81-102 and NI 81-106, with AIFs permitted to engage in a broader range of investment strategies (eg, including more latitude to engage in short-selling, borrowing and the use of derivatives) than is permitted for conventional investment funds.

Law stated - 23 December 2022

Peer-to-peer and marketplace lending

Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

Peer-to-peer (P2P) lending businesses in Canada may be subject to registration as dealers with the provincial securities regulators in the provinces in which they operate. As a result, P2P lenders may also be required to comply with prospectus and other regulatory requirements applicable to any other securities dealer operating in the same jurisdiction, including restricting investing opportunities to qualified accredited investors. Other provincial entities have enlisted the help of affiliated companies to issue notes and agreements on a prospectus-exempt basis. Additionally, some P2P lenders have obtained exemptions from certain requirements such as prospectus filing obligations through existing exemptions under the provincial securities legislation.

Law stated - 23 December 2022

Crowdfunding

Describe any specific regulation of crowdfunding in your jurisdiction.

Fintech companies that raise capital through crowdfunding are subject to provincial securities regulations. Various provincial securities regimes have adopted crowdfunding prospectus exemptions through a range of regulations and instruments. For example, the Ontario Securities Commission adopted Ontario Instrument 45-506 – Start-Up Crowdfunding Registration and Prospectus Exemptions , which provided specific registration and prospectus exemptions for start-up crowdfunding companies.

Similar regimes have also been adopted in other provinces through, among others, Multilateral Instrument 45-108 – Crowdfunding and Multilateral CSA Notice 45-316 - Crowdfunding Registration and Prospectus Exemptions permit early-stage companies and small businesses to raise limited amounts of capital through crowdfunding platforms. Both public and non-public companies are permitted to rely on the prospectus exemption. Also, where securities crowdfunding offerings are facilitated through a funding portal, the funding portal generally must be registered under National Instrument 31-103 – Registration Requirements, Exemptions and Ongoing Registrant Obligations (NI 31-103) and with the applicable provincial securities regulators.

The CSA published a new regulation, National Instrument 45-110 – Start-up Crowdfunding Registration and Prospectus Exemptions (NI 45-110), that contributes to a harmonised national framework and will replace similar instruments previously adopted by provincial securities regulators. NI 45-110 came into force on 21 September 2021.

On 14 February 2022, the federal government took the unprecedented step of invoking the Emergencies Act (Canada) to end disruptions, blockades, and the occupation of the city of Ottawa. These developments led to further action to limit the flow of financing of the blockades by extending the requirement to register as money services businesses (MSBs) under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA, SC 2000, c 17), Canada's federal anti-money laundering legislation, to crowdfunding platforms and certain payment service providers that were not previously regulated for this purpose.

Law stated - 23 December 2022

Invoice trading

Describe any specific regulation of invoice trading in your jurisdiction.

There is no specific regulation in Canada of invoice trading. Depending on its characteristics, invoice trading may be subject to provincial securities laws and/or FINTRAC obligations, to the extent it falls under the existing scope of securities trading activity or an MSB service, respectively. In addition, if carried out by a banking entity or an entity affiliated with a bank, it may be subject to federal banking legislation. Provincial loan and trust legislation may be applicable if the services include extending loan and trust services to the public and provincial consumer protection laws may also apply.

Law stated - 23 December 2022

Payment services

Are payment services regulated in your jurisdiction?

The continuation of the 2016 Payment Canada modernisation programme, amendments to the existing Payment Clearing and Settlement Act (PCSA, SC 1996, c 6), and the new RPAA, are expected to provide robust support and innovation opportunities for payment services in Canada. Payment services will continue to be subject to FINTRAC licensing to the extent that they are subject to MSB licensing requirements.

In December 2020, Payments Canada published the Modernization Delivery Roadmap, outlining the implementation process for two national payment systems enabled by the global ISO 20022 messaging standard: Lynx and the Real-Time Rail (RTR). Lynx, Canada's new high-value payments system, began operations on 30 August 2022, replacing the

Large Value Transfer System (LVTS), which had operated since 1999. Lynx will enable payment and settlement finality and flexibility for the application of future technologies, as well as enhanced cybersecurity capabilities. The RTR will provide real-time irrevocable credit payments and allow fintech service providers to develop new and enhanced ways for individuals to pay for goods or services and transfer money. The RTR was set to launch in 2022 but its delivery has been postponed.

The RPAA will apply to all retail payment activities performed by payment service providers in Canada, as well as all activities performed by providers outside of Canada who provide retail payment activities to an end user within Canada. Under the RPAA, payment service providers will be required to register with the BoC. Certain retail payment activities, such as those performed by systems under the PCSA, payment functions performed by Payments Canada, the BoC or, other designated entities and activities, will be exempt from the new RPAA. The new requirements will be fleshed out in future implementing regulations.

Law stated - 23 December 2022

Open banking

Are there any laws or regulations introduced to promote competition that require financial institutions to make customer or product data available to third parties?

In August 2021, the federal government published its Final Report – Advisory Committee on Open Banking. The report, which focused on supporting innovation and competition in the Canadian financial services sector system, proposed a two-phased approach set to be completed by 2023.

The recommendations outlined a consumer-focused framework for implementing secure open banking in Canada. Under new regulations, such those to be enacted under the Consumer Privacy Protection Act (part of Bill C-27, 1st Sess, 44th Parl, 2022, cl 2 (first reading 16 June 2022)), individuals would be granted more freedom to direct and transfer their personal information from one organisation to another, including to accredited third-party service providers. Other Canadian organisations such as the Canadian Competition Bureau have also made strong recommendations to further modernise Canada's financial sector following consultations with industry and regulatory stakeholders in light of global developments in open banking. Further to amendments made under the PCMLTFA in 2022 discussed above, FINTRAC regulatory guidance was also amended to provide that certain types of payment service providers may also be subject to registration as MSBs under that legislation.

Law stated - 23 December 2022

Robo-advice

Describe any specific regulation of robo-advisers or other companies that provide retail customers with automated access to investment products in your jurisdiction.

Companies engaged in robo-advising activities are subject to securities registration and related regulatory requirements in the governing province where the business operates, which are generally harmonised across the country under NI 31-103.

The CSA has also issued regular guidance, including Staff Notice 31-342 – Guidance for Portfolio Managers Regarding Online Advice , outlining the applicability of securities laws to online advisers. Fintech companies providing robo-advising are required to follow the same rules as human advisers, including complying with KYC and related requirements, and participating in due diligence and compliance reviews by CSA staff. The CSA has generally declined to grant exemptive relief for robo-advisers from NI 31-103 and related rules.

Pursuant to the proposed Consumer Privacy Protection Act (part of Bill C-27, 1st Sess, 44th Parl, 2022, cl 2 (first reading 16 June 2022)), organizations employing automated decision systems that assist or replace the judgement of human decision-makers would face new transparency obligations with respect to the nature of such systems and their potential impact on individuals. As of September 2023, Quebec's private sector privacy law (RSQ, c. 39.1) will impose a similar requirement. Bill C-27 will also enact the Artificial Intelligence and Data Act (cl 39), which would impose a number of obligations on AI systems that are designed to avoid biased output and harm to individuals.

Law stated - 23 December 2022

Insurance products

Do fintech companies that sell or market insurance products in your jurisdiction need to be regulated?

Fintech companies that provide insurance services are subject to the same regulations as conventional providers of insurance services, as well as broader legislation applicable to fintechs under Canadian AML, consumer protection and privacy legislation.

Law stated - 23 December 2022

Credit references

Are there any restrictions on providing credit references or credit information services in your jurisdiction?

There is no consolidated federal authority governing credit reference and information services. Both consumer protection legislation such as the Consumer Reporting Act (RSO 1990, c C-33), Personal Information Protection and Electronic Documents Act (PIPEDA, SC 2000, c 5) and its provincially-enacted counterparts, and individual contracts, govern the disclosure of credit information, activities related to credit cards and other credit agreements such as payday loans.

Law stated - 23 December 2022

CROSS-BORDER REGULATION

Passporting

Can regulated activities be passported into your jurisdiction?

Foreign fintech entities operate under the same regulatory framework as domestic businesses for regulated activities such as banking or insurance, to the extent their activities in Canada trigger regulation.

Provincial securities regulators have adopted a passport approach to the application of securities regulation under Multilateral Instrument 11-102 – Passport System .

This regime has been adopted by all provinces except for Ontario. It allows the participant to gain access to markets across Canada while dealing solely with their principal regulator and complying with harmonised regulation. Participants can clear a prospectus, obtain a discretionary exemption, register as a dealer or adviser in their home province and this decision or receipt is deemed to be a decision or receipt from other securities regulatory authorities, as long as conditions, such as filing requirements and fee payments, are met.

While Ontario is not a party to this system, it operates under a coordinated review model that generally allows for

seamless administration through dealing with the regulator in the Canadian jurisdiction with which the entity has the greatest nexus. In certain limited areas of securities regulation, Canadian securities administrators may also recognise compliance with foreign regulations as a form of 'substituted compliance' and allow for exemptions or waivers on that basis. Canadian securities regulators have also entered into memoranda of understanding with various international regulators to allow for coordination in regulation, information sharing and enforcement.

Under NI 31-103, there is also a type of cross-border passporting that applies to permit non-Canadian dealers and advisers that satisfy certain conditions to engage in non-Canadian trading and advisory activities with qualified Canadian resident 'permitted clients' under the 'international dealer' or 'international adviser' exemptions, largely premised on the basis of having appropriate regulatory oversight in their home jurisdiction. A similar regime also exists for non-Canadian investment fund managers in certain provinces.

Law stated - 23 December 2022

Requirement for a local presence

Can fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

Fintech companies are not per se subject to any licensing requirement. If they do need to be licensed, it is because their foreign regulatory status or activities in Canada may trigger the application of an existing licensing regime.

Fintech companies that are subject to foreign money services business (MSB) registration are not required to establish a Canadian presence (although they must designate a local agent for service or process). Similarly, foreign businesses that are subject to dealer, adviser or investment fund manager registration are generally not required to establish a local Canadian entity to register or rely on filings-based exemptions (although they must also designate a local agent for service or process). Full-service investment dealer registration, however, does require that a Canadian subsidiary be established and staffed appropriately. With certain exceptions, federal banking and insurance regulation also requires that licensed entities establish a Canadian presence.

Law stated - 23 December 2022

SALES AND MARKETING

Restrictions

What restrictions apply to the sales and marketing of financial services and products in your jurisdiction?

Marketing of financial services and products to Canadian users is subject to Canadian securities and derivatives laws. In particular, under provincial securities and derivatives legislation, a 'trade' is broadly defined to include 'any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance' of a trade in securities or derivatives and these activities may therefore be subject to dealer registration and prospectus requirements.

Marketing to Canadian users may also subject an entity to licensing with FINTRAC as a money service business or foreign money services business (MSB or FMSB) and to MSB registration in Quebec, as applicable. Marketing and advertising are also subject to provincial consumer protection legislation and generally, for Canadian banking and insurance purposes, an entity should not engage in targeted marketing to Canadian customers, particularly retail customers, unless that activity can be carried out in compliance with applicable licensing requirements.

The law known as Canada's Anti-Spam Legislation (S.C. 210, c. 23) generally requires prior express consent in order for an organization to send an email, text or other direct electronic message for marketing or promotional purposes.

Telemarketing in Canada is regulated by the Unsolicited Telecommunications Rules , which include provisions requiring compliance with a national do-not-call list.

Law stated - 23 December 2022

CHANGE OF CONTROL

Notification and consent

Describe any rules relating to notification or consent requirements if a regulated business changes control.

Money service businesses (MSBs) registered with the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) must provide notice of any changes to information previously provided to FINTRAC in connection with such registration within 30 days of becoming aware of the change. Schedule 1 to the Registration Regulations under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA, SC 2000, c 17) requires an applicant for registration to disclose every person, corporation or other entity that owns or controls, directly or indirectly, 20 per cent or more of the shares of the corporation.

The direct or indirect acquisition of 10 per cent or more of the securities of a registered securities firm, or all or a substantial part of its assets, is also subject to prior notification to securities regulators and, if applicable, approval of the Investment Industry Regulatory Organization of Canada (IIROC) (which will become the New Self-Regulatory Organization of Canada (New SRO), effective 1 January 2023) pursuant to its Dealer Member Rules and to disclosure of changes to upstream ownership. Regulated banks and insurance companies are similarly subject to pre-approval requirements for acquisition of significant interests, including change of control. The acquisition of significant positions in, or control of, publicly traded entities in Canada is also subject to securities laws and stock exchange rules. Depending on the size of the firm and nature of activities, Canadian antitrust and competition regulations may also impose notification or approval requirements.

Law stated - 23 December 2022

FINANCIAL CRIME

Anti-bribery and anti-money laundering procedures

Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

Registered entities must comply with reporting, record-keeping, know-your-client (KYC) and other AML/ATF (anti-money laundering/anti-terrorist financing) compliance programme requirements. Securities dealers, life insurance companies, banks, brokers and agents, money services businesses and certain other financial businesses are subject to the AML and ATF compliance requirements, including compliance programme, KYC, reporting, record-keeping and other requirements of the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). Additional requirements apply under the Criminal Code , the Corruption of Foreign Public Officials Act (SC 1998, c 34) and Canadian sanctions legislation.

Law stated - 23 December 2022

Guidance

Is there regulatory or industry anti-financial crime guidance for fintech companies?

FINTRAC issues guidance on policy interpretations, transaction reporting, record-keeping and other obligations for reporting entities. Fintech companies, among others, that qualify as either money service businesses (MSBs) or securities dealers have specific guidelines as to registration, reporting and regulatory compliance.

The Royal Canadian Mounted Police (RCMP), as a member of the Financial Crimes Task Force, sets standards and promotes the implementation of measures to combat money laundering, terrorist financing and other threats to the international financial system. The RCMP is also responsible for enforcement of the Criminal Code.

Law stated - 23 December 2022

PEER-TO-PEER AND MARKETPLACE LENDING

Execution and enforceability of loan agreements

What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

In Canada, there is a risk that certain loan or security agreements will not be enforceable where borrowers default on their loans. Lenders generally rely on peer-to-peer (P2P) lending companies' credit analytics and default management services to gauge the creditworthiness of a borrower. This subjects the lender to both credit risk from the borrower and risk from the integrity of the platform, typically without forms of insurance that may be provided by certain banks.

If the borrowers are consumers, there are numerous requirements under provincial consumer protection legislation pertaining to 'credit agreements', 'internet agreements' and 'remote agreements', among others, which, if not complied with, could render an agreement unenforceable or subject to cancellation by the consumer. In very general terms, the consumer protection legislation for credit agreements imposes (often quite specific) cost-of-borrowing disclosure obligations and prohibits a wide range of unfair practices. Actual execution of a loan contract by electronic signature is generally permitted, even for consumers, subject to the requirements described above. Loans offered in compliance with provincial securities laws are exempt from the consumer protection requirements, on the basis that retail investors are adequately protected under the securities legislation.

Law stated - 23 December 2022

Assignment of loans

What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected? Is it possible to assign these loans without informing the borrower?

Canadian securities regulators have taken a cautious approach to loans originated on P2P marketplace lending platforms and have determined that such loan arrangements may constitute securities. Generally, a borrower must grant a security interest to a lender in investment property to secure its payment obligations and that interest must attach. A secured lender can then perfect its interest by (1) registering a financing statement in accordance with the Personal Property Security Act, (2) taking possession or (3) obtaining effective control of the collateral. However, P2P lending involves a higher degree of risk. In many cases, lenders may rely on default management services provided by P2P lending companies.

It is possible for investors to purchase loans from P2P lending platforms and act as third-party debt collectors without informing the borrower when no changes are made to the terms of the loan.

Law stated - 23 December 2022

Securitisation risk retention requirements

Are securitisation transactions subject to risk retention requirements?

There is no requirement for risk retention on the part of a sponsor or seller in a Canadian securitisation. However, if securities issued in a Canadian transaction are offered to US or EU investors, US or EU risk-retention rules may apply to the transaction.

Law stated - 23 December 2022

Securitisation confidentiality and data protection requirements

Is a special purpose company used to purchase and securitise peer-to-peer or marketplace loans subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

The nature of the assets securitised, the location of the participants in a securitisation and the process used to purchase these loans will determine the legislation and regulations applicable. However, most applicable federal and provincial regulations outline some level of confidentiality required regarding user data. For example, federal and provincial consumer protection and privacy legislation, as well as regulations applicable to financial institutions, impose a certain level of confidentiality relating to borrower information.

Law stated - 23 December 2022

ARTIFICIAL INTELLIGENCE, DISTRIBUTED LEDGER TECHNOLOGY AND CRYPTOASSETS

Artificial intelligence

Are there rules or regulations governing the use of artificial intelligence, including in relation to robo-advice?

The regulation of AI and robo-advisers will continue to be an area of development in the financial services industry, although the general direction is that the same registration, know-your-client and information requirements of conventional wealth managers and advisers can be applied to digital advisers. Importantly, online advisers must be registered with the Canadian Securities Administrators (CSA) before advising or dealing in securities unless an exemption is available.

Furthermore, the registration and conduct requirements of NI 31-103 are technology-neutral and there are no 'online advice' exemptions for AI portfolio managers (PMs). PMs must register prior to implementing their online advice operating model, after which the CSA will assess how the firm will meet its obligations under NI 31-103.

The proposed Artificial Intelligence and Data Act (part of Bill C-27, 1st Sess, 44th Parl, cl 39 (first reading 16 June 2022) would impose on operators of AI systems a number of restrictions and requirements designed to eliminate biased output and harm to individuals.

Law stated - 23 December 2022

Distributed ledger technology

Are there rules or regulations governing the use of distributed ledger technology or blockchains?

The Canadian federal government has been experimenting with blockchain technology in various fields while the Bank of Canada (BoC) is conducting research on the effects of introducing a central bank digital currency. The BoC has noted that 'stablecoins', crypto assets backed fully or in part by currency of commodity holdings, have widespread potential. The BoC is further involved with Payments Canada and TMX Group on a research initiative, 'Project Jasper', which experiments with the use of distributed ledger technology for payments. VersaBank, a Canadian financial institution regulated by OSFI, also announced plans to launch VCAD, a type of digital currency backed by bank deposits. However, the failure of the TerraUSD (UST) algorithmic stablecoin to keep its peg to the US dollar, the subsequent collapse of the Luna crypto network and the broader shocks in the crypto market in 2022 could lead to further regulatory initiatives in Canada specifically targeting the use of distributed ledger and blockchain technology in retail investment transactions.

Law stated - 23 December 2022

Cryptoassets

Are there rules or regulations governing the promotion or use of cryptoassets, including digital currencies, stablecoins, utility tokens and non-fungible tokens (NFTs)?

Virtual currencies are not treated as legal tender in Canada under section 8 of the Currency Act (RSC 1985, c C-52) and may be subject to Canadian provincial securities and derivatives laws to the extent that they are considered a security (including a 'crypto contract') or a derivative under that legislation.

The CSA and the Investment Industry Regulatory Organization of Canada (IIROC) (or the New SRO effective 1 January 2023) have also acknowledged that it is widely accepted that certain well-established virtual currencies that function as a form of payment or a means of exchange on a decentralised network, such as Bitcoin, are not currently in and of themselves, securities or derivatives. They are rather akin to an intangible 'commodity', the value of which fluctuates based on the market. In assessing whether a particular virtual currency will be considered a security subject to Canadian securities laws, the CSA will perform case-by-case, fact-dependent analyses and consider the substance of the virtual currency over its form. The CSA has adopted an 'investment contract' test to apply to blockchain and cryptocurrency transactions that resemble traditional securities. In particular, the CSA has stated that the manner in which these assets are traded and held may constitute a 'crypto contract', such that the instruments should be regulated as 'investment contracts' and therefore as 'securities'.

Virtual currency transfer services are subject to money services business (MSB) registration with the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), which includes know-your-client, client identification, record-keeping, reporting and other anti-money laundering (AML) programme compliance requirements.

Currently, Canadian securities regulators have recognized or registered a number of domestic platforms or other intermediaries that facilitate trading in crypto-assets.

In August 2022, OSFI, Canada's prudential banking regulator, also announced an interim approach for the regulatory capital and liquidity treatment of the crypto assets exposure of federally regulated financial institutions. In November 2022, OSFI issued a further advisory signaling its expectation that federally regulated financial institutions clearly understand the risks of any planned crypto-asset activities and ensure that these risks have been properly addressed, including by complying with existing federal financial laws in relation to crypto assets, consistent with the 'principle endorsed by the Financial Stability Board, "same activity, same risk, same regulation"' .

Law stated - 23 December 2022

Token issuance

Are there rules or regulations governing the issuance of tokens, including security token offerings (STOs), initial coin offerings (ICOs) and other token generation events?

Digital currency exchanges and brokerages may be subject to FINTRAC regulation as MSBs (or in the case of non-Canadian exchanges or platforms, foreign MSBs or FMSBs). These entities must follow specific obligations imposed by the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (Canada) and associated regulations, including registration and compliance.

Digital currency exchange or brokerages may also be subject to provincial securities legislation, requiring registration as either a dealer platform or marketplace platform. Under Staff Notice 21-329 – Guidance for Crypto-Asset Trading Platforms: Compliance with Regulatory Requirements , entities are generally advised to register initially as 'restricted dealers,' gradually transitioning to full investment dealer registration, and if applicable, marketplace recognition, depending on the nature or products or services they provide and the manner in which investment, trading and custody are handled.

Law stated - 23 December 2022

DATA PROTECTION AND CYBERSECURITY

Data protection

What rules and regulations govern the processing and transfer (domestic and cross-border) of data relating to fintech products and services?

There are four general privacy and data protection statutes in Canada governing the processing and transfer of data: one federal and three substantially similar provincial statutory regimes (Alberta, British Columbia and Quebec).

The federal law, Personal Information Protection and Electronic Documents Act (PIPEDA), applies to fintech providers that operate within any of the industries that are federally regulated – most notably (in this context) the banking industry. PIPEDA applies to the processing of personal information in the course of commercial activity in any province that has not enacted its own privacy laws and to inter-provincial and international disclosures of personal information. Consequently, many national fintech service providers may be subject to PIPEDA, even if they are located in one of the three provinces with its own legislation.

Privacy laws generally permit the storage or processing of personal information outside of Canada, with consent. For the least sensitive types of personal information, implied consent is often sufficient (ie, posting a notice or including a disclosure in an organisation's privacy policy). For more sensitive personal information, Canadian privacy laws may require express consent to such transfers.

As of September 2023, Quebec's private sector privacy law (RSQ, c. P-39.1) will also explicitly require that an organization conduct an impact assessment with respect to any transfers of personal information outside of that province.

Law stated - 23 December 2022

Cybersecurity

What cybersecurity regulations or standards apply to fintech businesses?

In Canada, cybersecurity laws and regulations were typically established in the context of personal information protection. Methods of protection include physical, organisational and technological measures and aim to safeguard against loss, theft, unauthorised access, disclosure, copying, use and modification. In assessing the adequacy of security measures implemented by an organisation, the privacy commissions often look for an implementation of recognised third-party certification and standards that are appropriate for the organisation's industry.

Canadian regulators and self-regulatory organisations (including the Canada Securities Administrators (CSA), Investment Industry Regulatory Organization of Canada (IIROC), Office of the Superintendent of Financial Institutions (OFSI) and the Mutual Fund Dealers Association of Canada) have issued a considerable amount of fintech-specific cybersecurity guidance on cybersecurity best practices, including:

- corporate cybersecurity policies;
- incident response plans and reporting;
- employee cybersecurity training; and
- risk assessment and management (including vendor risk management).

While non-binding, this guidance is widely followed by the organisations to which it applies.

Unlike many other jurisdictions, Canada has not yet adopted comprehensive cybersecurity rules that legally require financial services companies, including those in the fintech sector, to adopt best practices of the type just described, although a new Critical Cyber Systems Protection Act (Bill C-26, 1st Sess, 44th Parl, cl 13 (first reading 14 June 2022)) is before Parliament at the time of writing. It would require operators of critical systems to establish a cybersecurity program, report breaches and mitigate supply-chain and third-party risks.

Fintech businesses that are 'reporting issuers' (ie, public companies) under Canadian securities legislation are expected and required by the CSA to disclose cybersecurity risks, potential effects of a cybersecurity incident and the governance practices that they have in place to mitigate this type of risk. Registrants (ie, dealers, advisers and investment fund managers) are also expected to be vigilant in keeping their cybersecurity measures up to date, including by following IIROC and Mutual Fund Dealers Association guidance. In general, the CSA expects all regulated entities to adopt a cybersecurity framework recommended by a regulatory authority or standard-setting body that is appropriate for entities of their size. Importantly, IIROC has recently proposed rule amendments that could require mandatory reporting of cybersecurity incidents by investment dealers.

On 9 November 2021, OSFI launched a public consultation on the newly released draft version of Guideline B-13: Technology and Cyber Risk Management . The proposed Guideline B-13 is designed to complement existing Guidelines E-21 (Operational Risk Management) and B-10 (Outsourcing of Business Activities, Functions and Processes) as well as OSFI's Technology and Cyber Incident Reporting Policy , including its Cyber Security Self-Assessment tool.

Law stated - 23 December 2022

OUTSOURCING AND CLOUD COMPUTING

Outsourcing

Are there legal requirements or regulatory guidance with respect to the outsourcing by a financial services company of a material aspect of its business?

Yes, the Office of the Superintendent of Financial Institutions (OSFI) has issued certain guidelines that would apply to outsourcing by a federally regulated financial services company (such as a bank or insurance company) of a material aspect of its business – specifically, the B-10 Guidelines for Outsourcing of Business Activities, Functions, and Processes (the B-10 Guideline). The B-10 Guideline addresses OSFI's expectations on federally regulated entities that outsource business activities to service providers, in particular the practices, procedures and standards that should be applied to the outsourcing arrangement. The guideline includes specific guidance for federally regulated entities on due diligence, contractual terms, data location, business continuity, outsourcing in foreign jurisdictions, monitoring and oversight. It also requires that federally regulated entities develop and implement an outsourcing policy. Although the B-10 Guideline does not technically have the force of law, it is nonetheless binding on the regulated entities that are subject to them. Additional regulatory and legislative limits may apply in respect of certain types of financial services companies, such as insurance companies. In April 2022, OSFI published for comment Draft Revised Guideline B-10 Third Party Risk Management that would replace the existing B-10 Guideline.

Under Canadian privacy laws, organisations generally remain responsible for the appropriate handling of personal information under their custody or control, even where such information has been transferred to domestic or foreign third-party service providers for processing. As such, where a financial services company transfers personal information under its custody or control to a third-party service provider (or that third party collects personal information on behalf of the financial services company) the financial services company must ensure that the information is adequately protected and only collected, used and disclosed in accordance with all applicable Canadian privacy laws. This is typically accomplished through due diligence, robust contractual protections, and periodic audits. Beginning in September 2023, organizations that engage in outsourcing that involves the transfer of personal information to a jurisdiction outside Quebec (including to another Canadian province) will be required by Quebec's private sector privacy law (RSQ, c. 39.1) to first conduct an impact analysis.

Under Companion Policy 31-103, securities registrants must use contractual and other means to provide a comparable level of protection while the information is in the hands of the service provider. Outsourcing organisations are obliged as part of their due diligence to choose vendors with care and, in particular, to ensure that they are contractually bound to comply with appropriate security and confidentiality protocols. Periodic reviews of the service provider, and of the privacy training provided to third-party personnel, are also required in some circumstances.

Law stated - 23 December 2022

Cloud computing

Are there legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

The financial services industry must adhere to all applicable Canadian privacy legislation with respect to the use of cloud computing. Federal legislative requirements may, in some cases, require federally regulated financial institutions to maintain certain records in Canada, which can limit the use of cloud computing platforms.

Law stated - 23 December 2022

INTELLECTUAL PROPERTY RIGHTS

IP protection for software

Which intellectual property rights are available to protect software, and how do you obtain those rights?

Canada has a robust IP framework. As in any other country, fintech innovations are generally protected through patents,

copyrights and trade secrets. Canadian IP databases can be used to search up filed or registered trademarks, copyrights and patents.

Inventions that can be patented include products, processes or machines. Computer code in written form has automatic copyright protection. However, if a computer program provides a new solution to a technological problem and modifies how a computer works, the software-implemented invention may be patentable.

Law stated - 23 December 2022

IP developed by employees and contractors

Who owns new intellectual property developed by an employee during the course of employment? Do the same rules apply to new intellectual property developed by contractors or consultants?

The owner of the invention is entitled to patent it unless there has been an assignment of the invention and the associated IP rights. Express contractual language should be used in employment agreements as best practice to protect IP created by an employee. Barring any specific provision, there is a presumption that employees are entitled to ownership of a patent of any invention they created in the course of their employment. Employers will be deemed owner of the invention and resulting patent rights if there is an express contract stating such and if it can be proven that the employee was employed for the express purpose of inventing or innovating.

In the absence of express terms, the employer is the first owner of the copyright in works that an employee creates in the course of their employment. For contractors or consultants, courts will look at various factors. For work created outside of working hours and/or using their own resources, the central factor is the subject matter of the copyright work.

Law stated - 23 December 2022

Joint ownership

Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

Generally, patent co-ownership can be changed by parties through written mutual agreement. However, co-owners of a patent cannot dilute the other co-owners' interests in the patent.

One applicant cannot withdraw a patent application without the consent of the other co-applicants. Similarly, once the patent is registered, one owner cannot license the patent rights to a third party without first obtaining consent from the other co-owners.

For assignment, however, a co-owner may assign his or her own interest in a patent in the absence of the other co-owners' consent unless doing so would dilute the co-owners' rights.

Law stated - 23 December 2022

Trade secrets

How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

There is no formal process for protecting a trade secret, or any act or statute which regulates trade secrets in Canada. Trade secret law is developed out of the common law, or in Quebec, civil law, and includes some dispositions in the

Criminal Code.

Courts will use several factors to assess whether an action involves the misuse of a trade secret and how to compensate the owner for its misuse. Businesses can also use non-disclosure or confidentiality agreements or clauses and encryption or password protection to protect trade secrets.

Law stated - 23 December 2022

Branding

What intellectual property rights are available to protect branding and how do you obtain those rights? How can fintech businesses ensure they do not infringe existing brands?

Brand names and logos can be registered as trademarks for 10 years and renewed indefinitely. Businesses should protect their IP with registrations and documentation to control ownership and use of their IP rights, including permitted use under licensing and collaborative agreements with third parties.

In order to ensure that a fintech company is not infringing third-party trademark rights, freedom to operate searches can be conducted to ascertain if there are any prior third-party rights that could pose an obstacle to the use or registration of a mark, or both. Such searches are highly recommended prior to commencing use of a mark as it could become costly to have to transition to a different mark once investments have been made in an original name.

Law stated - 23 December 2022

Remedies for infringement of IP

What remedies are available to individuals or companies whose intellectual property rights have been infringed?

IP rights holders, not the Canadian Intellectual Property Office (CIPO), are responsible for enforcing their IP rights. Remedies for infringement include seeking damages sustained as results of the infringement, the profits made by the infringer, a reasonable royalty and partial court costs or attorney fees. In addition, injunctive relief may be sought as well. In lieu of the above remedies, copyright owners can be compensated through statutory damages (this is a remedy exclusive to copyright infringement claims).

Law stated - 23 December 2022

COMPETITION

Sector-specific issues

Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction?

There are currently no industry-specific competition or foreign investment issues with respect to fintech companies in Canada. Investments in (and acquisitions of) fintech companies are subject to the same general competition and foreign investment regime as other mergers. However, in recent years, the Canadian Competition Bureau (CCB) has focused its research and advocacy on the importance of innovation and disruption among fintech firms and the potential for this dynamism to be upset by complex regulatory barriers or incumbent market power. In 2017, the CCB published a report entitled 'Technology-led innovation in the Canadian financial services sector'. It included recommendations encouraging policymakers to reduce the regulatory barriers to entry associated with fintech

products and services and limit the ability of powerful financial incumbents to take steps that frustrate the growth of fintech start-ups.

In December 2022, the federal government tabled legislation to modernize the Investment Canada Act to address 'changing global dynamics' and impose pre-implementation filing requirements for foreign acquisitions of Canadian businesses operating in designated sensitive sectors, which are expected to include, among others, quantum computing and AI and companies handling personal data.

Law stated - 23 December 2022

TAX

Incentives

Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

At the federal level, qualifying corporations can claim a tax credit based on eligible scientific research and experimental development (SRED) expenditures. The federal tax credit for Canadian-controlled private corporations (CCPCs) is up to 35 per cent of qualifying SRED expenditures on a maximum total amount of C$3 million of qualifying SRED expenditures and 15 per cent of qualifying SRED expenditures over C$3 million. However, the C$3,000,000 limit may be reduced if the taxable capital of the CCPC (and associated corporations) exceeds a certain threshold. For non-CCPCs, the federal tax credit is 15 per cent of qualifying SRED expenditures.

For CCPCs, the credit is first applied against federal taxes and the unused portion of the 35 per cent federal tax credit is refundable. A portion of the 15 per cent credit may also be refundable for certain CCPCs. For non-CCPCs, the federal tax credit is not refundable and may only be applied against taxes. In all cases, if the credit is not refundable and cannot be used in a given year, it may be carried forward or carried back to other taxation years in accordance with the detailed rules of the Income Tax Act (Income Tax Act, RSC 1985, c 1 (5th Supp)).

Provinces also offer similar tax credits on research and development expenses, some of which may also be refundable. The provincial credits range from 4.5 per cent to 30 per cent. Certain other industry-specific tax credits are available, depending on the circumstances.

Law stated - 23 December 2022

Increased tax burden

Are there any new or proposed tax laws or guidance that could significantly increase tax or administrative costs for fintech companies in your jurisdiction?

As of July 2021, new goods and services tax/harmonized sales tax (GST/HST) rules for digital economy businesses came into effect. Non-resident vendors providing cross-border digital services or goods to Canadian consumers as well as platform-based short-term accommodations must register with the Canada Revenue Agency and charge and remit GST/HST if their total taxable supplies are over C$30,000 over a 12-month period. Depending on the provinces, different rates apply.

On 14 December 2021, the federal government released the draft legislation for the Digital Services Tax Act, which will implement a 3 per cent Digital Services Tax (DST). The DST is not expected to apply if a multilateral (OECD) Pillar One agreement is reached before 1 January 2024. The DST applies at the rate of 3 per cent on Canadian in-scope revenue in the calendar year generated from digital services (as defined under the Digital Services Tax Act) in excess of C$20 million earned by an individual entity or consolidated group with at least €750 million in global revenue. The earliest any

DST will become payable by a taxpayer is mid-2025, but that first payment will be for DST on Canadian digital services revenue earned throughout the 2022–2024 calendar years. In addition, in the 2022 Fall Economic Statement, the federal government affirmed its intention to proceed with the DST and also its intention to implement the OECD's Pillar One (reallocation of taxing rights) and Pillar Two (global minimum tax) approach.

Law stated - 23 December 2022

IMMIGRATION

Sector-specific schemes

What immigration schemes are available for fintech businesses to recruit skilled staff from abroad? Are there any special regimes specific to the technology or financial sectors?

While there are no specific temporary foreign work programmes tailored to the fintech industry, there are numerous programmes that enable Canadian companies to hire temporary foreign workers in the IT and financial sectors. Canada is also party to a number of multilateral treaties with partnering countries involving the freedom of movement of labour, such as the Canada–United States–Mexico Agreement.

Certain programmes are available for investors and entrepreneurs; however, some programmes may be restricted in terms of the number of participants and be contingent on:

- the province in which the investment will be made;
- the amount of the investment and level of ownership; and
- the provincial agencies that are involved in the establishment of business operations.

One fintech-relevant foreign worker programme, Canada's Global Talent Stream programme (the Program), was implemented by the federal government to help Canadian businesses recruit individuals with technical expertise. The Program's requirements are nuanced but accessible for employers looking to recruit unique and specialised foreign talent to scale up and grow. If a company hires a foreign worker through the programme, it must develop a Labour Market Benefits Plan that demonstrates the company's commitment to activities that will have a tangible and lasting positive impact on the Canadian labour market.

Law stated - 23 December 2022

UPDATE AND TRENDS

Current developments

Are there any other current developments or emerging trends to note?

Canada's fintech industry continues to flourish, with strong levels of investment and partnerships in both start-up and later stages initiatives. As in other countries, the global pandemic has accelerated digital transformation, including the shift to digital payments and borderless online trading, fuelled in part by remote work, income support programmes and booming equity markets.

These developments have also accelerated the pace of regulatory developments, both federally and provincially, particularly in the digital payments and crypto spaces.

In October 2020, the Bank of Canada published a report on the foundational principles and core features of central bank digital currencies in conjunction with seven other central banks including the Bank of England and the European Central Bank. The competitive race between central bank digital currencies and privately issued digital currencies

globally will likely accelerate the modernisation and regulation of retail payment systems in Canada. This, in turn, is anticipated to promote the further development of blockchain, cryptocurrency or crypto asset, cloud and other AI technologies. AI is now gaining widespread adoption and is expected to profoundly transform many segments of the financial services industry in Canada. However, the headwinds facing the broader global economy and the tech sector in the post-pandemic high interest rate and inflationary environment may slow the pace of private funding and create new challenges for the sector in 2023.

Law stated - 23 December 2022

Jurisdictions

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