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LEGISLATIVE SUMMARY

Bill C-86:
A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures

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Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

Legislative Summary of Bill C-86
(Legislative Summary)

Publication No. 42-1-C86-E

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LEGISLATIVE SUMMARY OF BILL C-86: A SECOND ACT TO IMPLEMENT CERTAIN PROVISIONS OF THE BUDGET TABLED IN PARLIAMENT ON FEBRUARY 27, 2018 AND OTHER MEASURES*

1 BACKGROUND

Bill C-86, A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures (short title: Budget Implementation Act, 2018, No. 2) was introduced and read for the first time in the House of Commons on 29 October 2018.[1]

On 6 November 2018, the bill passed second reading and was referred to the House of Commons Standing Committee on Finance. The committee reported the bill with amendments on 22 November 2018, and the bill was passed by the House of Commons on 3 December 2018. That day, it received first reading in the Senate; it passed second reading and was referred to the Standing Senate Committee on National Finance on 4 December 2018. The committee reported the bill without amendment on 7 December 2018, and the Senate passed the bill on 10 December 2018. It received Royal Assent on 13 December 2018.

As both the long and short titles suggest, the purpose of the bill is to implement the government's overall budget policy, introduced in the House of Commons on 27 February 2018. Consistent with established legislative practice, this is the second implementation bill for Budget 2018. Bill C-74, the first such implementation bill, was passed on 21 June 2018.

Bill C-86 is divided into four parts.

- Part 1 implements income tax and related measures concerning such subjects as non-resident corporations, cross-border surpluses, foreign income and the disclosure of tax information. Part 1 also amends the *Mutual Legal Assistance in Criminal Matters Act*.
- Parts 2 and 3 implement, respectively, certain Goods and Services Tax/ Harmonized Sales Tax (GST/HST) measures and certain excise measures.
- Part 4, which is subdivided into 23 divisions, implements various measures by enacting several Acts, including the following:
  - the Canadian Gender Budgeting Act (Division 9);
  - the Pay Equity Act (Division 14), and
  - the Department for Women and Gender Equality Act (Division 18).

  Part 4 also implements measures by amending several Acts, including the following:
  - the *Bank Act* (divisions 3 and 10);
  - the *Canadian Business Corporations Act* (Division 6);

- the *Copyright Act* (Subdivisions C and H of Division 7);
- the *Canada Shipping Act, 2001* (Division 22); and
- the *Marine Liability Act* (Divisions 23).

This document provides a brief description of the main measures proposed in the bill by summarizing the substance of each part. For ease of reference, the information is presented in the same order as it appears in the summary in the bill.

2 DESCRIPTION AND ANALYSIS

2.1 PART 1: IMPLEMENTATION OF CERTAIN INCOME TAX AND RELATED MEASURES PROPOSED IN THE 2018 BUDGET

2.1.1 RULES WITH RESPECT TO TAX CONSEQUENCES ARISING FROM FOREIGN DIVISIVE REORGANIZATIONS

Clauses 2 and 39 amend section 15 of the *Income Tax Act* (ITA)[2] and section 5907 of the *Income Tax Regulations* (ITR),[3] respectively, to address the tax consequences of foreign divisive reorganizations.

Clause 2(1) repeals section 15(1.4)(e) of the ITA, and clause 2(2) adds section 15(1.5) to the Act to address the tax benefits conferred on a taxpayer that holds shares of a non-resident corporation that divides into one or more corporations, referred to as a foreign divisive reorganization. New section 15(1.5) provides that if a shareholder of the original corporation receives shares of the new corporation after the divisive reorganization, the value of the shares is equal to the fair market value of the shares of the new corporation. New section 15(1.5) also deems that any gains or losses incurred by the original corporation from the distribution of the shares of the new corporation are to be nil and that any property of the original corporation that becomes property of the new corporation is deemed to be disposed of and bought for the fair market value of the property.

Clause 39 amends section 5907 of the ITR to account for the tax consequences related to any deemed dispositions of property held by the original corporation and transferred to the new corporation.

Clause 2(1) is deemed to have come into force on 24 October 2012, and clauses 2(2) and 39 apply to foreign divisive reorganizations that occur after 23 October 2012.

2.1.2 CIRCUMVENTION OF THE CROSS-BORDER ANTI-SURPLUS STRIPPING RULE

Clauses 3, 5, 14 and 21 amend sections 18(5), 84(1)(c.1) to 84(1)(c.3), 128.1 and 212.1 of the ITA, respectively, in order to prevent a non-resident shareholder from extracting or “stripping” tax-free amounts from a Canadian corporation by using partnerships and trusts as intermediaries to transfer shares to a new Canadian corporation. In general, non-residents will attempt to extract tax-free

amounts from a corporation by artificially increasing the paid-up capital (PUC) in respect of the shares of a corporation. “PUC” refers to the amount of money a corporation received from shareholders when its shares were first sold; this amount can be returned to shareholders tax-free.

A typical scheme has the sole non-resident shareholder of a Canadian corporation creating a new Canadian corporation to which the shares of the original corporation are transferred. The PUC of the original shares is $20 but the fair market value is $50; after the transfer, the PUC of the new shares would be equal to $50 and as a result, the amount that could be returned to the shareholder tax-free would increase. Section 212.1 is an anti-avoidance rule that limits the PUC to the PUC of the original corporation, and if the new corporation distributes any amounts above the PUC limit, section 84 deems that excess amount to be a dividend that is to be included in the income of the shareholder.

Clause 21 introduces several amendments to section 212.1 in order to include schemes that use partnerships and trusts as intermediaries to transfer shares from one Canadian corporation to a new Canadian corporation. The most substantive change is in clause 21(8), which adds section 212.1(5) so that tiered trusts and partnerships, which are trusts and partnerships that themselves are beneficiaries of trusts or members of partnerships, are considered “look-through” entities and as such, the beneficiaries and members of upper-tier trusts and partnerships are considered to have a direct interest in the lower-tier trusts and partnerships. As well, clause 21(8) adds section 212.1(6) to set out how to attribute the ownership of shares of a Canadian corporation that are held, disposed of or acquired through tiers of trusts and partnerships and eventually to a new Canadian corporation, through what is called the “trusts and partnerships look-through rule.”

Clauses 3 and 5 make identical consequential amendments to sections 18 and 84, respectively. Clause 3 changes the definition of “equity amount” in section 18(5) to exclude any amounts that would increase the PUC of the shares when a corporation is non-resident or there is a sale of shares to which section 212.1 applies. This exclusion is made to avoid an increase in the PUC of the shares, which would increase the amount of internal debt that a Canadian corporation could take on from a non-resident shareholder, an amount that is limited under the ITA. Clause 5 amends the deemed dividend rules in sections 84(1)(c.1), 84(1)(c.2) and 84(1)(c.3), so that when a corporation is non-resident or there is a sale of shares to which section 212.1 applies, any amount that increases the PUC is considered a deemed dividend and included in the income of the non-resident shareholder.

Lastly, clause 14 adds new section 128.1(1.2), so that the look-through rules for tiers of trusts and partnerships also apply when a foreign corporation becomes a Canadian corporation.

These clauses apply to transactions that occur after 26 February 2018.

2.1.3 Rules to Prevent Misuse of the Foreign Accrual Property Income Regime

Under the ITA, when a controlled foreign affiliate[4] of a Canadian taxpayer earns property income, that income is generally taxable in the year that it is earned. One of the purposes of the foreign accrual property income tax system is to limit the avoidance or deferral of property income tax through a foreign corporation.

An investment business[5] is generally defined as a business whose main purpose is to derive income from property. However, property income earned by an investment business is treated as active income or income earned by an active business if certain conditions are met. One of these conditions is that the company employs more than five full-time employees (or the equivalent).

According to the Department of Finance Canada, certain taxpayers whose foreign investment activities would not warrant more than five full-time employees have engaged in what it considers to be aggressive tax planning in order to meet the number-of-employees test. This type of planning includes the use of what is known as a "tracking arrangement" in a foreign affiliate. These arrangements generally involve consolidating the assets and activities of several shareholders into a single foreign company while each shareholder retains control and income from its assets and activities.[6]

Clause 7, in addition to making consequential amendments, amends the ITA to add new sections 95(8) to 95(12), which provide for several situations and are intended to prevent taxpayers from employing structures that use tracking arrangements to reduce their tax burden.

In particular, new section 95(8) sets out the conditions under which a property is to be considered a tracking interest:

- all or part of the fair market value of the particular property, or of any payment or right to receive an amount in respect of the particular property, can reasonably be considered to be determined, directly or indirectly, by reference to certain criteria (outlined in sections 95(8)(a)(i) to 95(8)(a)(iv)) in respect of this property or these activities); and
- the tracked property and activities represent less than all of the property and activities of the person or partnership.

New sections 95(9) and 95(12) contain application rules introduced to address tracking arrangements in the context of foreign affiliates of Canadian taxpayers.

New sections 95(10) and 95(11) of the ITA are intended to prevent certain strategies to avoid taxation of foreign accrual property income using a tracking arrangement.

Clause 7 generally applies to the taxation years of a foreign affiliate that begin on or after 27 February 2018.

2.1.4 Consistency Between the Trading or Dealing in Indebtedness Rules and the Investment Business Rules Within the Foreign Accrual Property Income Regime

Where the main purpose of a business carried on by a taxpayer's foreign affiliate is to derive income from the trading or dealing in indebtedness, the income of that business is generally a foreign accrual property income of the affiliate and is usually taxable in the year in which it is earned. Similar rules apply to income from an investment business under certain conditions.

The ITA provides rules for companies that generate income from the trading or dealing in indebtedness, as well as rules for investment companies, and provides exceptions for certain foreign financial institutions. However, only the investment business rules require a taxpayer to meet certain minimum capital requirements in order to qualify for the foreign financial institution exception.

Clause 7 amends section 95(2)(l) of the ITA to add a minimum capital requirement applicable to businesses that generate income from the trading or dealing in indebtedness. This new requirement is similar to the one for investment firms.

Clause 7 generally applies to the taxation years of a foreign affiliate that begin on or after 27 February 2018.

2.1.5 Application of the At-Risk Rules at Each Level of a Tiered Partnership Structure

The limited partnership at-risk rules[7] apply to limited partners and are intended to limit the amount of tax losses allocated to them. In general, the total allowable losses cannot exceed the at-risk amount of the limited partner's investment in the partnership.

In a recent decision, the Federal Court of Appeal limited the application of the at-risk rules in a situation where partnerships were themselves limited partners in other partnerships, known as tiered partnership structures.[8]

Clause 8 is intended to ensure that the at-risk rules apply in situations involving one or more levels of a tiered partnership structure. In addition to making consequential amendments, clause 8 amends section 96(2.1)(e) of the ITA and adds section 96(2.1)(f) to the Act to provide that a limited partner that is a partnership is not deemed to have incurred losses as a limited partner for the amount of the losses in certain circumstances.

Clause 8 applies to the taxation years that end after 26 February 2018.

2.1.6 Minister Responsible for Determining International Operational Missions for the Purpose of the Deduction Available to Members of the Canadian Forces or Police Officers

Section 110(1)(f)(v) of the ITA provides a deduction in the computation of taxable income for employment income earned by members of the Canadian Forces or a police force serving on a deployed operational mission.

Clause 9(1) of Bill C-86 amends section 110(1)(f)(v)(A) by extending the authority to determine what constitutes an international operational mission for the purposes of the deduction beyond the Department of National Defence, to include the Department of Public Safety and Emergency Preparedness, and by adding the requirement that a risk allowance or score be associated with the missions in order to assess the amount of the deduction.

Clause 9(3) states that the amendments in clause 9(1) apply to missions initiated after September 2012 and in respect of missions initiated before October 2012 that were not prescribed under Part LXXV of the ITR as it read on 28 February 2013.

Clause 9(2) amends section 110(1)(f)(v)(A) by extending the authority to determine what constitutes an international operational mission for the purposes of the deduction beyond the Minister of National Defence or a person designated by that minister, to include the Minister of Public Safety and Emergency Preparedness or a person designated by the minister.

Clause 9(4) states that the amendments in clause 9(2) apply to the 2017 taxation year and subsequent taxation years.

2.1.7 Synthetic Equity Arrangement Rules and Securities Lending Arrangement Rules

Clauses 10(1) to 10(5) and clause 27 amend sections 112 and 260 of the ITA, respectively, to modify the rules and definitions regarding the inter-corporate dividend deduction. Generally, when dividends are received by a Canadian corporation from another Canadian corporation, they are included as income; however, under section 112, the recipient corporation is allowed to claim a deduction for the dividend. The purpose of the deduction is to ensure that the dividends are only taxed once as they flow through subsidiary and parent corporations.

One exception is called the “dividend rental arrangement rules,” which are set out in section 112(2.3). These rules deny the deduction to a shareholder corporation when the main reason for the shareholder to enter into a particular arrangement is to receive a dividend while allocating the risk of owning the share to another taxpayer.

Some Canadian financial institutions have been engaging in “synthetic equity arrangements” in order to get around the dividend rental arrangement rules. A synthetic equity arrangement is a financial arrangement where a taxpayer retains legal ownership of a share but the risk of owning the share is sold to an investor using an equity derivative; an equity derivative is a financial instrument whose value is based on the price of the share. The tax consequences are that the dividend rental arrangement rules no longer apply, and the taxpayer could claim artificial losses

in relation to the inter-corporate dividend deduction and for any dividend payments made to the investor. Additional tax revenue could also be lost if the investor does not pay Canadian income tax; such an investor is referred to as a "tax-indifferent investor" in the ITA.

Budget 2015 amended the dividend rental arrangement rules so that the inter-corporate dividend deduction was no longer allowed for synthetic equity arrangements when the investor was not paying Canadian income tax. Clause 10(1) amends section 112(2.31)(b) to clarify that the deduction is not allowed no matter how a tax-indifferent investor obtained all or substantially all of the risk associated with the share. Clauses 10(2) to 10(5) make several amendments to sections 112(2.32) and 112(2.33) to clarify the representations a taxpayer needs to obtain from an investor in synthetic equity arrangements in order to be able to claim the inter-corporate dividend deduction.

Clauses 10(1) to 10(5) apply in respect of dividends that are paid or become payable after 26 February 2018.

Some financial institutions have also used "securities lending arrangements" to achieve the same tax benefits as synthetic equity arrangements. Securities lending arrangements involve one party lending a share in a Canadian corporation to a taxpayer, and the taxpayer agreeing to return an identical share in the future. Over the course of the arrangement, the taxpayer makes payments to the party as compensation for the dividends the taxpayer receives for the share. Consequently, a taxpayer could be claiming artificial losses for both the inter-corporate dividend deduction and the amount of compensation paid to the party.

Clause 27 makes several amendments to sections 260(1), 260(5), 260(6) and 260(6.1) so that the dividend rental arrangement rules apply to arrangements that are substantially similar to securities lending arrangements.

Clauses 27(1) to 27(5) apply to amounts paid or payable, or received or receivable, as compensation for dividends after 26 February 2018, but do not apply after 26 February 2018 and before October 2018 for written arrangements entered into before 27 February 2018.

2.1.8 Ensuring that Certain Individuals Are Not Precluded from Receiving the Canada Child Benefit

Introduced in 2016, the Canada Child Benefit (CCB) is a tax-free monthly payment made to eligible families with children under 18 years of age. Section 122.6 of the ITA provides that, to be eligible for the CCB, an individual must be a parent of a qualified dependant, while the definition of "child" in section 252 of the ITA includes this description: a person younger than 19 years of age who is wholly dependent on another individual for support and of whom the taxpayer has, in law or in fact, the custody and control.

Under certain programs where the Government of Canada or a provincial government entrusts an individual with the care and upbringing of a child in need of protection on a temporary basis, the individual may receive a social assistance payment in respect

of the child. Clause 11(1) amends the definition of "eligible individual" in section 122.6 of the ITA to clarify that an individual shall not be disqualified as a parent, and by extension as an individual eligible for the CCB, solely due to the receipt of social assistance payments for the benefit of the child from the Government of Canada or the government of a province.

Clause 11(2) deems this change to have come into force on 1 January 2008.

2.1.9 Canada Workers Benefit

The Canada Workers Benefit (CWB) is a refundable tax credit for low-income workers. First introduced in Bill C-74 (*Budget Implementation Act, 2018, No. 1*[9]), the CWB replaces the Working Income Tax Benefit as of the 2019 taxation year. This credit consists of a basic amount for individuals with income below certain levels, and a disability supplement for those who are eligible for the disability tax credit. An individual's CWB entitlement for a taxation year is determined by the individual's "working income" and, if applicable, that of the individual's spouse for that taxation year. An individual's "adjusted net income" is used to ensure that the CWB is only available to low-income individuals. The CWB is gradually reduced for individuals whose "adjusted net income" and, if applicable, whose adjusted family net income exceed certain levels.

Section 122.7(1) of the ITA provides that both "working income" and "adjusted net income" are calculated without regard to sections 81(1)(a) and 81(4) of the ITA. Section 81(1)(a) excludes from the calculation of income any amounts that are exempt from income tax under another enactment of Parliament other than a tax treaty, while section 81(4) excludes the first $1,000 of an allowance received by an emergency volunteer.

Clauses 12(1) and 12(2) of Bill C-86 amend the definitions of "working income" and "adjusted net income" in section 122.7(1) of the ITA to remove the reference to sections 81(1)(a) and 81(4), effectively excluding the amounts that are specified in these two provisions from the calculation of an individual's "working income" and "adjusted net income."

Clause 12(3) adds new section 122.7(1.1) to allow individuals to include the amounts specified in sections 81(1)(a) and 81(4) in their working income – and, if applicable, in the working income of their eligible spouse – provided that these amounts are also included in the calculation of the adjusted net income. For certain individuals, such as those with insufficient working income to qualify for the credit, the inclusion of these amounts may increase their CWB entitlement.

Section 122.7(2) provides that to receive the basic CWB for a taxation year, an eligible individual must file a return of income for the taxation year and apply for the CWB. Clause 12(4) amends this section to remove the requirement that an individual must apply to receive the basic CWB. Consequential to the removal of the requirement to apply to receive the basic CWB, several sections of the ITA and ITR are amended to facilitate the change.

To ensure that only one individual in a couple receives the basic CWB, clause 12(5) amends section 122.7(5) of the ITA to provide that if both an individual and the individual's spouse would otherwise qualify as eligible individuals, and there is no agreement about who should receive the CWB, the Minister of National Revenue shall designate one eligible individual to receive the basic CWB for the taxation year. Similarly, clause 12(6) amends section 122.7(10) of the ITA to provide that in cases where there is more than one individual who would otherwise be eligible to claim a child as eligible dependant for a taxation year for the purposes of the basic CWB and the CWB disability supplement, the minister shall designate one eligible individual to claim the child as an eligible dependant if an agreement cannot be reached on which of them should claim the child as an eligible dependant.

Clause 12(7) stipulates that the amendments made by clauses 12(1) to 12(6) come into force on 1 January 2019.

Clause 35 adds new section 203 to the ITR to require designated educational institutions, as defined in section 118.6(1) of the ITA, to provide an annual information return, called a Tuition and Enrolment Certificate, to the Canada Revenue Agency (CRA). This facilitates the provision of the Canada Workers Benefit in situations where an individual has not applied for it.

This amendment applies to the 2019 taxation year and subsequent taxation years.

Clauses 36, 37 and 38 amend sections 205(3), 205.1(1), 209(1) and 209(5) of the ITR:

- to make the Tuition and Enrolment Certificate subject to the late filing penalty provisions;
- to require mandatory electronic filing for prescribed information returns if more than 50 copies of such returns are required to be filed for a calendar year;
- to require the distribution of Tuition and Enrolment Certificates to the taxpayers to whom they relate; and
- to allow the distribution to be made electronically without taxpayers' express consent.

These amendments come into force on 1 January 2019.

2.1.10 Refundable Tax Credit for the Purposes of the Climate Action Incentive

Clause 13 adds new section 122.8 to the ITA, providing a refundable climate action incentive tax credit to distribute proceeds collected from the fuel charge levied under Part 1 of the *Greenhouse Gas Pollution Pricing Act* (GGPPA) in the provinces and territories subject to the federal carbon pricing system.

New section 122.8(1) sets out the definitions used in the application of the climate action incentive credit provisions. An "eligible individual" must, at the end of the taxation year, be at least 18 years of age, or a parent, or married or in a common-law

partnership. A “qualified relation,” is defined as the person, if any, who, at the end of the taxation year, is the individual’s cohabiting spouse or common-law partner. A “qualified dependant” must be the individual’s child or be dependent on the individual for support, be younger than 18 years of age, live with the individual, and not be an eligible individual.

New section 122.8(2) specifies individuals who are not eligible for the climate action incentive credit for the taxation year, including individuals who die before April of the following taxation year; prisoners confined for at least 90 days during the taxation year; non-residents of Canada at any time in the taxation year; officers or servants of a foreign country at any time in the taxation year; or recipients of an allowance under the *Children’s Special Allowances Act* at any time in the taxation year.

New section 122.8(3) provides that in cases where an individual has more than one residence, the individual is considered to reside at any time only at the principal place of residence.

New section 122.8(4) stipulates that the amount of the credit is deemed to be a payment of tax by the individual at the end of a taxation year and that an eligible individual must file a return of income for the taxation year and make a claim under this section.

New section 122.8(4) also outlines the formula for the calculation of the climate action incentive credit. It contains five variables and is specified as (A+ B + C × D) × E, of which A, B and C are specified by the Minister of Finance for a province in which the eligible individual resides at the end of the taxation year, by the authority stipulated in section 122.8(5):

- A equals the amount for eligible individuals in respect of the province in which they reside at the end of the taxation year.
- B is the amount related to an individual’s qualified relation. If, at the end of the taxation year, the eligible individual does not have a qualified relation and if that individual also does not have a qualified dependant, B is deemed to be nil.
- C is the amount for a qualified dependant for the taxation year for the relevant province.
- D is the number of qualified dependants at the end of the taxation year, excluding the qualified dependant for whom an amount was already included in determining B for the taxation year.
- E provides a 10% increase in the credit for individuals who, at the end of the taxation year, reside outside of a census metropolitan area as determined in the last census before the taxation year if there is a census metropolitan area in the relevant province.

If any of these amounts for a taxation year for a province is not specified by the minister, the amount is deemed to be nil.

New section 122.8(6) provides that the amount of an individual's credit under this section is deemed to have been paid as a rebate in respect of charges levied under Part 1 of the GGPPA in the relevant province for the year following the taxation year.

New section 122.8(7) provides that when an individual and the individual's qualified relation both would otherwise be eligible for the climate action incentive credit, only one individual designated by the Minister of National Revenue may claim the credit in respect of the individual for a taxation year.

Similarly, new section 122.8(8) states that when a person would be the qualified relation of two or more individuals for a taxation year, the person is deemed to be the qualified dependant of the individual on whom those individuals agree. If there is no agreement between the individuals as to who receives the credit, the minister shall designate one individual to receive the credit for the taxation year.

New section 122.8(9) provides that notwithstanding current section 128(2), which provides a short taxation year in the event of a bankruptcy, any reference to the taxation year of a bankrupt individual is deemed to be a reference to the calendar year.

New section 122.8 applies to the 2018 taxation year and subsequent taxation years.

Consequential to the introduction of the climate action incentive tax credit, clauses 18(1), 18(8) and 18(9) amend sections 152(1)(b) and 152(4.2)(b) of the ITA, and section 19 adds section 163(2)(c.4) to the Act to include reference to the new credit for the purpose of assessments; the Minister of National Revenue's discretion to make reassessments beyond the normal reassessment period; and the false statement or omission penalty provisions.

These amendments apply to the 2018 taxation year and subsequent taxation years.

2.1.11 Allocation Rules for Losses Applied Against Part IV Taxes

The refundable dividend tax on hand (RDTOH) was a notional account that included a percentage of the earnings of a Canadian-controlled private corporation (CCPC) from specified sources, and was divided into the eligible RDTOH and non-eligible RDTOH accounts by the *Budget Implementation Act, 2018, No. 1*. The eligible RDTOH is equal to the tax paid on eligible dividends received by a CCPC, and the corporation is able to receive a refund from its eligible RDTOH account if it pays any taxable dividend. The non-eligible RDTOH account consists of all refundable taxes paid on non-eligible dividends, and the corporation is only able to obtain a refund from its non-eligible RDTOH account to the extent that it pays non-eligible dividends.

Clause 15 amends section 129 of the ITA to ensure that when non-capital losses and farm losses are used to reduce a corporation's Part IV tax (the tax on taxable dividends received by private corporations), the residual amount of Part IV tax payable is allocated to the corporation's eligible RDTOH account, and any excess amount is then added to the non-eligible RDTOH account.

This measure applies to taxation years that begin after 2018.

2.1.12 Artificial Losses on Shares Held as Mark-to-Market Property by Financial Institutions

Clauses 10(6) to 10(8) amend sections 112(5.2) and 112(5.21) of the ITA, and clauses 10(9) and 16 add sections 112(9.1) and 142.5(4), respectively, to the Act to limit the circumstances under which a Canadian financial institution can claim losses on the sale of mark-to-market shares. Under section 142.5 of the ITA, financial institutions are required to fully include or deduct from income gains or losses from the sale of shares that are "mark-to-market," which are shares whose value is based on the current market. As well, the dividend stop-loss rules set out in section 112(5.2) of the ITA restrict the ability of a financial institution to claim the inter-corporate dividend deduction when it is in relation to mark-to-market shares.

Some financial institutions have abused these two rules by entering into transactions with Canadian public companies that want to repurchase their shares from public shareholders. Through private agreements, the public companies repurchase their shares from the financial institutions. The financial institutions are deemed to have received a dividend for any amount received for the shares that is greater than the paid-up capital (PUC) of the repurchased shares; generally, PUC is the amount that was paid for the shares when they were first sold. The tax consequences of the sale are that financial institutions claim artificial losses in relation to the inter-corporate dividend deduction and these artificial losses are being used to offset any gains realized on the sale of the mark-to-market shares. This circumvents the rules set out in section 142.5, which require gains or losses from mark-to-market shares to be fully included or deducted from income.

Clauses 10(6) and 10(7) amend two portions of section 112(5.2) to change the stop-loss rules formula to prevent a financial institution from realizing a loss on a share repurchase that is greater than the mark-to-market gain that was realized with respect to the share. Clause 10(8) makes a consequential amendment to section 112(5.21) to reflect the change in the formula, while clause 10(9) adds section 112(9.1) to ensure that the deemed dividend meets the criteria set out for shares in section 112(5.21). Lastly, clause 16 adds section 142.5(4) to clarify that the proceeds from the sale of a mark-to-market share do not include any amount that is deemed to be a dividend upon a winding up of a corporation or cancellation of the shares.

These clauses apply to dispositions that occur after 26 February 2018.

2.1.13 Nonpartisan Political Activities of Charities

The ITA recognizes two types of registered charity: charitable foundations and charitable organizations.[10] The preferential status granted to registered charities under the ITA amounts to an indirect government subsidy and, to obtain (and maintain) their charitable status, charities must comply with certain rules.

To be considered charitable under the common law, charitable organizations and charitable foundations are required to be established and operated for *exclusively* charitable purposes.[11] This requirement is specified in section 149.1(1) of the ITA with regard to charitable foundations, but not with regard to charitable organizations. Clause 17(3) of the bill amends section 149.1(1) to specifically clarify that charitable organizations, like charitable foundations, must be constituted and operated exclusively for charitable purposes.

Among other restrictions, charities are limited as to the types of purposes they can have and activities they can undertake. "Institutions with political purposes are not eligible for charitable status,"[12] although the courts do recognize "that a certain amount of political participation may be legitimate."[13]

The legislative framework governing the political activities of charities is set out in sections 149.1(6.1) and 149.1(6.2) of the ITA. In broad terms, these sections provide that charities

> must devote "substantially all" of their resources to their charitable purposes or activities … and may devote part of their resources to "political activities" if these are "ancillary and incidental" to their charitable purposes or activities AND if they do not include partisan activities.[14]

The CRA interprets the references to "substantially all" as allowing a maximum of 10% of resources to be spent on political activities.[15]

These rules have been criticized as being unclear and have been subject to litigation. In November 2015, the Prime Minister asked the Minister of National Revenue to work with the Minister of Finance to modernize the legislation governing the charitable sector.[16]

Momentum for change intensified when, in July 2018, the Ontario Superior Court of Justice declared the 10% limit on political expression infringed, without justification, the right to freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*.[17] Consequently, the court declared sections 149.1(6.2)(a) and 149.1(6.2)(b) of the ITA to have no force and effect.[18]

Clause 17 of the bill largely removes the ITA provisions relating to the political activities of charities. Of note, clause 17(1) repeals the definition of "political activity" set out in section 149.1(1) of the ITA, while clause 17(8) removes the language that effectively limited charities' political participation. The prohibition on charities providing "direct or indirect support of, or opposition to, any political party or candidate for public office" remains.

Finally, clause 17(4) adds a partial definition of the term "charitable activities" to section 149.1(1). Charitable activities are regulated under common law.[19] The new partial definition clarifies that the term "charitable activities includes public policy dialogue and development activities carried on in furtherance of a charitable purpose."

The amendments are deemed to have come into force on:

- 1 January 2008 or 29 June 2012 (depending on the amendment), in respect of organizations, corporations and trusts that were registered charities on 14 September 2018;
- 1 January 2012 or 29 June 2012 (depending on the amendment), in respect of associations that were registered Canadian amateur athletic associations, on 14 September 2018; and
- 14 September 2018, in any other case.

2.1.14 Extended Reassessment Period in Respect of Any Income, Loss or Other Amount Arising in Connection with a Foreign Affiliate

Under certain exceptions, section 152(4) of the ITA allows the CRA to reassess the taxes owing of corporations and mutual fund trusts up to four years from the date of the initial notice of assessment (the reassessment period). For other taxpayers, this reassessment period is generally three years from the date of the initial notice of assessment.

Section 152(4)(b)(iii) of the ITA allows the Minister of National Revenue – in certain circumstances – to extend the reassessment period by an additional three years for transactions involving the taxpayer and a foreign affiliate with whom the taxpayer was not dealing at arm's length.

Bill C-86 allows the Minister of National Revenue to also apply section 152(4)(b)(iii) – the three-year extension of the reassessment period – to any income, loss or other amount related to a foreign affiliate of the taxpayer.

To make this change, clauses 18(3) and 18(6) amend sections 152(4)(b)(iii) and 152(4.01)(b)(iii) of the ITA, respectively.

This measure applies to taxation years that begin after 26 February 2018.

2.1.15 Extended Reassessment Period when Reassessment Relates to the Adjustment of a Loss Carryback for Transactions Involving a Taxpayer and Non-resident Non–arm's-length Persons

When a transaction takes place between a Canadian entity and a non–arm's-length non-resident, the CRA is provided an additional three years – beyond the normal reassessment period – to reassess the tax consequences of the transaction. In addition, when a taxpayer carries back a loss to deduct it against the taxable income of a prior taxation year, the CRA is also provided an additional three years beyond the normal reassessment period to reassess the tax consequences of the transaction.

Bill C-86 provides that these two reassessment period extensions apply consecutively instead of concurrently – that is, for six years – in order to prevent Canadian entities from carrying back losses from transactions with non–arm's-length non-residents beyond the CRA's ability to reassess the transaction.

This measure applies in respect of taxation years in which a carried-back loss is claimed, where that loss is carried back from a taxation year that ends after 26 February 2018.

To enact this change, clauses 18(3), 18(4), 18(5) and 18(7) amend sections 152(4)(b)(iii), 152(4) and two parts of section 152(4.01) of the ITA, respectively.

2.1.16 Extended Reassessment Period for the Time During Which a Requirement for Information or Compliance Order Is Contested

To facilitate CRA audits, section 231.1 of the ITA allows the CRA to "inspect, audit or examine the books and records of a taxpayer" and, for that purpose, to require the taxpayer to "answer all proper questions relating to the administration or enforcement of this Act." In particular, sections 231.2(1) and 231.7(1) of the ITA allow the Minister of National Revenue or a judge, respectively, to order a taxpayer to provide the CRA with any information necessary for a purpose related to the administration or enforcement of the Act.

As the CRA has a limited amount of time during which it is allowed to assess a taxpayer, the CRA or the court provides a set amount of time for the taxpayer to comply with the order. Bill C-86 ensures that, where a taxpayer seeks the review of an order to provide the CRA with additional information, the period between the application for review and the disposition of it does not count towards the set amount of time the taxpayer has to comply with the order, or towards the time within which an assessment may be made.

To make these changes, clauses 22 and 23 amend sections 231 and 231.6(7) of the ITA, respectively, and clause 24 adds section 231.8 to the Act.

2.1.17 Time Limit for Information Returns in Respect of a Taxpayer's Foreign Affiliates

Section 233.4(4) of the ITA provides taxpayers with a 15-month period after the end of their taxation year to file a T1134 form (Information Return Relating to Controlled and Not-Controlled Foreign Affiliates) with respect to information about their foreign affiliates.

Clause 25(1) amends section 233.4(4) of the ITA to reduce the amount of time to file the T1134 form from 15 months to 12 months after the end of the taxation year, effective for the 2020 taxation year. Clause 25(2) reduces the deadline to 10 months for the subsequent taxation years.

2.1.18 Disclosure of Tax Information to Bilateral Mutual Legal Assistance Treaty Partners

Clause 26 adds section 241(4)(e)(xiii) to the ITA to allow an official from the CRA to share tax information pursuant to a court order made under the *Mutual Legal Assistance in Criminal Matters Act* (MLACMA)[20] in relation to a request from another country for assistance with a criminal investigation or prosecution of a drug-related, criminal organization or terrorism offence. The request for information can be made either through an administrative arrangement entered into under section 6 of the MLACMA or through a bilateral agreement for mutual legal assistance in criminal matters to which Canada is a party.

2.1.19 Deduction for Employee Contributions to the Enhanced Portion of the Québec Pension Plan

On 22 February 2018, Quebec's Bill 149, An Act to enhance the Québec Pension Plan and to amend various retirement-related legislative provisions, came into force.[21] This legislation made changes to the Québec Pension Plan (QPP) that are similar to those that were made to the Canada Pension Plan (CPP) by *An Act to amend the Canada Pension Plan, the Canada Pension Plan Investment Board Act and the Income Tax Act*, which created an additional portion of CPP.[22]

Clause 34 amends the ITA to create a deduction for employee contributions and the employee share of contributions by self-employed persons to the additional portion of QPP, which becomes effective on 1 January 2019; this reflects the tax treatment provided for these types of contributions to the additional CPP. Clause 40 provides that the amendment comes into force on 1 January 2019.

2.2 Part 1: Amendments to the *Criminal Code* and the *Mutual Legal Assistance in Criminal Matters Act*

Clause 28 and clauses 29 to 33 amend the *Criminal Code*[23] and the *Mutual Legal Assistance in Criminal Matters Act* (MLACMA), respectively to improve the ability to share tax information with domestic law enforcement agencies and other countries in relation to criminal investigations and prosecutions.

Clause 28 amends section 462.48(2)(c) of the Code, which relates to the investigation and prosecution of drug-related, criminal organization and terrorism offences, to allow the Attorney General to make an application to a court to request tax information obtained by or on behalf of the Minister of National Revenue not only for the purposes of the ITA, but also for those of Part IX of the *Excise Tax Act* (ETA), which deals with the Goods and Services Tax/Harmonized Sales Tax (GST/HST), and the *Excise Act, 2001*.

Clauses 29 to 32 amend sections 2(1), 5(1), 7 and 8(1), respectively, of the MLACMA, and clause 33 adds section 22.06 to the Act to enhance the ability to share tax information with other countries for criminal investigations and prosecutions. Clause 29 expands the scope of the application of the MLACMA by amending the definition of "agreement" in section 2(1) to include the *Convention on*

Mutual Administrative Assistance in Tax Matters (CMAATM) as it pertains to criminal investigations or prosecutions, as well as tax information exchange agreements and tax treaties to which Canada is a party.

Clause 30 amends section 5(1) to confirm that the agreements already defined in section 2 must be published in the *Canada Gazette*. Clause 31 clarifies section 7 with regard to the functions of the Minister of Justice in relation to the agreements already defined in section 2. Clause 31 also adds section 7(3), which states that when a request is made by another country pursuant to the CMAATM, a tax information exchange agreement or a tax treaty, and is presented to the Minister of Justice by the Minister of National Revenue, the Minister of Justice will deal with the request. Clause 32 amends section 8(1) to clarify that requests for assistance made under an agreement are not limited to "mutual legal" assistance.

Lastly, clause 33 adds section 22.06 to allow an order to be made by a court for the production of tax information related to criminal offences referred to in section 462.48(1.1) of the Code, namely, drug-related, criminal organization and terrorism offences that are being investigated by another country. Furthermore, the order must be obtained and executed in the manner provided for in the Code, and the MLACMA provisions prevail over the Code in the event of any inconsistencies.

2.3 Part 2: Implementation of Certain Goods and Services Tax/Harmonized Sales Tax Measures

2.3.1 Requirement that the Purchaser Self-Assess Goods and Services Tax/Harmonized Sales Tax on a Sale of Carbon Emission Allowances

Under the *Excise Tax Act* (ETA),[24] the initial supply of carbon emission allowances by a Canadian government entity is generally exempt from GST/HST. However, when carbon emission allowances are sold on a secondary market, the seller must generally collect GST/HST from the purchaser and remit it to the Receiver General for Canada.

Clause 41 amends section 123(1) of the ETA to add the definition of "emission allowance."

According to this definition, an emission allowance describes a prescribed property or an allowance, credit or similar instrument that meets the following three criteria:

- it must be issued or created by a government or international regulator (referred to as a "regulator" in this definition), a board, commission or other body established by a regulator;
- it can be used to satisfy prescribed requirements or requirements under a scheme or arrangement implemented by a regulator to regulate greenhouse gas emissions; and
- it must represent a specific quantity of greenhouse gas emissions expressed as carbon dioxide equivalent.

Clause 44 adds section 221(2.1) to the ETA so that the seller of emission allowances is not required to collect GST/HST owed by the purchaser.

Clause 45 amends section 228(4) of the ETA so that it is the purchaser who is required to remit the GST/HST to the Receiver General for Canada. When the purchaser is a GST/HST registrant, the GST/HST cost is generally nil, since the purchaser is usually able to claim an equivalent input tax credit.

Clause 48 is a consequential amendment that amends section 261 of the ETA so that the amount of tax paid by mistake on the sale of emission allowances can be refunded to the purchaser, under certain conditions.

Clause 53 is a consequential amendment that amends section 298 of the ETA to set time limits for assessments on the sale of an emission allowance by a person who is not required to collect GST/HST.

These new measures are generally deemed to have come into force on 27 June 2018. However, they also apply to the sale of carbon emission allowances before 27 June 2018 when the GST/HST was not collected before 27 June 2018.

2.3.2 Assessment Period for Group Registered Education Savings Plan Trusts that Make a Special Relieving Election in Respect of Their Past Harmonized Sales Tax Liability

Financial institutions that pay GST/HST on their inputs as part of the exempt supply of financial services generally cannot claim input tax credits on the supply of these services.

In the absence of specific rules, financial institutions operating in provinces participating in the HST system would pay a higher tax than those operating outside those provinces. To address this situation, financial institutions that supply services in at least one province that participated in the HST system and at least one other province – referred to as selected listed financial institutions (SLFIs) – determine the provincial component of the HST they must pay by applying a special attribution method that takes into account where they supply financial services rather than where they make purchases. In certain circumstances, the SLFI rules extend to registered education savings plan trusts.

Clause 60 amends the ETA by extending the assessment period for group registered education savings plan trusts like SLFIs that make a special relieving election in respect of their past HST liability incurred during the period from 1 July 2010 to 21 July 2016.

2.3.3 Goods and Services Tax/Harmonized Sales Tax Rules in Respect of Investment Limited Partnerships

Under the ETA, collective investment vehicles generally supply financial services that are GST/HST exempt. As a result, they are usually not entitled to claim input tax credits for GST/HST paid on expenses incurred in the course of their business. GST/HST is therefore a non-recoverable expense for these businesses.

For fairness, the ETA provides specific rules to allow certain collective investment vehicles that meet the investment plan definition to determine the provincial component of HST they must pay by applying an allocation method that takes into account the place of residence of their investors, rather than the place of residence of the investment plan manager.

Clause 41 amends section 123(1) of the ETA by adding the definition of "investment limited partnership." For the purposes of this definition, an investment limited partnership means a limited partnership whose primary purpose is to invest funds in financial instruments and:

- the partnership is or forms part of an arrangement or structure that is represented or promoted as a hedge fund, investment limited partnership, mutual fund, private equity fund, venture capital fund or other similar collective investment vehicle; or
- the total value of all interests in the limited partnership held by listed financial institutions is 50% or more of the total value of all interests in the limited partnership.

Clause 42 adds section 132(6) to the ETA, which provides that if 95% or more of the total value of all interests in the investment limited partnership is held by non-resident members, the partnership is deemed not to be resident in Canada.

Clauses 41 and 42 generally apply from 8 September 2017.

Clause 43 introduces section 149(5)(f.1), which adds investment limited partnerships to entities that qualify as investment plans. This means that an investment limited partnership would be a listed financial institution under section 149(1)(a)(ix) and would therefore be subject to the rules for financial institutions and listed financial institutions. This amendment allows, among other things, investment limited partnerships to benefit from the allocation method applicable to investment plans.

Clause 43 generally applies to the tax years of a person that begin in 2019 or, if the person makes an election to that effect, in 2018.

Clause 49 amends section 272.1(3)(b) of the ETA to apply GST/HST to the supply of management and administrative services by a general partner to its limited partnership and to establish that the supply must be made at fair market value. This provision generally applies on or after 8 September 2017, but tax may apply to amounts paid or that became payable prior to 8 September 2017 if those amounts are deemed part of the payment for the same service.

Clause 54 amends the *Financial Services and Financial Institutions (GST/HST) Regulations*[25] by adding section 4.1, which states that members of an investment limited partnership are prescribed members, under certain conditions, for the purposes of new section 132(6) of the ETA. This provision applies as of 8 September 2017.

Clause 55 amends section 1(1) of the *Selected Listed Financial Institutions Attribution Method (GST/HST) Regulations* (SLFI Regulations)[26] by adding paragraph (i) to the definition of "distributed investment plan," which adds "an investment limited partnership" to the list of entities that are distributed investment plans.

As a result, the investment limited partnership would be deemed by section 3(e) of the SLFI Regulations to have a permanent establishment in a particular province throughout its taxation year if, at any time in the taxation year:

- it is qualified, under the laws of Canada or a province, to sell or distribute its units in the particular province; or
- a person resident in the particular province holds one or more of its units.

Clauses 55 to 59 are consequential measures and transitional rules related to investment limited partnerships. They generally apply from 8 September 2017.

2.3.4 Exclusion of Books that Are Sold by a Public Service Body from the Goods and Services Tax/Harmonized Sales Tax Rebate for Printed Books

Section 259.1(2) of the ETA provides authority for the Minister of National Revenue to pay specified organizations, as prescribed in the ETA, GST/HST rebates in respect of their acquisition of specified property, which includes printed books or an update of such books, audio recordings of printed books, and bound or unbound printed versions of scripture of any religion. A rebate may be paid only if the printed books have been acquired or imported for a purpose other than to be sold.

Clause 47(1) amends sections 259.1(2)(a) and 259.1(2)(b) by clarifying the conditions under which a specified person or a person can claim the rebate. Clause 47(1) states that the specified person or the person cannot acquire or import books for the purpose of selling them or for the purpose of transferring ownership to another person in the course of supplying another property or service.

This amendment provides that the GST/HST book rebate applies for printed books acquired by educational and literacy institutions for their own use in helping people learn to read and improve literacy skills, and does not apply for printed books acquired by these institutions to be sold on their own, or as part of another good or service.

Clause 47(2) states that these amendments apply as of 28 July 2018.

2.3.5 Extended Assessment Period for the Time During Which a Requirement for Information or Compliance Order Is Contested

To facilitate CRA audits, the ETA allows the CRA to require persons to provide certain information for the purposes of administering Canada's taxation system. In particular, sections 289(1), 292(2) and 289.1(1) of the ETA allow the Minister of National Revenue or a judge to order a person to provide the minister with any information necessary for a purpose related to the administration or enforcement of the Act.

As the CRA has a limited amount of time during which it is allowed to reassess a taxpayer, the minister, the court or the ETA itself provides a set amount of time for the person to comply with the order.

Clause 50 adds section 289.2 to the ETA and clause 51 amends 292(7) to ensure that, when a person contests an order to provide additional information under the ETA, the time period between when the person seeks the review and the disposition of it does not count towards the set amount of time the person has to comply with the order or in the time within which an assessment of a person may be made.

2.3.6 Disclosure of Confidential Information to Bilateral Mutual Legal Assistance Treaty Partners, or to Canadian Police Officers

Similar to the amendments made to the ITA, clause 52(1) amends section 295(5)(d.1) of the ETA to allow the disclosure of confidential information under a court order made under section 462.48(3) of the Code, which pertains to drug-related, criminal organization or terrorism offences, or under an order made through the *Mutual Legal Assistance in Criminal Matters* Act (MLACMA) in response to a request from another country for assistance with a criminal investigation or prosecution of a drug-related, criminal organization or terrorism offence. The request for information can be made either through an administrative arrangement entered into under section 6 of the MLACMA or through a bilateral agreement for mutual legal assistance in criminal matters to which Canada is a party.

Clause 52(2) expands section 295(5)(n) of the ETA to allow the disclosure of confidential information solely for the purposes of a provision in a tax treaty or in a listed international agreement.

2.4 Part 3: Implementation of Certain Excise Measures

2.4.1 Refund Regime in Respect of Excise Tax on Diesel Fuel

The *Excise Tax* Act (ETA) provides that the vendor or the purchaser of diesel fuel used exclusively as heating oil can apply for an excise tax refund under certain conditions. However, only the purchaser can apply for a refund when the diesel fuel is used to generate electricity, other than to generate electricity in or by a vehicle of any mode of transportation, in which case no refund is allowed.

Clause 61 amends sections 68.01(1)(a) and 68.01(3)(a) of the ETA to also allow vendors of diesel fuel to apply for an excise tax refund when the diesel fuel is used to generate electricity, other than to generate electricity in or by a vehicle of any mode of transportation, if the following conditions are met:

- the quantity of diesel fuel delivered to the purchaser is at least 1,000 litres;
- the vendor applies for the refund within two years after selling the diesel fuel to the purchaser;

- the purchaser certifies that the diesel fuel is to be used exclusively to generate electricity (other than to generate electricity in or by a vehicle of any mode of transportation); and
- the vendor reasonably believes that the purchaser will use the diesel fuel exclusively to generate electricity (other than to generate electricity in or by a vehicle of any mode of transportation).

Clause 61 also amends section 68.01(1)(b) of the ETA to allow a purchaser to apply for a refund if a vendor cannot make an application under section 68.01(1)(a)(i.1).

2.4.2 Anti-avoidance Excise Measure Relating to the Taxation of Cannabis

A new federal excise duty framework related to the legalization of cannabis was implemented through the *Budget Implementation Act, 2018, No. 1*.

Since that Act was passed, the federal government has signed agreements with most provincial and territorial governments to implement a coordinated framework for cannabis taxation, and regulations describing the additional excise duty rates for each signatory province and territory were announced on 17 September 2018. The framework came into force on 17 October 2018, and non-medical cannabis was available for legal retail sale. Cannabis products are now generally subject to a combined federal–provincial duty equivalent to the higher of a uniform rate of $1 per gram or an *ad valorem* rate of 10% of the producer's selling price.

Clause 63 amends the *Excise Act, 2001*[27] by adding section 2.1 to introduce an anti-avoidance rule relating to the calculation of the value of a cannabis product in non–arm's-length transactions. In general, this amendment ensures that, if the cannabis product is sold for less than the vendor's set price or fair market value, the combined federal–provincial duty cannot be circumvented by calculating the *ad valorem* based on the producer's set price for the cannabis product or on the fair market value of the product.

This measure is deemed to have come into force on 17 September 2018.

2.4.3 Extended Assessment Period of a Person by the Period of Time During Which a Requirement for Information or Compliance Order Is Contested

2.4.3.1 *Excise Act, 2001*

To facilitate CRA audits, the *Excise Act, 2001* allows the CRA to require persons to provide certain information for the purposes of administering Canada's taxation system. In particular, sections 208(1), 209(1) and 210(2) of the *Excise Act, 2001* permit the Minister of National Revenue or a judge to order a person to provide the CRA with any information necessary for a purpose related to the administration or enforcement of the Act.

As the CRA has a limited amount of time during which it is allowed to reassess a taxpayer, the taxpayer will have a limited amount of time to comply with an order as determined by the Minister of National Revenue, the court or the *Excise Act, 2001*.

Clause 64 of the bill adds section 209.1 to the *Excise Act, 2001*, and clause 65 amends section 210(7) of the Act to ensures that, where a person contests an order to provide the CRA with additional information under the *Excise Act, 2001*, the period between when the person seeks the review and the disposition of it does not count towards the set amount of time the person has to comply with the order or the time within which an assessment of a person may be made.

2.4.3.2 *Air Travellers Security Charge Act*

In Canada, travellers pay an Air Travellers Security Charge on air transportation services for travel within Canada and from Canada to foreign destinations. The CRA is responsible for administering the Air Travellers Security Charge, which came into effect on 1 April 2002, though the charge is collected by air carriers or their agents at the time of ticket purchase.

Section 38 of the *Air Travellers Security Charge Act*[28] empowers the Minister of National Revenue to "require a person resident in Canada or a person who is not resident in Canada but who carries on business in Canada to provide any information or record."

Clause 62 amends section 38(6) of the Act to ensure that when a taxpayer contests an order to provide the Minister with additional information under the *Air Travellers Security Charge Act*, the period between when the person seeks the review and the disposition of it does not count towards the set amount of time the person has to comply with the order or the time within which an assessment of a person may be made.

2.4.4 Disclosure of Confidential Information to Bilateral Mutual Legal Assistance Treaty Partners, or to Canadian Police Officers

Similar to the amendments made to the ITA, clause 66(1) amends section 211(6)(d.1) of the *Excise Act, 2001* to allow the disclosure of confidential information under a court order made under section 462.48(3) of the Code, which pertains to drug-related, criminal organization or terrorism offences, or under an order made through the *Mutual Legal Assistance in Criminal Matters Act* (MLACMA) in response to a request from another country for assistance with a criminal investigation or prosecution of a drug-related, criminal organization or terrorism offence. The request for information could be made either through an administrative arrangement entered into under section 6 of the MLACMA or through a bilateral agreement for mutual legal assistance in criminal matters to which Canada is a party.

Clause 66(2) expands section 211(6)(l) to allow the disclosure of confidential information solely for the purposes of a provision in a tax treaty or in a listed international agreement.

2.4.5 Consistency Between the English and French Versions of the Legislation

Clauses 67 and 68 amend sections 233.1 and 234.1 of the *Excise Act, 2001* dealing with penalties for certain cannabis-related contraventions to ensure consistency between the English and French versions of the provisions.

2.5 Part 4: Implementation of Various Measures

2.5.1 Division 1: Amendments to the *Customs Tariff*

Clause 69 amends section 21 of the *Customs Tariff*[29] to modify the definitions of "beer," "wine" and "spirits" for the purposes of Part 2, Division 2, of that Act, which imposes customs duties.

Clauses 70, 71, 72, 73, 74(2), 75(2), 76(2), 77 and 78 amend sections 69(5)(b), 70(7)(b), 71(7)(b), 71.1(8)(b), 71.2(7)(b), 71.3(7)(b), 71.4(7)(b), 71.6(6)(b) and 134(2), respectively, of the *Customs Tariff* to replace references to Supplementary Notes 4(b) and 4(c) of Chapter 8 of the schedule to the *Customs Tariff* with references to Supplementary Notes 3(b) and 3(c). These amendments account for changes in the note numbers that occurred as a consequence of the repeal, in January 2017, of Supplementary Note 2 of Chapter 8 of the schedule. The affected sections in the *Customs Tariff* deal, among other things, with the determination of the customs duty rates that the Governor in Council can apply on fresh fruit from some countries if it adopts a bilateral emergency measure regarding Canada's imports of these products.

Similarly, clauses 83(1) and 83(4) amend Supplementary Notes 3(a) and 3(d) of Chapter 8 of the schedule to the *Customs Tariff* to replace the references that these notes make to Supplementary Notes 4(a), 4(b) and 4(c), with references to Supplementary Notes 3(a), 3(b) and 3(c), respectively. Clauses 83(2) and 83(3) amend Supplementary Notes 3(b) and 3(c) by removing some of the tariff items referred to in them.

Clauses 74(1), 75(1) and 76(1) amend sections 71.2(3)(a), 71.3(3)(a) and 71.4(3)(a), respectively, which limit the frequency with which the Governor in Council can adopt certain emergency measures. The amendments remove references to tariff items that are not included, and add references to tariff items that are included, in the schedule to the *Customs Tariff*.

Clause 90 repeals Supplementary Note 1 of Chapter 38 of the schedule to the *Customs Tariff*, which defines certain terms for the purposes of a tariff item that is not included in the schedule.

Clauses 79 to 82, 84 to 89, 91 to 95 and 97 to 120 make spelling, grammatical, punctuation and other changes to the description of certain tariff items in the French, English or both versions of the schedule to the *Customs Tariff*.

Clauses 121 and 123 repeal a number of tariff items in the schedule to the *Customs Tariff* to facilitate customs administration.[30] Clause 122 adds the tariff items found in Schedule 1 to Bill C-86 to the schedule to the *Customs Tariff*.

Clauses 124 and 125 make coordinating amendments that recognize implementation of the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* and its tariff provisions, as well as the changes contained in Bill C-85, An Act to amend the Canada–Israel Free Trade Agreement Implementation Act and to make related amendments to other Acts.

Clause 126 identifies 1 January 2019 as the date on which clauses 69 to 123 enter into force.

2.5.2 Division 2: Amendments to the *Canada Pension Plan*

Clauses 127 and 128 add sections 53.3(4) and 53.4(3) to the *Canada Pension Plan*[31] to provide for the proration of amounts known as "drop-in amounts" calculated for parents with lower earnings during child-rearing years, when a contributor's contributory period begins or ends during such a period.

Clause 129(1) provides that section 114(2) of the *Canada Pension Plan*, which normally determines the effective date of major amendments, does not apply for the amendments in Division 2 of the bill. Clause 129(2) provides that Division 2, in accordance with section 114(4) of the *Canada Pension Plan*, comes into force on a day to be fixed by order of the Governor in Council, but not before the day on which section 380 of the *Budget Implementation Act, 2018, No. 1*, which adds sections 53.3 and 53.4 to the *Canada Pension Plan*, comes into force.

2.5.3 Division 3: Insurance Issues

Division 3 of Part 4 of the bill amends the *Trust and Loan Companies Act*, the *Bank Act*, the *Insurance Companies Act*, the *Canada Deposit Insurance Corporation Act*, the *Financial System Review Act* and the *Office of the Superintendent of Financial Institutions Act*.

2.5.3.1 Subdivision A: Amendments to the *Trust and Loan Companies Act*, the *Bank Act* and the *Insurance Companies Act*

2.5.3.1.1 Thresholds Below Which the Acquisition of Control of Certain Entities, or the Acquisition or Increase of a Substantial Investment in Them, Does Not Require the Approval of the Superintendent of Financial Institutions

Part 4, Division 3, Subdivision A, of the bill amends the *Trust and Loan Companies Act* (TLCA),[32] the *Bank Act*[33] and the *Insurance Companies* Act (ICA)[34] to establish an exemption to the need for financial institutions to obtain approval from the Superintendent of Financial Institutions for certain investments.

The TLCA, the *Bank Act* and the ICA permit federally regulated financial institutions to make substantial investments in "permitted" entities that allow those institutions to remain primarily engaged in their area of expertise of providing financial services. For example, a bank may acquire shares of another financial institution or an unregulated lender. These investments and acquisitions may involve public policy considerations and require regulatory approval.

The Superintendent's approval would be required when a federally regulated financial institution is making a substantial investment in an entity that, due to its business activities, may expose the federally regulated financial institution to market or credit risks. In such a case, it is the type of business that is considered and not the value of the investment; approval is needed for all investments in entities that fall within the definition of permitted entities, regardless of whether the investment would be too small to actually expose the federally regulated financial institutions to any significant risk.

Clauses 130 to 134 amend section 453 of the TLCA, sections 468 and 930 of the *Bank Act*, and sections 495 and 971 of the ICA to establish thresholds below which investments in permitted entities do not require the approval of the Superintendent. The thresholds are based on a formula that compares the relative size of the investment or purchase with the size of the federally regulated financial institution. They could be between 0.5% and 2%, depending on the specifics of the transaction. If the value of the transaction as a proportion of the value of the acquiring financial institution is smaller than the threshold, the transaction will not require the Superintendent's approval.

2.5.3.1.2 Investment of Financial Institutions in the Canadian Business Growth Fund

In February 2017, the Advisory Council on Economic Growth recommended the establishment of a private-sector growth fund, supported by the federal government, that would assist small and medium-sized enterprises with growth potential. The Canadian Business Growth Fund was established in March 2017 with an initial investment of $500 million by a consortium of Canadian financial institutions. The fund's mission is to "provide patient minority capital and strategic counsel to mid-market Canadian businesses to support their growth and foster innovation, while earning market returns."[35]

The TLCA, the *Bank Act* and the ICA generally prohibit federally regulated financial institutions from acquiring or making substantial investments in commercial entities other than those engaged in financial services. When substantial investments in commercial entities are allowed, they must be short-term.

The legislative changes allow federally regulated financial institutions to make long-term substantial investments in commercial entities through the fund, subject to certain conditions.

Clauses 135 to 151 amend sections 449(1) and 451 of the TLCA and add a new section 450.1 to the Act; amend sections 464(1), 466, 507(1) and 928 of the *Bank Act* and add new sections 465.1, 510.01, 510.02 and 927.1 to the Act; and amend sections 490(1), 493, 552 and 969 of the ICA and add new sections 492.1, 551.1 and 968.1 to that Act, in order to:

- limit the investment of a single federally regulated financial institution in the business growth fund to $200 million;
- prevent any one of the financial institutions from acquiring control of the fund;
- prohibit the institutions from investing in the fund if the fund acquires interests in certain commercial entities, such as insurance brokers or motor vehicle leasing companies; and
- place limits on the amount that the fund can invest in a single entity.

2.5.3.1.3 Consent to Receive Electronic Documents

The TLCA, the *Bank Act* and the ICA define the conditions under which information can be exchanged electronically between financial institutions and customers. For example, the Acts set out how consent must explicitly be given before information may be shared electronically with a customer.

Clauses 152 to 154 amend section 539.04 of the TLCA, section 995 of the *Bank Act*, and section 1037 of the ICA to clarify that consent can be obtained electronically by the financial institution.

2.5.3.2 Subdivision B: Amendments to the *Canada Deposit Insurance Corporation Act* and the *Financial System Review Act*

Clauses 157, 159, 160, 162 and 163 make technical amendments to sections 10(1)(d), 10(1)(e), 12.1, 13, 20 and 21(5) of the *Canada Deposit Insurance Corporation Act* (CDICA)[36] that:

- clarify the provision for the calculation of insured deposits;
- repeal references to accounting standards that are no longer relevant;
- repeal amendments not in force;
- clarify that the length of time for extended deposit insurance coverage following the amalgamation of Canada Deposit Insurance Corporation (CDIC) member institutions is limited to two years or until the maturity of a term deposit; and
- clarify that withdrawals made by a depositor after the amalgamation of CDIC member institutions reduces the insured amount of pre-existing deposits.

Clause 164 repeals section 26(1) of the CDICA respecting accumulated net earnings.

Clause 158 exempts from the calculation of the CDIC's borrowing limit any borrowing under section 60.2 of the *Financial Administration Act*, which allows the federal government to make loans to the CDIC for financial stability and efficiency under certain circumstances.

Clause 161 amends section 14 of the CDICA so that the liquidator of a CDIC member institution may not apply the law of set-off or compensation to a claim related to insured deposits. Legal set-off is the right of one entity to pay another entity less money than owed because the second entity is also indebted to the first.

Clause 165 repeals sections 191 and 192 of the 2012 *Financial System Review Act*.[37] Sections 191 and 192 amended the provisions that governed the annual membership premiums paid by CDIC member institutions, but that had not yet come into force. Clause 166 introduces coordinating amendments to address the potential coming into force of one or both of the sections before they are repealed upon Royal Assent of Bill C-86. Clause 166 also introduces amendments to sections 21 and 23 of the CDICA to replace any amendments that may be introduced by sections 191 and 192.

2.5.3.3 Subdivision C: Amendments to the *Office of the Superintendent of Financial Institutions Act*, the *Trust and Loan Companies Act*, the *Bank Act* and the *Insurance Companies Act*

Clause 167 amends section 37 of the *Office of the Superintendent of Financial Institutions Act*[38] to clarify that the Superintendent cannot use privileged information – information that is subject to privilege under the law of evidence, solicitor–client privilege, the professional secrecy of advocates and notaries, or litigation privilege – as evidence in a proceeding if the privileged information was disclosed by a financial institution, bank holding company, insurance holding company, a person who controls these entities or an entity that is affiliated with those entities.

Similarly, clauses 168 to 173 add new section 504.01 to the TLCA, new sections 608.1, 638.1 and 956.2 to the *Bank Act*, and new sections 672.3 and 999.2 to the ICA to confirm that the disclosure of privileged information to the Superintendent does not constitute a waiver of privilege and that the Superintendent cannot disclose any privileged information for an investigation or prosecution of an offence or violation under any Act of Parliament or legislature of a province.

2.5.4 Division 4: Amendments to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*

Part 2 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA)[39] addresses the reporting of currency and/or monetary instruments. It requires persons or entities to report the importation and exportation of currency or monetary instruments with a value of $10,000 or more. Part 2 also enables officers, who are defined in the *Customs Act*, to perform searches where there are reasonable grounds to suspect a person or entity is carrying unreported currency or monetary instruments.

Section 13 of the PCMLTFA provides persons or entities carrying currency and/or monetary instruments the option – once engaged in the importation/exportation process – to decide not to proceed with the importation or exportation of currency and/or monetary instruments before that currency or those instruments are retained or forfeited.

Clause 174 repeals section 13 of the PCMLTFA to remove the ability of an individual or entity in the process of importing or exporting currency or monetary instruments to withdraw from that importation or exportation before the retention or forfeiture of the currency and/or monetary instrument.

Clauses 175(1) and 175(2) make consequential amendments to sections 14(3) and 14(4)(b) of the PCMLTFA, respectively.

2.5.5 Division 5: Amendments to the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*, the *Greenhouse Gas Pollution Pricing Act* and the *Offshore Health and Safety Act*

Clauses 176 to 178 of Bill C-86 amend the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act* (C–NLAAIA)[40] and the *Greenhouse Gas Pollution Pricing Act* (GGPPA)[41] to allow for Newfoundland and Labrador's greenhouse gas pricing regime[42] to apply to the province's offshore area.

The amendments also confer powers and impose duties and functions on the Canada–Newfoundland and Labrador Offshore Petroleum Board for the application of that regime. The Board is authorized to administer and enforce the pricing mechanisms as determined under either Newfoundland and Labrador's *Management of Greenhouse Gas Act* or an agreement with the appropriate provincial minister.

The fees and charges obtained for the administration of the greenhouse gas pricing mechanisms are paid entirely to the province of Newfoundland and Labrador, if related to the powers, duties or functions of the Board. All fees and charges obtained under other regulations made under the C–NLAAIA are shared equally between the federal government and the province. This includes, for instance, the amount to be paid by the holders of, or applicants for, operating licences for petroleum operations in the offshore area.

Clause 178 adds section 189.1 to the GGPPA so that the provincial regime does not apply if the offshore area is mentioned in Part 2 of Schedule 1 to that Act. Hence, the federal regime has precedence over the C–NLAAIA if the federal government decides to put a price on greenhouse gas emissions in the offshore area.

Clauses 179 and 180 of Bill C-86 amend the *Offshore Health and Safety Act*[43] to extend by one additional year (until 31 December 2020) the application of the occupational health and safety transitional regulations for the offshore areas designated under the C–NLAAIA and the *Canada–Nova Scotia Offshore Petroleum Resources Accord Implementation Act* and the corresponding provincial acts. This extension provides additional time to the provinces of Newfoundland and Labrador and Nova Scotia to develop permanent occupational health and safety regulations for their offshore areas.

Under section 181, these provisions come into force, or are deemed to have come into force, on a day to be fixed by order of the Governor in Council, but that day must not be before 1 January 2019.

2.5.6 Division 6: Amendments to the *Canada Business Corporations Act*

In contrast to a legal owner – who holds legal title to a property or asset in that owner's name – a beneficial owner is an individual who possesses certain benefits of ownership over a property or asset irrespective of whether the individual's name appears on the legal title. For example, individuals or groups of individuals who are not the legal owners of a corporation might directly or indirectly have the power to vote or influence the actions of that company and may therefore be considered its beneficial owners.

Registries of beneficial owners exist outside Canada. The United Kingdom operates a registry of corporate beneficial owners by requiring all companies and limited liability partnerships operating in the U.K. to provide the government with certain information in relation to the beneficial owners of companies, defined as those having at least 25% of total share ownership or voting rights. Furthermore, the European Commission's Fourth Anti-Money Laundering Directive, adopted in May 2015, requires all member states to create similar beneficial ownership registries.[44]

Within Canada, certain corporate information, including the names and addresses of a corporation's directors, is collected and subsequently made publicly accessible when the business incorporates. Information about the beneficial owners of the corporation is generally not recorded. Businesses operating in Canada can choose to incorporate federally under the *Canada Business Corporations Act* (CBCA)[45] or under the provincial regime in which the business operates, such as under Ontario's *Business Corporations Act*. The corporate information that has been collected is kept by the jurisdiction under which the incorporation took place. Corporations Canada keeps the registry of federally incorporated businesses.

As announced on 11 December 2017, the federal and provincial/territorial ministers of Finance agreed to pursue legislative amendments to federal, provincial and territorial corporate statutes to ensure that corporations hold accurate and up-to-date information on beneficial owners, and that such information is available to law enforcement, tax and other authorities.[46] The goal of the agreement is to bring these changes into force by 1 July 2019.

Division 6 of Part 4 of Bill C-86 amends the CBCA to require most federally incorporated businesses to create and maintain a list of their own beneficial owners, referred to as "individuals with significant control." Corporations are exempt from this requirement if their shareholder information is already available, as it is, for example, when they are listed on a designated stock exchange.

Clause 182 creates new section 2.1 of the CBCA to define "individuals with significant control" as those having at least 25% of total share ownership or voting rights, either directly, indirectly, as a matter of influence, or jointly with another person. New section 2.1 also allows for future regulations to broaden this definition.

Section 2 of the CBCA defines an “individual” as a “natural person,” and therefore individuals with significant control must be natural persons and not another corporation or legal entity.

Clause 183 creates new section 21.1 to detail the list, or “register,” that the corporation must create and maintain. In particular, the register must contain, for each individual with significant control:

- name;
- date of birth;
- latest known address;
- jurisdiction of residence for tax purposes;
- the day on which the individual became or ceased to be an individual with significant control;
- a description of how each individual is an individual with significant control, which includes a description of interests and rights in respect of shares of the corporation; and
- any other information that may be prescribed in regulation.

In addition, the corporation must take reasonable steps at least once every financial year to ensure that it has identified all such individuals, and that the information in the register is accurate, complete and up-to-date. It must also record the steps taken in doing so. Where the corporation is informed of any changes in such information, it must update its registry within 15 days of receiving that information. Within one year of the sixth anniversary of an individual’s ceasing to be an individual with significant control, the corporation must dispose of that individual’s “personal information” held in its registry, as defined by the *Personal Information Protection and Electronic Documents Act*.

Contravention of any of the above stipulations by the corporation, without reasonable cause, is deemed to be a summary offence punishable by a maximum fine of $5,000. Furthermore, directors or officers of the corporation can be prosecuted for a summary conviction offence punishable by a maximum fine of $200,000 or imprisonment for a maximum term of six months or both for the following:

- knowingly authorizing, permitting or acquiescing to the contravention of the registry requirements;
- knowingly recording, authorizing, permitting or acquiescing to the recording of false or misleading information in the register; or
- knowingly providing, authorizing, permitting or acquiescing to provide any person or entity with false or misleading information in relation to the register.

In addition, new section 21.1 provides that shareholders must, to the best of their knowledge, reply accurately and completely as soon as feasible to the corporation's requests for such information. A shareholder who knowingly contravenes this requirement can be prosecuted for a summary conviction offence punishable by a maximum fine of $200,000 or imprisonment for a maximum term of six months or both.

Shareholders, creditors and their representatives may access the corporation's register for specified purposes upon filing an affidavit to do so with the corporation. These purposes include influencing the voting of shareholders, offers to acquire securities of the corporation, and any other matter relating to the affairs of the corporation. Use of the registry's information outside of these purposes is a summary conviction offence punishable by a maximum fine of $5,000 or imprisonment for a maximum term of six months or both. Corporations must also disclose information held in their registers, upon request, to "the Director" appointed by the Minister of Industry to carry out the duties and exercise the powers under the CBCA.

Clauses 184 and 185 make consequential amendments to sections 250 and 261(1) of the CBCA, respectively.

These measures come into force six months after Royal Assent.

2.5.7 Division 7: Intellectual Property and Other Amendments

Division 7 of Part 4 of Bill C-86 was introduced as part of the federal government's Intellectual Property Strategy. Launched on 26 April 2018, the Strategy aims to "help Canadian entrepreneurs better understand and protect intellectual property and also get better access to shared intellectual property."[47]

Major components of the Strategy are amendments to key intellectual property laws and other statutes to "remove barriers to innovation"[48] and the creation of an independent body to oversee patent and trade-mark agents.

Division 7 of Part 4 of Bill C-86 is organized as follows:

- Subdivision A amends the *Patent Act*;
- Subdivision B amends the *Trade-marks Act*, the *Economic Action Plan 2014 Act, No. 1*, and the *Combating Counterfeit Products Act*;
- Subdivision C amends the *Copyright Act* to standardize the notice-and-notice regime and to reform proceedings before the Copyright Board;
- Subdivision D enacts the College of Patent Agents and Trade-mark Agents Act;
- Subdivision E amends the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*;
- Subdivision F amends the *Access to Information Act*, the *Privacy Act* and the *Pest Control Products Act*;

- Subdivision G amends the *National Research Council Act*; and
- Subdivision H amends the *Copyright Act* to modernize the Copyright Board, as well as improve the timeliness of its proceedings and the clarity of its decision-making processes.

2.5.7.1 SUBDIVISION A: AMENDMENTS TO THE *PATENT ACT*

Subdivision A makes five main changes to the *Patent Act*[49] and related Acts (note that these changes also apply to certificates of supplementary protection, which provide two years' additional protection to certain types of patented inventions).

Clause 195 amends the *Patent Act* by adding sections 76.2 and 76.3, which require that patent demand letters must comply with requirements to be established by regulation. This amendment seeks to address concerns that patent owners might use misleading or threatening language to encourage settlements where their right might not otherwise be clearly established.

Clauses 187, 191, 197 and 201 make written communications between the Patent Office and an individual that occurred during the patent application process admissible as evidence in patent litigation. Previously, any communications between a patent owner and the Patent Office made during a patent application could not be considered as evidence in any later litigation involving that patent. As a result, patent owners were not bound, when enforcing their patent, to what they had said to the Patent Office about its scope, allowing them to assert a larger reach for their patent in court than they had initially asserted in their application.

Clauses 192, 193, 197 and 202 codify a patent research exception that exists under the common law, whereby a patent holder cannot sue an individual who engages in research into the subject matter of their patent. The exception is added to the *Patent Act* as new section 55.3, which states that "an act committed for the purpose of experimentation relating to the subject-matter of a patent is not an infringement of the patent" and which provides the Governor in Council the power to make regulations directing courts on how to interpret this provision.

Clauses 188, 194, 196 and 203 expand the prior use exemption in the *Patent Act*, which allows individuals who were independently using an invention that becomes patented by someone else to continue that activity without infringing the patent. Clause 194, in particular, replaces section 56 of the *Patent Act*, which outlines the prior use exemption, with broader language that now also includes all acts committed before the claim date and any acts committed after the claim date where "serious and effective preparations" were made before. It also extends prior use rights to users of articles or services that would otherwise be covered by the claim and allows businesses that are covered by the prior use provision to maintain that protection if the business is transferred.

Clauses 190 and 200 introduce a requirement, established under sections 52.1 and 52.2 of the *Patent Act*, that a "licencing commitment" by the owner of a "standard-essential patent" to a standard-setting organization must be respected by any subsequent owners as well.

Subdivision A makes a number of other technical changes, including clarifying the filing date of an application for a patent split off from another (clause 189) and making a series of coordinating amendments to other Acts (clauses 204 to 212).

2.5.7.2 SUBDIVISION B: AMENDMENTS TO THE *TRADE-MARKS ACT*

Clauses 218 and 220 add "bad faith" as a ground to invalidate and to oppose the registration of a trade-mark under new sections 18(1)(e) and 38(2)(a.1) of the *Trade-marks Act*,[50] respectively. The amendments aim, notably, to hinder the registration of a trade-mark for the sole purpose of extracting value from preventing others from using it. At the same time, clause 229 adds section 68.2 to the *Trade-marks Act*, which provides that a person cannot cite bad faith to oppose the registration of a trade-mark if the registration was advertised before new section 32(2)(a.1) comes into force.

Clause 225 adds new section 53.2(1.1) to the *Trade-marks Act* to make the enforcement of exclusive rights to a registered trade-mark conditional on the use of that trade-mark in Canada during the first three years following its registration. The amendment thus discourages registering a trade-mark without the intention to use it.

Clauses 215 and 216 add sections 9(3) and 11.01, respectively, to the *Trade-marks Act* to allow a person to register or use a trade-mark consisting of, or resembling, an official mark that was invalidly reserved for use by an entity that is not a public authority or no longer exists. Clause 215 also adds section 9(4) to the *Trade-marks Act*, empowering the Registrar of Trade-marks to notify the public that trade-marks consisting of, or resembling, an official mark can be registered or used when that mark was invalidly reserved.

This subdivision also aims to modernize the conduct of proceedings before the registrar and to prevent parties from abusing these proceedings. Clauses 217, 221 and 222 amend the *Trade-marks Act* to enable the registrar to order costs against parties engaging in delaying tactics or abusive procedures. Clauses 217 and 219 amend the *Trade-marks Act* to allow the registrar to treat certain objections as withdrawn if the objector is in default of the continuation of the objection. Clause 223 adds new section 45.1 to the *Trade-marks Act* to allow a party to request that the evidence it intends to submit in some proceedings under the *Trade-marks Act* be kept confidential, and to allow the registrar to issue confidentiality orders in that regard. Clause 226 amends section 56(5) of the *Trade-marks Act* to require that parties, on appeal of a decision of the registrar, request leave from the Federal Court to introduce new evidence at this stage, to avoid that the parties relitigate matters already disputed before the registrar. Clause 227 amends section 65 the *Trade-marks Act* to empower the Governor in Council to make regulations with respect to the powers of the registrar to award costs under sections 11.13, 38 and 45, and clause 228 adds new section 65.3 regarding case management by the registrar of certain proceedings, including authorization for the registrar to fix timelines for these proceedings.

Clauses 224, 231 to 235, and 236 to 238 amend, respectively, the *Trade-marks Act*, the *Economic Action Plan 2014 Act, No. 1* (EAP 2014, No. 1)[51] and the *Combating Counterfeit Products Act* (CCPA)[52] to clarify their application in order to facilitate Canada's accession to the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*. Clauses 239 to 241 of Bill C-86 coordinate its amendments with provisions of these two statutes and of the *Economic Action Plan 2015 Act, No. 1* that had not come into force when Bill C-86 was introduced.

Clause 242 provides for the coming into force of provisions of this subdivision in coordination with sections of the EAP 2014, No. 1 and of the CCPA, all of which also amend the *Trade-marks Act* but had not come into force when Bill C-86 was introduced.

2.5.7.3 Subdivision C: Amendments to the *Copyright Act* with Respect to Information in a Notice

Notice and notice is a system established under sections 41.25 and 41.26 of the *Copyright Act*[53] that is intended to discourage online copyright infringement. It allows copyright owners who suspect that an Internet account has been used to infringe their copyright (through, say, an unauthorized download) to send a "notice of claimed infringement" to the owner of that account. This notice is first sent to the subscriber's Internet service provider, who is obliged to forward it.

Subdivision C amends the *Copyright Act* to prescribe limits on what can be included in a notice of claimed infringement to address concerns that copyright owners were abusing the system by including settlement demands in the notices, pressuring recipients to settle even when they may not have done anything wrong.

Clause 243 amends section 41.25 by adding subsection 41.25(3), which prohibits a notice from containing an offer to settle, a demand for personal information or payment, or anything else outlined in the relevant regulation.

Clauses 244 and 245 amend sections 41.26 and 41.27 of the *Copyright Act*, respectively, to ensure that Internet service providers need only comply with notice and notice where the notice itself complies with section 41.25(3).

Clause 246 amends section 62(1)(c) to give the Governor in Council the ability to make regulations that would further prescribe what cannot be included in a notice under notice and notice.

2.5.7.4 Subdivision D: Enactment of the College of Patent Agents and Trade-mark Agents Act

Clause 247 enacts the College of Patent Agents and Trade-mark Agents Act (CPATAA). The CPATAA establishes the College of Patent Agents and Trade-mark Agents, which is responsible for regulating patent agents and trade-mark agents ("intellectual property" or "IP" agents) to maintain professional and ethical standards.

Section 1 of the CPATAA provides its short title. Section 2 defines key terms. Section 3 makes IP agents employed in the federal and provincial public service subject to the CPATAA. Section 4 provides that the Governor in Council may designate any federal minister to be the minister responsible for the CPATAA.

Sections 5 to 12 establish and organize the college. Sections 13 to 20 provide rules for establishing its board of directors. Sections 21 to 23 contain provisions for the establishment of the college's Investigations Committee and Discipline Committee and the appointment of a registrar of the college and a chief executive officer. Sections 24 and 25 establish the powers of the minister. Sections 26 to 31 establish the regimes for issuing licences to IP agents and for the respective IP agent registers. Sections 32 to 34 set out the obligations for licensees to meet prescribed standards of professional conduct and to hold professional liability insurance. Sections 35 and 36 establish the powers of the registrar.

Sections 37 to 50 provide the investigation duties and powers of the College, along with guarantees to protect the privileged information of non–IP agents that has no bearing on an investigation. Such guarantees take account of the fact that IP agents often practise in the same organization and share clients with other professionals, such as lawyers. Sections 51 to 63 provide for disciplinary hearings and measures that can be taken upon finding misconduct or incompetence by an IP agent. Sections 64 to 66 restrict the use the college can make of privileged information.

Sections 67 to 74 establish prohibitions and criminal offences related to falsely claiming to be a licensed IP agent and to representing another person before the Patent Office or the Office of the Registrar of Trade-marks without authorization.

Section 75 authorizes the board of directors to make by-laws. Section 76 empowers the Governor in Council to make regulations. Section 77 provides that the regulations prevail over the by-laws in case of conflict or inconsistency.

Sections 78 to 86 are transitional provisions that, notably, establish an interim board of directors that will establish the college, make IP agents registered with the Canadian Intellectual Property Office licensed agents, and empower the Governor in Council to make regulations on transitional matters.

Clauses 248 to 258 make consequential amendments to the *Access to Information Act*, the *Patent Act*, the *Privacy Act* and the *Trade-marks Act*. Clauses 259 to 263 make coordinating amendments to the provisions of the EAP 2014, No. 1; the *Economic Action Plan 2014 Act, No. 2*; the *Economic Action Plan 2015 Act, No. 1*; and the CCPA that were not in force when Bill C-86 was introduced.

Clause 264 specifies provisions that come into force on days fixed by order of the Governor in Council.

2.5.7.5 SUBDIVISION E: AMENDMENTS TO THE *BANKRUPTCY AND INSOLVENCY ACT* AND THE *COMPANIES' CREDITORS ARRANGEMENT ACT*

Clauses 266 to 269 amend the *Bankruptcy and Insolvency Act* (BIA)[54] and the *Companies' Creditors Arrangement Act* (CCAA)[55] to ensure that the insolvency of the owner of an IP, as well as any restructuring made under those Acts, does not affect a third party's right to the ongoing use of the IP when this usage right was conferred by an agreement between the owner of the IP and the third party.

More specifically, Bill C-86 adds new sections maintaining the third party's usage right of an IP despite:

- a court-authorized sale of that IP as part of a proposal to creditors (clause 266, adding section 65.13(9) to the BIA);
- a sale or disposition of that IP, or a disclaimer or termination of the agreement conferring the usage right, by:
  - a trustee (clause 267, adding section 72.1 to the BIA), or
  - a receiver (clause 268, adding section 246.1 to the BIA); or
- a court-authorized sale of assets including that IP (clause 269, adding section 36(8) to the CCAA).

The amendments maintain the usage right only if the third party abides by the terms of the agreement conferring the right.

Clauses 270 and 271 provide transitional measures for ongoing actions and proceedings.

Clause 272 of Bill C-86 provides for the coming into force of clauses 266 to 271 on a day to be fixed by order of the Governor in Council.

2.5.7.6 SUBDIVISION F: AMENDMENTS TO THE *ACCESS TO INFORMATION ACT*, THE *PRIVACY ACT* AND THE *PEST CONTROL PRODUCTS ACT*

Under the *Patent Act* and the *Trade-marks Act*, confidential information that a client communicates to a registered patent or trade-mark agent is treated as a communication subject to solicitor–client privilege. Clauses 273, 274 and 275 add new section 23.1 to the *Access to Information Act*,[56] add new section 27.1 to the *Privacy Act*,[57] and replace section 42(2)(g) of the *Pest Control Products Act*,[58] respectively, so that information considered privileged under the *Patent Act* and the *Trade-marks Act* need not be disclosed under these three statutes.

Clause 276 provides a transitional measure pertaining to terminology employed in the *Trade-marks Act*. Clause 277 coordinates the amendment made under clause 273 with the language employed in clause 10 of Bill C-58, An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts, which had not received Royal Assent when Bill C-86 was introduced.

2.5.7.7 SUBDIVISION G: AMENDMENTS TO THE *NATIONAL RESEARCH COUNCIL ACT*

The National Research Council Canada (NRC) is an agency of the Government of Canada, created under the *National Research Council Act* (NRCA),[59] that is tasked with scientific and industrial research and development. In the course of that work, it develops, acquires and commercializes real property and IP. The three changes to the NRCA made through the provisions in Subdivision G broaden the NRC's ability to dispose of that property and give the NRC more control over its IP.

Clause 278 amends section 3(2), which gives the NRC the power to acquire and hold real, personal, movable and immovable property, so that the NRC can sell or otherwise dispose of and loan or lease property as well.

Clause 279 amends section 5(1)(l) so that it allows the NRC to dispose of

> any intellectual property right – including any patent, copyright, industrial design, trade-mark, trade secret, know-how or other similar right and any such future right that is described under a written agreement.

This change clarifies that the NRC may commercialize all forms of IP that it possesses. The language of the previous text seemed to exclude some forms of IP, like copyrighted works.

Clause 279 also adds section 5(3), which states that the administration and control of any invention made by an NRC employee, along with any patent over that invention, vests with the NRC. Typically and under the *Public Servants Inventions Act*, inventions made by public servants vest in "Her Majesty in right of Canada."

2.5.7.8 SUBDIVISION H: AMENDMENTS TO THE *COPYRIGHT ACT* TO MODERNIZE THE LEGISLATIVE FRAMEWORK RELATING TO THE COPYRIGHT BOARD

The Copyright Board is an administrative body, established by the *Copyright Act*, that determines the royalties to be paid for certain uses of copyrighted works and that oversees the economic relationship between users and "collective societies" – organizations that manage and enforce copyright for their members. The Board does this primarily through the setting of tariffs that outline royalties paid by users to collective societies for rights to the works in the societies' repertoires.

Clause 292 adds section 66.501 to the *Copyright Act*, which states that the Board shall set "fair and equitable" rates, in line with, among other things, a competitive and transparent market, and that it must consider the public interest.

Subdivision H makes a number of changes to the timeframe of Board decisions. Clause 292 adds section 66.502 to the *Copyright Act*, which requires the Board to address proceedings "as informally and expeditiously" as the circumstances and fairness permit. Clauses 296 and 297 add new sections 68 and 83(2), respectively, to the Act to move the filing date for proposed tariffs:

- Existing filing date: no later than 31 March of the calendar year before the calendar year in which the proposed tariff is to take effect.
- New filing date: no later than 15 October of the second calendar year before the calendar year in which the proposed tariff is to take effect.

Clauses 296 and 297 also add new sections 68.1(2) and 83(4), respectively, to the *Copyright Act* to extend the minimum term of a tariff to three years, as opposed to one year. Additionally, clause 295 adds new section 66.91(2) to allow the Board, with the approval of the Governor in Council, to vary tariff-setting timelines as needed.

To give the Board more control over its proceedings and prevent needless or strategic delays, clause 292 adds new section 66.504 to the *Copyright Act* to give the Board the capacity to assign a matter to a case manager who may "give any directions or make any orders" consistent with the *Copyright Act* to advance the proceeding.

In keeping with some of the tariff-setting regimes established under the *Copyright Act*, collective societies can only acquire remuneration for their members on the basis of a tariff set by the Board. Clause 296 adds new section 67(3) to the *Copyright Act* to narrow this limitation, allowing most collective societies the ability to enter into agreements with users instead. Under new sections 67(2) and 83 of the *Copyright Act*, the tariff-setting process remains mandatory in three cases:

- the retransmission of distant radio and television signals;
- the reproduction and performance of radio and television broadcasts by educational institutions; and
- the private copying levy on the sale of blank audio recording media.

The delays in the tariff-setting process sometimes lead to the setting of tariffs after their proposed coming-into-force date, imposing sudden and uncertain retroactive liabilities on users. Clause 296 adds section 73.2 to the *Copyright Act* to ensure that, when a tariff has yet to be set after the date it was intended to start, any tariff that preceded it continues to apply.

More generally, clauses 296 and 297 also restructure the sections of the *Copyright Act* that outline the tariff regimes the Board oversees to ensure that, to the extent possible, these regimes are uniform and consistent.

2.5.8 Division 8: Amendments to the *Employment Insurance Act* and the *Canada Labour Code*

2.5.8.1 Amendments to the *Employment Insurance Act*

Part I of the *Employment Insurance Act* (EIA)[60] establishes a maximum number of weeks of parental benefits payable for the care of one or more newborn or newly adopted children. Under the "standard parental benefits" option, the maximum is 35 weeks, and under the "extended parental benefits" option, the maximum is 61 weeks (sections 12(4)(b) and 12(4.01)). When two claimants share parental benefits, the total number of weeks they can receive between them is the maximum applicable to each option, namely 35 or 61 weeks (sections 23(4) and 23(4.1)). Similar provisions apply with respect to self-employed persons under Part VII.1 of the EIA (sections 152.05(12), 152.05(13), 152.14(2)(b) and 152.14(4)).

Clauses 303 to 306 of Bill C-86 amend these provisions of the EIA to increase the number of weeks parental benefits may be payable in circumstances where both parents have agreed to share these benefits. This measure was announced in Budget 2018 as the new Employment Insurance parental sharing benefit.[61]

Specifically, under the amended provisions, standard parental benefits may be payable for a maximum of 40 weeks, while extended parental benefits may be payable for up to 69 weeks. The total number of weeks that claimants sharing parental benefits can receive between them is the maximum applicable to each option, namely 40 or 69 weeks. However, the maximum number of weeks that may be payable to an individual claimant, even where parental benefits are shared, continues to be 35 or 61 weeks, depending on the option chosen under the legislation.

Clause 307 stipulates that provisions from the EIA regarding the division of weeks of parental benefits between claimants, which were in place before the relevant provisions of the bill come into force, continues to apply with respect to claims relating to a child or children born or placed in adoption before that date.

2.5.8.2 Amendments to the *Canada Labour Code*

Currently, under Part III of the *Canada Labour Code* (CLC),[62] the aggregate amount of parental leave that may be taken by two employees with respect to the same birth or adoption must not exceed 63 weeks (section 206.1(3)), while that which may be taken by one or two employees in relation to maternity and parental leaves must not exceed 78 weeks (section 206.2).

Clauses 310 and 311 of Bill C-86 amend these CLC provisions to increase the aggregate amount of parental leave to a maximum of 71 weeks, and the aggregate amount of maternity and parental leaves to a maximum of 86 weeks, where the parental leave is divided between employees. However, the maximum amount of parental leave that may be taken by one employee, even when this leave is shared, continues to be 63 weeks, while the applicable maximum in relation to a combination of maternity and parental leaves for one employee remains at 78 weeks.

2.5.8.3 Coming into Force

Clause 313 of Bill C-86 provides that, other than those clauses making coordinating amendments (clauses 308, 309 and 312), Division 8 of Part 4 comes into force on a day to be fixed by order of the Governor in Council.

2.5.9 Division 9: Enactment of the Canadian Gender Budgeting Act

Division 9 of Part 4 enacts An Act respecting the consideration of gender equality and diversity in the budget process (short title: Canadian Gender Budgeting Act [CGBA]).

Section 2 of the CGBA outlines the Government of Canada's gender budgeting policy. The policy states that the federal government will:

- promote the principle of gender equality and inclusiveness as part of the federal budget;
- consider gender and diversity in taxation and resource allocation decisions;
- make analysis on the impact of government decisions with respect to gender and diversity publicly available; and
- increase the capacity of departments listed in Schedule VI of the *Financial Administration Act*[63] to consider gender and diversity in policies in a budgetary context.

Sections 3 to 5 of the CGBA outline the implementation of the policy.

Under section 3, if an assessment of the impacts of the budget plan's measures in terms of gender and diversity is not included in a tabled budget plan or related documents that the Minister of Finance has made public, the Minister of Finance must table a report on those impacts in both the Senate and the House of Commons within 30 sitting days following the budget's tabling.

Section 4 requires that, on an annual basis, the Minister of Finance conduct a publicly available analysis of the impacts, in terms of gender and diversity, of tax expenditures that are deemed appropriate by the minister.

Section 5 requires that, on an annual basis, the President of the Treasury Board make public an analysis of the impacts, in terms of gender and diversity, of the existing Government of Canada expenditure programs that the president, in consultation with the Minister of Finance, considers appropriate.

2.5.10 Division 10: Amendments to the *Bank Act* and the *Financial Consumer Agency of Canada Act*

Division 10 of Part 4 of the bill amends sections of the *Bank Act* related to the protection of customers and the public with respect to corporate governance, responsible business conduct, disclosure and transparency, and redress. It also amends the *Financial Consumer Agency of Canada Act* to grant additional powers to that agency.

In a previous budget implementation bill, Bill C-29, A second Act to implement certain provisions of the budget tabled in Parliament on March 22, 2016 and other measures, a consumer protection framework was proposed. It was intended to supersede any provincial provisions related to either consumer protection or banks' business practices regarding consumers in order to avoid overlap between federal and provincial rules and ensure uniformity across Canada. Following opposition to this element of the framework, the section dealing with it was removed from Bill C-29 before the bill was passed. Division 10 of Part 4 does not contain an explicit assertion of exclusive federal jurisdiction over bank customers.

The 2018 federal budget stated that legislation would be introduced to strengthen the tools and mandate of the Financial Consumer Agency of Canada (FCAC), as well as consumer rights and interests when dealing with banks. In addition, in the spring of 2018, the FCAC published two reports related to financial consumer protection. One, which reviewed domestic bank retail practices and best practices for regulatory supervision of consumer protection,[64] found that certain practices of banks, especially with respect to sales incentives for employees, may place sales ahead of customers' interests. The second report examined best practices for supervision of financial consumer protection.[65]

2.5.10.1 The *Bank Act*

Division 10 of Part 4 amends the *Bank Act*. Clauses 316 to 328 amend sections 157(2)(e), 157(2)(f), 330(1), 524(2), 541(2)(b), 545(6) and 611; repeal sections 413.1, 418.1(3), 540(2), 540(3), 545(4), 545(5) and 552(3). In addition, they add new section 195.1 to create a committee at each bank to oversee obligations to customers. Each committee must consist of at least three directors, a majority of whom must be independent of the bank and its subsidiaries. The committee is required to ensure compliance with consumer provisions[66] and review the appropriateness of the bank's related procedures. Following meetings, the committee must report to the other directors. It must also notify bank auditors when it is meeting and allow them to attend. Ninety days after the end of each financial year of the bank, the directors must report to the Commissioner of the FCAC on how the committee performed its duties during the year.

Clause 329 adds new Part XII.2, "Dealings with Customers and the Public," to the *Bank Act*. It contains five divisions (sections 627.01 to 627.998).

Division 1 of new Part XII.2 lists definitions. Division 2 creates a “fair and equitable dealings” regime which, among other things:

- requires banks to ensure that its officers and employees are trained in the banks’ policies and procedures for complying with consumer provisions;
- prohibits the communication of false or misleading information to a customer, the public or the Commissioner of the FCAC;
- prohibits imposing undue pressure on a person for any reason or engaging in related conduct that will be set out in regulations, and it requires disclosure of these prohibitions;
- requires banks to establish and implement policies and procedures to ensure that products and services offered to an individual are appropriate for that person and that incentives are not available to officers and employees that interfere with their ability to comply with such policies and procedures;
- prohibits banks from providing an individual with a product or service without obtaining the individual’s express consent and extends existing legislation with respect to the provision of a cancellation period following the purchase of a product or service;
- restricts the imposition of charges or penalties in relation to a product or service;
- requires banks to provide electronic alerts in specified circumstances with specified content, such as when account balances fall below a specified amount;
- in respect of optional products or services provided to individuals under promotional offers, prohibits a bank from imposing any charges as of the day on which an individual no longer benefits from the offer without obtaining consent within five business days before that day;
- requires banks to keep records of all complaints and make them available to the Commissioner of the FCAC and to establish complaint-handling procedures that are satisfactory to the commissioner;
- prohibits banks from using the term “ombudsman” to describe internal complaint-handling procedures; and
- requires external complaint bodies to publish a summary of each final recommendation regarding a complaint, including the reasons for the complaint, and to report annually to the commissioner.

Division 3 of new Part XII.2 sets out the framework that deals with disclosure and transparency. The division broadens existing legislation and regulations that require banks to disclose information in a specified manner, and it specifies that they must use language that is clear, simple and not misleading.

Division 4 of new Part XII.2 requires a bank to credit or refund charges or penalties that were incorrectly imposed.

Division 5 of new Part XII.2 authorizes the Governor in Council to make regulations with respect to banks’ dealings with customers and the public.

Clause 334 adds new Part XVI.1, which deals with whistleblowing in respect of any "wrongdoing" (sections 979.1 to 979.4). The definition of wrongdoing includes a contravention of any provision of the Act, voluntary code of conduct or policies established by the bank. Any employee with reasonable grounds to believe that the bank or any person has committed or intends to commit a wrongdoing may report the matter to the bank, the Commissioner of the FCAC, the Superintendent of Financial Institutions, other regulatory bodies, or law enforcement agencies, and the employee's identity is to be kept confidential. Banks are required to establish and implement procedures for dealing with wrongdoing reports, and no employee shall be dismissed, suspended, demoted, disciplined, harassed or otherwise disadvantaged as a result of the report.

Clause 335 is a transitional provision to provide that a corporate body previously approved as an external complaints body under current section 455.01 of the *Bank Act*, which will be repealed, is deemed to be approved under new section 627.48 if the body was approved before the coming into force of Division 10.

2.5.10.2 THE *FINANCIAL CONSUMER AGENCY OF CANADA ACT*

Division 10 of Part 4 of the bill also amends the *Financial Consumer Agency of Canada Act* (FCACA).

Clauses 330 to 333 amend sections 641, 659, and 974 and add sections 661.1 and 661.2 to authorize the Commissioner of the FCAC to perform audits of banks and to direct, or to obtain a court order to compel, banks to conform to a compliance agreement, a consumer provision or new Part XII.2.

Clause 336 amends some definitions in section 2 of the FCACA. Clause 337 adds new section 2.1, which states that the purpose of the FCACA is to ensure that entities subject to the FCACA are supervised by an agency of the Government of Canada so as to contribute to the protection of consumers of financial products and services and the public, including by strengthening the financial literacy of Canadians. Clause 338 amends section 3(2) of the FCACA to include in the objects of the FCAC the protection of the rights and interests of consumers and the public, and it authorizes the FCAC to publish information on trends and emerging issues.

Clauses 339 to 351 make other amendments to the FCACA, including:

- allowing the Commissioner of the FCAC to direct banks to comply with their legal obligations, including ordering restitution when charges have been improperly collected;
- amending the FCACA to state that the Commissioner of the FCAC "shall," rather than "may," publish the nature of a violation, the name of the person who committed it and the amount of the penalty imposed, subject to regulations; and
- increasing the maximum penalties for a violation of the *Bank Act* from $50,000 for individuals and $500,000 for financial institutions to $1 million and $10 million, respectively.

2.5.11 Division 11: Amendments to the *First Nations Land Management Act*

Division 11 of Part 4 gives effect to amendments to the *Framework Agreement on First Nation Land Management*. The Framework Agreement can only be amended with the consent of Canada and two-thirds of the First Nations that have ratified the agreement.[67]

Clause 352 adds to the preamble of the *First Nations Land Management Act* (FNLMA)[68] a reference to the Government of Canada's commitment to implement the *United Nations Declaration on the Rights of Indigenous Peoples*.

In clause 353, the bill expands the First Nations land management regime by adding to the definition of "First Nation land" the term "lands set aside," a term which is defined as "land in Yukon that is reserved or set aside by notation in the property records of the Department of Indian Affairs and Northern Development for the use of Indigenous peoples in Yukon." Other clauses extend the application of existing provisions to include these lands. For example, clause 354(2) clarifies that lands set aside to which a land code[69] applies are not reserve lands. Clause 355 provides that First Nations may develop land codes applicable to "a parcel of lands set aside."

Clause 356 adds new section 6.01 to the FNLMA to address reserves that are set apart for more than one First Nation. This section enables all the First Nations for whom a reserve has been set aside to establish a land management regime applicable to the whole reserve. To do so, each of the First Nations must have a land code in force. Further, each First Nation must amend its land code to include uniform rules and procedures for the management of land and for the resolution of any disputes about land management between the First Nations.

The bill also amends the community approval process for land codes and individual agreements. Clause 361 adds new section 8.1, which provides First Nations with the option of appointing a ratification officer to determine whether the approval process occurs in accordance with the framework agreement and the FNLMA. Clauses 363 and 365 provide that, if a ratification officer is appointed, the officer has the following duties and functions of a verifier:[70]

- to publish a notice of the date, time and place of a vote;
- to observe the conduct of the vote; and
- to submit a report on the conduct of the vote to the verifier, who then certifies the validity of the land code.

Other amendments to the community ratification process include allowing for electronic votes (clause 362) and stipulating that in a vote for the approval of the land code and individual agreement, a council may fix the minimum percentage of eligible voters who are required to participate, and it may fix an approval rate (clause 363).

Under section 19 of the FNLMA, once a First Nation's land code comes into force, "all revenue moneys collected, received or held by Her Majesty for the use and benefit of the First Nation or its First Nation members cease to be Indian moneys[71] and shall be transferred to the First Nation." Clause 369 extends this provision to include capital moneys, and further amends section 19 of the FNLMA so that any future revenue and capital moneys will also be transferred to the First Nation. Clause 369 also adds new section 19(2) to the FNLMA, stipulating that the Crown is not liable for actions by a First Nation or other body in relation to the management of revenue or capital moneys transferred to the First Nation under the FNLMA.

Clause 382 adds section 46.1, which provides that First Nations with land codes already in force can amend their individual agreements to provide for the transfer of capital moneys. However, the First Nation must inform its members of its intention to amend the individual agreement and of the amount of capital moneys held by the Crown.

The bill also includes amendments relating to matrimonial real property on First Nations reserves. Clause 368 repeals section 17 of the FNLMA, which addressed the rules on the breakdown of marriage. Clause 370 amends section 20(1) of the FNLMA to expand First Nations law-making authority to include the rules and procedures that apply during a conjugal relationship, when that relationship breaks down or on the death of a spouse or common-law partner. Rules and procedures can be enacted with respect to, among other matters, "the use, occupation and possession of family homes on First Nation land," and "the division of the value of any interests or rights held by spouses or common-law partners in or to First Nation land or structures on First Nation land." Section 370(2) replaces section 20(3) of the FNLMA and provides that these laws may also include provisions related to enforcement of a court order, decision or agreement reached under the law on First Nations lands.

Under section 25 of the FNLMA, the minister shall establish the First Nation Land Register. Clause 373 repeals the part of section 25 whereby the First Nation Land Register is to be administered in the same way as the Reserve Land Register and provides that the Governor in Council on recommendation of the minister may make regulations respecting the transfer of the administration of the First Nation Land Register to "any person or body."

Finally, clause 374 adds to the FNLMA provisions pertaining to "Additions to First Nation Land." New section 25.1 provides that, through an order, the minister may, at the request of a First Nation with a land code in force, set apart any Crown lands as a reserve for the use and benefit of the First Nation. Further, the First Nation may grant interests or rights and licences and enact laws applicable to the lands before the order is made.

2.5.12 DIVISION 12: AMENDMENTS TO THE *FIRST NATIONS FISCAL MANAGEMENT ACT*

The *First Nations Fiscal Management Act* (FNFMA)[72] establishes an opt-in framework to enable First Nations to address economic development and access financing on reserve. The FNFMA enables First Nations to establish their own financing by collecting local revenues and obtaining financing for infrastructure and economic development through pooled investment and borrowing. Three institutions support the FNFMA:

- the First Nations Tax Commission, which regulates property taxation by reviewing and approving a First Nation's local revenue laws;
- the First Nations Financial Management Board (FNFMB), which sets standards and assesses and certifies First Nations' financial management and administration; and
- the First Nations Finance Authority, which provides access to financing and investment services through a pooled investment fund which raises funds on the capital markets for revenue to lend to First Nations.

To participate in the framework, a First Nation must request to be named in the schedule to the FNFMA.

Clause 385(1) amends section 2(1) to add definitions for "interest" and "right" to the FNFMA. These definitions harmonize the application of common law and civil law traditions related to property and ensure bijural consistency when the FNFMA refers to a lien guarantee, or priority or other references to securities, interests and rights. The amendment also provides for consistency between the English and French versions of the FNFMA. The changes are incorporated into several clauses of the bill, including clause 386, which amends sections 5(1), 5(6) and 5(7) of the FNFMA; clause 388, which amends section 8(1); clause 389, which amends section 10(1); clause 390, which amends section 14(2); clause 391, which amends section 17(2); clause 396, which amends section 35(2); and clause 397, which amends section 38(2).

Clause 385(1) also adds a definition of "capital assets" to section 2(1) of the FNFMA to include capital infrastructure for clarity and consistency related to the use of the terms "capital assets" and "infrastructure." Similarly, clause 385(2) replaces section 2(4) of the FNFMA; clauses 394(1) to 394(3) amend portions of sections 32(1) to 32(3); clause 403(1) replaces sections 74(a)(i) and 74(a)(ii); and clause 405 replaces section 79. These changes incorporate the term "capital assets" into FNFMA provisions dealing with financing of both capital infrastructure and capital assets for the provision of local services on reserve lands.

Clause 386(1) removes the requirement under section 5(6) of the FNFMA that a borrowing First Nation with a property tax regime must enact a property taxation law to pay into the debt reserve fund when the fund falls below a certain level.

Clause 396 adds new section 35(1)(c.01) to the FNFMA to enable the First Nations Tax Commission to establish new standards under the Act and related regulations to establish taxation arrangements for lands that are shared between one or more First Nations, called joint reserves.

The key purpose of the FNFMB is to review the financial management system and the financial performance of First Nations that wish to participate in the borrowing regime to assess if the First Nation complies with the standards set by the FNFMB. These review provisions are set out in section 50 of the FNFMA. Previously, only First Nations named in the schedule to the FNFMA could work with the FNFMA institutions to access capital and qualify for loans. Clause 398 adds new section 50.1(1) to the FNFMA to expand the number of entities that the FNFMB can work with to include the following:

- non-participating First Nations not named in the schedule to the FNFMA;
- tribal councils;
- Aboriginal groups with a treaty, land claims agreement or self-government agreement;
- a related entity established under such treaties or agreements;
- an entity owned or controlled by one or more First Nations for the advancement of Aboriginal people; and
- not-for-profits established to provide public services to Aboriginal people.

The new section enables those entities to request a financial assessment from the FNFMB; the FNFMB will then provide a report, along with an opinion as to whether the entity complies with its standards. Clause 400 adds new section 56.1 to the FNFMA to enable any of the entities listed above to obtain the services of the FNFMB, other than co-management and third-party management services.

Section 53 of the FNFMA allows for third-party and co-management of borrowing by First Nations in certain circumstances. Clause 399 grants additional authority to the FNFMB's enforcement and intervention powers in order to impose co-management or third-party management arrangements on a First Nation and act in the place of the council of the First Nation to:

- fulfill regulations made under the FNFMA;
- undertake borrowing on behalf of the First Nation; and
- manage assets of the First Nation related to the delivery of programs and services, including having the authority to enter into or end agreements related to programs, services and assets, amongst other powers.

The governance of the First Nations Finance Authority changes with the amendments in this bill. Currently, under section 61(2) of the FNFMA, a representative of either a borrowing member or an investing member can be nominated as a director of the First Nations Finance Authority's Board of Directors. Clause 401 restricts board membership to representatives of borrowing members.

Clause 408 adds new Part 5, "Payment of Moneys," to the FNFMA after section 89 to allow a borrowing member First Nation to request that all moneys held for it in the Consolidated Revenue Fund, and all moneys to be collected or received in the future by Her Majesty, be paid to the First Nation. For such payment to occur, the Minister of Indian Affairs and Northern Development must be satisfied that:

- the eligible voters of a First Nation approve of the payments of moneys by a vote;
- independent legal and financial advice has been sought on the relative risks of such a payment; and
- there is a financial administration law in place approved by the FNFMB.

2.5.13 Division 13: Amendments to the *Export and Import Permits Act*

Clause 415 amends section 6.2(1) of the *Export and Import Permits Act*[73] to authorize the Minister of Foreign Affairs to determine import access quantities, as well as the basis for calculating them, for all goods that have been added to the *Import Control List* pursuant to section 5(6) of the Act.[74]

2.5.14 Division 14: Enactment of the Pay Equity Act and Amendments to the *Canadian Human Rights Act* and the *Parliamentary Employment and Staff Relations Act*

In June 2016, the House of Commons Special Committee on Pay Equity, which had been created earlier that year, recommended, among other things, "that the Government of Canada draft proactive pay equity legislation within 18 months of the tabling of [its] report."[75]

Division 14 of Part 4 of the bill creates a new Pay Equity Act (PEA) and makes related amendments to the *Canadian Human Rights Act* (CHRA)[76] and the *Parliamentary Employment and Staff Relations Act* (PESRA).[77] Clause 416 of Bill C-86 contains the text of the PEA, which has 184 sections in 10 parts, while clauses 419 to 426 contain amendments to the CHRA, and clause 427 contains amendments to the PESRA. Among other things, the amendments to the CHRA and the PESRA incorporate references to the PEA.

The purpose of the new PEA is set out in section 2 of the Act:

> The purpose of this Act is to achieve pay equity through proactive means by redressing the systemic gender-based discrimination in the compensation practices and systems of employers that is experienced by employees who occupy positions in predominantly female job classes so that they receive equal compensation for work of equal value, while taking into account the diverse needs of employers, and then to maintain pay equity through proactive means.

The PEA defines who is an employee for the purpose of the Act, sets out which employers are subject to certain provisions of the Act, and describes the provisions for pay equity plans. Under section 184, a statutory review of the PEA is to be conducted by Parliament within 10 years of the Act's coming into force, and every five years thereafter.

2.5.14.1 Pay Equity Plans

A key requirement of the PEA is that employers establish pay equity plans. Part 1 of the PEA includes direction on establishing plans. As set out in sections 16(1), 16(2),17(1) and 17(2), in some cases, employers are obliged to establish a pay equity committee to develop the pay equity plan; in others, employers can voluntarily establish such a committee.

Employers or pay equity committees have the following roles with respect to establishing pay equity plans:

- identifying job classes to which the pay equity plan relates (section 32 of the PEA);
- determining which job classes are predominantly female or male (sections 35 to 38);
- determining the value for the work performed in each job class (sections 41 to 43);
- calculating the compensation for each job class (sections 44 to 46); and
- comparing compensation for each job class (sections 47 to 50).

The contents of pay equity plans are set out in section 51 of the PEA.

Under section 60, when a pay equity plan shows differences in compensation between predominantly female job classes and predominantly male job classes, the employer must increase compensation for the positions in the predominantly female job classes. As noted in section 61(2), in certain circumstances, this increase can be phased in. Section 98 stipulates that employers cannot reduce compensation to employees to achieve pay equity.

Clause 83 states that pay equity plans must be revised and the revision posted no later than five years after either the first pay equity plan or the previous revised version were posted.

Pay equity provisions are added to the PESRA under clause 427 of the bill.

2.5.14.2 Pay Equity Commissioner

Part 5 of the PEA establishes the role of the Pay Equity Commissioner. The Commissioner's mandate and duties are set out in section 104, and include dispute resolution, monitoring the implementation of the PEA, and education relating to rights and obligations under the PEA. Under section 117, the Commissioner must report annually to Parliament on the administration and enforcement of the Act.

Section 118(1) in Part 6 of the PEA authorizes the Commissioner to conduct compliance audits of employers or bargaining agents that are subject to the PEA.

Under clause 419 of Bill C-86, the CHRA is amended to include the Pay Equity Commissioner as a member of the Canadian Human Rights Commission.

2.5.14.3 Administrative Monetary Penalties

Part 7 of the PEA establishes an administrative monetary penalties regime for violations of the PEA. Section 126 states that the purpose of the penalty is to "promote compliance … and not to punish." Under section 127(2), depending on the number of employees, an employer may be subject to a maximum penalty of either $30,000 or $50,000, and bargaining agents are subject to the same penalties. An employer, bargaining agent or other person named in the notice of penalty can pay the penalty (section 137) or ask that the violation or the penalty be reviewed by the Pay Equity Commissioner (section 139). Under section 142(8), the Pay Equity Commissioner's decision is final and cannot be reviewed by a court.

2.5.14.4 Dispute Resolution

Part 8 of the PEA relates to dispute resolution. The Pay Equity Commissioner can consider a number of matters that are disputed in relation to the establishment of, the contents of, or adherence to a pay equity plan. Under section 161 of the PEA, in certain circumstances, the commissioner can review decisions relating to matters that have been dismissed or discontinued. Section 162 gives the commissioner the power to refer "an important question of law or a question of jurisdiction" to the Canadian Human Rights Tribunal.

2.5.14.5 Miscellaneous

The Governor in Council's authority to make regulations relating to the PEA is set out in sections 127 and 181 of the PEA.

Clause 440 of Bill C-86 sets out the coming into force dates of various sections of the PEA.

2.5.15 Division 15: Amendments to the *Canada Labour Code*

2.5.15.1 Subdivision A: Amendments to the *Canada Labour Code* with Respect to Various Aspects of Employment

Subdivision A of Division 15 of Part 4 of Bill C-86 introduces a series of changes with regards to Part III of the *Canada Labour Code* (CLC), as summarized below. Part III of the CLC sets out the federal labour standards that apply to employees and employers in works, undertakings or businesses under the legislative authority of the Parliament of Canada. It does not apply to federal public service employees.

2.5.15.1.1 Breaks and Rest Periods

Clauses 444 and 445 of the bill amend Division I (Hours of Work) of Part III of the CLC to, among other things:

- introduce a break of at least 30 minutes every five consecutive hours of work, a break which must be paid if the employer requires the employee to be at its disposal during this time (new section 169.1(1));

- provide that employees are entitled to a rest period of at least eight consecutive hours between work periods or shifts (new section 169.2(1)); and
- stipulate that employers must provide their employees with their work schedules in writing at least 96 hours before the start of the first work period or shift under that schedule. Employees may refuse to work any work period or shift in their schedule that starts within 96 hours of the time they were given the schedule (new sections 173.01(1) and 173.01(2)).

Under new sections 169.1(2), 169.2(2) and 173.01(3), the above-noted right to breaks, rest periods and work refusal may be waived only in specified circumstances. These include an imminent or serious threat to the life, health or safety of any person or a threat of damage to or loss of property.

In addition, clause 450 of the bill introduces Division II.1 under Part III of the CLC, to be known as “Breaks for Medical Reasons or Nursing.” Under new sections 181.1 and 181.2 and subject to the regulations, employees are allowed to take unpaid breaks for medical reasons (though a certificate from a health care practitioner may be required) or to nurse or express breast milk.

2.5.15.1.2 Annual Vacations and General Holidays

Clause 454 amends the provision in Division IV (Annual Vacations) of Part III of the CLC that sets out the rules regarding annual vacation with pay. Currently, under this provision, every employee is entitled to a paid annual vacation of at least two weeks, increasing to three weeks after six consecutive years of employment with the same employer.

Clause 454 amends section 184 of the CLC and adds new section 184.01 so that employees are entitled to the following:

- at least two weeks of annual vacation if at least one year of employment with the same employer has been completed (paid at 4% of their annual wages);
- at least three weeks of annual vacation if at least five consecutive years of employment with the same employer have been completed (paid at 6% of their annual wages); and
- at least four weeks of annual vacation if at least 10 consecutive years of employment with the same employer have been completed (paid at 8% of their annual wages).

Clause 458 of the bill repeals section 196(3) of Division V (General Holidays) of Part III of the CLC, which stipulates that employees are not entitled to holiday pay for a general holiday that occurs within the first 30 days of their employment.

2.5.15.1.3 Leaves of Absence

2.5.15.1.3.1 Amendments to Existing Leaves of Absence

Bill C-86 also introduces a series of reforms with respect to existing leaves of absence under Part III of the CLC. Notably, clauses 466, 467, 469, 470 and 487 of the bill eliminate the minimum length-of-service requirements for the following leaves:

- maternity leave (amended section 206(1));
- parental leave (amended section 206.1(1));
- leave related to critical illness (amended sections 206.4(2) and 206.4(2.1));
- leave related to death or disappearance of a child as a result of a crime (amended sections 206.5(2) and 206.5(3)); and
- medical leave (amended section 239(1)).

In the case of maternity leave, for example, the amendments mean that an employee no longer needs to have completed six consecutive months of continuous employment with an employer in order to be entitled to the leave.

Clause 494 amends section 247.5(1) to reduce the minimum length of service that a member of the reserve force would need to have in order to be entitled to a leave of absence from employment to take part in prescribed operations or activities (such as an operation in Canada or abroad that is designated by the Minister of National Defence, or annual training). It changes from six consecutive months to at least three consecutive months of continuous employment with the same employer.

Clause 494 also adds new sections 247.5(1.1) and 247.5(1.2) to limit to 24 months in any 60-month period the maximum amount of leave that may be taken by a member of the reserve force in relation to specified operations or activities, subject to such exceptions as a national emergency. However, in accordance with clause 525, this limitation applies only to leaves that begin on or after the coming into force of the relevant provisions of Bill C-86.

Clause 487 of the bill changes the heading of Division XIII of Part III of the CLC from “Sick Leave” to “Medical Leave.” Through amended section 239(1), it also broadens the entitlement to medical leave by allowing an employee to take a leave of absence from employment not only as a result of personal illness or injury, but also due to organ or tissue donation, or to attend medical appointments during working hours. The amount of leave remains unchanged at 17 weeks. Clause 487 also amends section 239(2) to remove the requirement to provide a certificate from a health care practitioner, unless the leave of absence is three days or longer. According to clause 524, CLC provisions regarding sick leave that are in place before the relevant provisions in Bill C-86 regarding medical leave come into force continue to apply to an employee who is on leave on the coming into force date.

Finally, clause 462 of the bill changes the heading of Division VII of Part III of the CLC, which currently lists the various leaves of absence, to "Maternity-related Reassignment and Leave and Other Leaves."

2.5.15.1.3.2 New Leaves of Absence

Clause 471 of the bill adds new section 206.9 to introduce a new leave of absence from employment under Division VII of Part III of the CLC, to be known as "leave for court or jury duty." This leave, which is not subject to a minimum length-of-service requirement, allows an employee to take a leave of absence in order to attend court to act as a witness or juror in a proceeding, or to participate in a jury selection process.

Under clause 514, Bill C-86 also makes amendments to the following new leaves of absence introduced by the *Budget Implementation Act, 2017, No. 2*, which are not yet in force: family responsibility leave and leave for victims of family violence.

Specifically, the family responsibility leave of up to three days to carry out responsibilities related to the health or care of a family member or to the education of a family member under 18 years of age is replaced by a personal leave of up to five days. Under amended section 206.6(1), employees are entitled to personal leave for the reasons outlined above, and also for treating their own illnesses or injuries, addressing any urgent matter concerning themselves or their family members, attending their citizenship ceremony, and for any other reason prescribed by regulation. Under amended section 206.6(2), while the amendments also remove the minimum length-of-service requirement, for employees to be entitled to pay for the first three days of the leave, they must have completed three consecutive months of continuous employment with the same employer.

In addition, once in force, the leave for victims of family violence will allow an employee who is a victim of family violence, or who is the parent of a child who is a victim of family violence, to take a leave of absence from employment of up to 10 days. Under new section 206.7(2.1), the first five days of this leave are paid for those employees who have completed three consecutive months of continuous employment with the employer.

2.5.15.1.4 Compensation for and Reimbursement of Work-Related Expenses

Clause 451 of the bill changes the title of Division III of Part III of the CLC from "Equal Wages" to "Equal Treatment." Additional amendments to this division are made under clause 452 of the bill.

Under new section 182.1, an employer is prohibited from paying one employee a rate of wages that is less than that paid to another employee by reason of different employment status (such as full-time, part-time, contract, casual) if, among other factors, they work in the same industrial establishment, and perform substantially the same kind of work under similar working conditions. This prohibition, however, does not apply when the difference in pay is due to such specified reasons as seniority, merit, or the quantity or quality of each employee's production. In addition, employers are prohibited from reducing an employee's rate of wages in order to comply with this new requirement.

According to clause 518, if a collective agreement contains a provision that allows differences in rates of wages based on employment status, and there is a conflict between that provision and Bill C-86, the collective agreement provision will prevail over new section 182.1 for two years following the coming-into-force date.

Clause 461 adds Division VI.1, entitled “Temporary Help Agencies,” to Part III of the CLC. This clause and clause 520 contain similar provisions for employees of temporary help agencies as those found in clauses 451 and 518, described above. Under new section 203.2 of the CLC, employees of temporary help agencies are not to be paid wages at a rate that is lower than that provided by the agency’s client to its employees. Under new section 203.1(1), temporary help agencies are also prohibited from charging a fee to any of their employees or clients in specified circumstances, and from preventing or attempting to prevent an employee from establishing an employment relationship with a client.

In addition, clause 486 of the bill introduces Division XII.1 under Part III of the CLC, to be known as “Reimbursement of Work-related Expenses.” Under new section 238.1 in this division, employees are entitled to reimbursement of reasonable work-related expenses, subject to certain exceptions and within time limits set out under a collective agreement or other written agreement, or as prescribed by regulation. According to clause 523, this division applies only in relation to expenses incurred on or after the day on which the relevant provisions from Bill C-86 come into force.

2.5.15.1.5 Group and Individual Terminations of Employment

Clauses 478 to 485 of the bill update the protections available with respect to group and individual terminations of employment, under divisions IX and X of Part III of the CLC, respectively.

Among other things, under new section 212.1(1), employers are required to provide an employee who is being terminated as part of a group with at least eight weeks (instead of the two weeks that are currently stipulated) of either written notice of their termination date, pay in lieu of notice, or a combination of notice and pay in lieu of notice. New section 213.1 specifies that where notice is not provided, employers are required to provide the transitional support measures set out in the regulations, or an amount equal to the prescribed value of those measures.

In the case of individual terminations of employment, new section 230(1.1) replaces the two-weeks’-notice-of-termination requirement with notice that ranges from two weeks of notice for an employee who has completed at least three consecutive months of continuous employment with the same employer, to eight weeks of notice for an employee who has completed at least eight consecutive years of continuous employment with the same employer. Amended section 230(1) stipulates that employers must provide the applicable number of weeks’ notice of termination set out in the legislation, payment in lieu of notice, or a combination of notice and payment in lieu of notice.

New section 230(2.2) sets out the requirement for employers to provide employees whose employment is being terminated with a written statement setting out their vacation benefits, wages and severance pay, along with any other benefits and pay

arising from their employment. A similar requirement already exists with respect to group termination of employment, although new section 212.1(8) updates that requirement.

Under clauses 521 and 522 of the bill regarding an employer's giving notice of termination before the coming into force of the relevant provisions of Bill C-86, the CLC provisions regarding group and individual terminations of employment that were in place before the coming-into-force date continue to apply to the employer and affected employees.

2.5.15.1.6 Unjust Dismissal

Clauses 488 to 493 of the bill amend various unjust dismissal provisions under Division XIV of Part III of the CLC. Among other things, new section 240(1.1) prevents an employee from making an unjust dismissal complaint if that employee has already filed a complaint with respect to reprisals or genetic testing on substantially the same facts unless the latter complaint has been withdrawn.[78]

Amended section 240(3) also broadens the criteria that the minister may consider in granting an extension of the period for filing a complaint (which is within 90 days of the dismissal) to include any circumstances prescribed by regulation. Currently, the minister may only consider circumstances where the complaint was filed in a timely manner but with the wrong government official.

In addition, new sections 241(4) and 241(5) allow the inspector to whom a complaint of unjust dismissal is made to deem the complaint to be withdrawn where the employee has effectively abandoned it. Similarly, new sections 241.1(1) and 241.2(1) provide the Canada Industrial Relations Board (once it assumes responsibility for adjudicating matters under Part III of the CLC) with the power to suspend or reject an unjust dismissal complaint in specified circumstances.

2.5.15.1.7 Other Employee Protections

Clause 443 of the bill adds new sections 167.1 and 167.2 to the CLC. New section 167.1 prohibits employers from treating employees as if they were not their employees (that is to say, as if they were independent contractors), with the objective of avoiding their obligations with respect to labour standards arising under Part III of the CLC. New section 167.2 places on the employer the burden of proof to demonstrate that the individual in question is not its employee.

Clause 447 of the bill changes the title of Division II of Part III of the CLC from "Minimum Wages" to "Minimum Wage and Age of Employment." Currently, under this division, an employer may employ a person who is under 17 years of age only in an occupation specified by the regulations, and subject to the conditions fixed by the regulations for employment in that occupation. Clause 448 amends section 179 of the CLC to raise the minimum age of employment to 18. According to clause 517, the amended provision applies to persons who are 17 years old as if they were 18 years of age, provided that they are employed by an employer on the coming-into-force date of Bill C-86.

Clause 457 of the bill broadens the provision allowing for continuity of employment upon the transfer from one federally regulated employer to another of a federal work, undertaking or business (as a result of a sale, lease, merger or other arrangement). Amended section 189(1) of the CLC also allows for continuity of employment where the work, undertaking or business comes under federal jurisdiction as a result of the transfer.

New sections 189(1.1) and 189(1.2) establish that there is also continuity of employment where an employer loses a contract to another employer due to a retendering process, and the employee is then rehired by the second employer, subject to exceptions. According to clause 519 of the bill, this provision applies in circumstances where the second employer carries out the federal work, undertaking or business on or after the coming-into-force date of Bill C-86.

In addition, clause 502 adds new section 253.1 to the CLC, requiring that an employer, within the first 30 days of an employee's employment and on an ongoing basis as it is made available, provide the employee with information related to that individual's employment. This includes any materials that the minister makes available that contain information about employer and employee rights and obligations under Part III of the CLC. Employers must also post these materials in readily accessible places where they are likely to be seen by employees. According to clause 527 of the bill, employers must provide employees with a copy of the materials within 90 days of the coming into force of this provision or within 90 days of the minister making these documents available, whichever is later.

2.5.15.1.8 Technical Amendments

Bill C-86 introduces technical amendments to replace the term "medical practitioner" with "health care practitioner," thereby expanding the scope of practitioners who can provide a certificate in relation to various matters, including maternity-related reassignment and leave.

2.5.15.1.9 Coming into Force

According to clause 534 of the bill, provisions in Subdivision A of Division 15 of Part 4 of Bill C-86 come into force on different dates, generally on a day to be fixed by order of the Governor in Council, or on the later of 1 September 2019 and the date on which certain provisions from the *Budget Implementation Act, 2017, No. 2* come into force.

2.5.15.2 Subdivision B: Amendments to the *Canada Labour Code* to Allow the Minister of Labour to Designate a Head of Compliance and Enforcement

Currently, several powers, duties and functions under Part II (occupational health and safety) and Part IV (administrative monetary penalties – not yet in force[79]) of the CLC are conferred on the Minister of Labour, who may delegate any of these powers, duties and functions to any qualified person or class of persons. Part III (labour standards) of the CLC confers specific powers, duties and functions on inspectors (designated by the Minister of Labour) and regional directors.

Subdivision B of Division 15 of Part 4 of the bill amends parts II to IV of the CLC by providing a new Head of Compliance and Enforcement with the powers, duties and functions of the Minister of Labour, inspectors and regional directors. The bill adds new section 122.21 to provide for the designation of the Head by the Minister of Labour. The bill also makes related amendments to parts II to IV of the CLC to remove references to the Minister of Labour, inspectors and regional directors.

The bill adds new sections 140(1.1) and 249(1), and amends section 272 of the CLC to provide the Head with the authority to delegate to any qualified person or class of persons any of the powers the Head is authorized to perform under parts II to IV, subject to any terms and conditions specified by the Minister of Labour. Under clauses 553(1), 587(1) and 614, the Head may also make the delegation subject to any terms and conditions that the Head considers appropriate. In addition, through clauses 553(3) and 587(1), the bill adds new sections 140(4.1) and 249(1.1), respectively, which stipulate that the Head may provide a certificate of authority to any person to whom those powers, duties and functions have been delegated.

Clauses 587(6) and 587(7) further amend the CLC by adding new section 249(6) and by amending section 249(7), respectively, to provide that the Head and any person to whom powers, duties or functions have been delegated cannot be required to give testimony in any civil suit or civil proceeding. The existing liability protection under section 249(8) that applies to inspectors is amended through clause 587(8) to apply to the Head and to any person to whom powers, duties and functions have been delegated.

Related amendments to headings are also made to remove reference to the Minister of Labour (clauses 552 and 614) and to inspectors (clause 598). Clause 569 also repeals the definitions of “inspector” and “regional director” in section 166 of the CLC.

Clause 625 sets out that the amendments in Subdivision B of Division 15 of Part 4 come into force on the first day that clause 441 of the bill and section 377 of the *Budget Implementation Act, 2017, No. 1* are in force.

2.5.16 Division 16: Amendments to the *Wage Earner Protection Program Act*

The Wage Earner Protection Program (WEPP) is a federal program that provides payment of wages, commissions, vacation and severance owing to workers whose employer has gone bankrupt or become subject to receivership. Division 16 of Part 4 amends the *Wage Earner Protection Program Act* (WEPPA).[80] More specifically, the amendments:

- increase the maximum payment from four weeks to the equivalent of seven weeks’ maximum insurable earnings under the *Employment Insurance Act* (from about $3,977 to $6,960 for 2018);
- expand program eligibility to make timely payments to workers in cases of lengthy restructuring processes under the *Companies’ Creditors Arrangement Act* (CCAA) or the *Bankruptcy and Insolvency Act* (BIA);

- expand program eligibility, under certain conditions, to include individuals who worked for foreign companies operating in Canada that filed for bankruptcy or became subject to a receivership outside of Canada;
- modify the definition of “eligible wages” to ensure that workers who continue to be employed following the date of bankruptcy or receivership are eligible for payments in respect of termination and severance pay;
- strengthen provisions that allow the government to recover from insolvent employers or from third parties, such as directors, amounts paid out by WEPP;
- confirm the Minister of Labour’s authority to pay the fees and expenses of trustees and receivers, including fees related to duties performed under the WEPP and the BIA; and
- provide program recipients with review and appeal rights with respect to overpayment decisions.

Division 16 of Part 4 begins with clause 626, which amends the long title of the WEPPA to reflect that new types of insolvency events can give rise to payments under the program. The existing name is “An Act to establish a program for making payments to individuals in respect of wages owed to them by employers who are bankrupt or subject to a receivership,” and the new name is “An Act to establish a program to provide for payments to individuals in respect of wages owed to them by employers who are insolvent.”

Clause 628 amends section 4 of the WEPPA to expand eligibility for the program through amendments to the description of the program’s purpose, thus allowing for additional types of insolvency events to give rise to payments under the program and leading, in clauses 627(1) to 627(5), to changes to related definitions. Essentially, the period during which eligible wages can be earned is expanded, and the definition of “eligible wages” is amended to include a broader range of insolvency events under the BIA and the CCAA. In addition, clause 650, with references to clauses 627(1) and 627(3), provides that the definition of “eligible wages” as amended by the bill will apply to individuals whose former employer filed for bankruptcy or receivership on or after the date of Royal Assent. Moreover, clauses 629(1) and 629(2) amend section 5 to expand program eligibility to individuals who are owed eligible wages by a former employer that is the subject of foreign insolvency events.

In addition to expanding eligibility, Division 16, through amendments made in clause 631 to section 7, significantly increases the amounts that can be paid under WEPPA from four to seven weeks of eligible earnings. These amendments also set out circumstances, to be more fully prescribed by regulations, under which amounts can be reduced. In addition, clause 649, with its reference to clause 631(1), provides that section 7(1), as amended by the bill, applies to individuals whose former employer filed for bankruptcy or became subject to a receivership on or after 27 February 2018, the date of the announcement of Budget 2018.

Substantively, Division 16 also contains several amendments related to the government’s responsibility for expenses and its ability to recover amounts paid out under the program. Notably, clause 638 adds new section 22.1, which clarifies the minister’s authority to pay fees and expenses of trustees and receivers that

relate to the performance of their duties under the WEPPA or the BIA. However, clause 639, which comes into force at a later date to be fixed by order of the Governor in Council pursuant to clause 653 of the bill, replaces sections 22 and 22.1 (as modified by the bill) to add that trustees' or receivers' fees and expenses are also to be paid out by the insolvent employer, if applicable. It also adds that the minister has authority to pay any fees or expenses related to the performance of the duties of the trustees or receivers under the CCAA. In addition, amendments to section 36 contained in clauses 646 and 647 clarify the circumstances of subrogation.

The bill also contains several amendments that are administrative in nature. These amendments clarify the responsibilities to inform and provide information. Clauses 633, 634 and 635 amend sections 10, 12 and 18, respectively, and set out the duties of the minister and program adjudicators to provide trustees and receivers administering the former employers' estate or property with particular information. Clause 637(2) amends section 21(1)(d) to specify the duties of the trustees and receivers to provide the minister and workers with program information. Clause 637(4) amends section 21(4) to clarify the responsibilities to provide program information to those providing services to bankrupt or insolvent persons.

Division 16 also contains several technical amendments. Clauses 641 through 645 amend sections 31 through 34 of the WEPPA to introduce an appeal mechanism for overpayment decisions, which is to be administered by the Canada Industrial Relations Board. Section 19, which stipulates that an action of an adjudicator under the WEPPA is final and may not be reviewed, is amended by clause 636 so that it relates only to the appeal process governing eligibility decisions. Clauses 648(1) and 648(2) amend section 41 to reconcile new amendments and provide regulation-making authority.

The coming-into-force provisions are contained in clause 653 of the bill. These provisions stipulate that:

- all clauses expanding the program to include two new insolvency events that can give rise to a payment come into force on a date to be fixed by order of the Governor in Council;
- changes requiring regulations also come into force on a date to be fixed by order of the Governor in Council; and
- amendments providing an appeal mechanism of overpayment decisions administered by the Canada Industrial Relations Board come into force when related amendments contained in the *Budget Implementation Act, 2017, No. 1* (which transfers the adjudicative functions of the program to the Board) take effect. If, however, those related amendments come into force before the bill receives Royal Assent, the relevant provisions from Bill C-86 come into force on the day of Royal Assent.

Although not specified under clause 653, all other amendments come into force upon Royal Assent.

2.5.17 Division 17: Amendments to the *Bretton Woods and Related Agreements Act*, the *European Bank for Reconstruction and Development Agreement Act* and the *Official Development Assistance Accountability Act*, and Enactment of the International Financial Assistance Act

Clauses 654, 655 and 658 of Bill C-86 amend section 13 of the *Bretton Woods and Related Agreements Act*,[81] section 7 of the *European Bank for Reconstruction and Development Agreement Act*[82] and section 5 of the *Official Development Assistance Accountability Act* (ODAAA),[83] respectively, so that reports that must be tabled in Parliament under these sections have a common requirement regarding the timing of their tabling, that is, within one year after the end of each fiscal year.

Clause 656 repeals the definition of "official development assistance" under section 3 of the ODAAA; that definition does not reflect the most recent definition used for the term by the Development Assistance Committee of the Organisation for Economic Co-operation and Development (OECD). Clause 657 adds new section 3.1 to the ODAAA to allow the Governor in Council to define "official development assistance" through regulation, taking into account the most recent OECD definition.[84]

Clause 659 of Bill C-86 enacts An Act to support the delivery of international financial assistance (short title: International Financial Assistance Act [IFAA]), for which the competent minister is defined as either the Minister of Foreign Affairs or the Minister for International Development. The IFAA provides the minister with authorities to support three new programs: a sovereign loans program, an international assistance innovation program, and a program that aims to mitigate the effects of climate change through repayable contributions.

Regarding the sovereign loans program, section 3(1)(a) of the IFAA allows the minister to make loans to a foreign state or to any person or entity, subject to regulations. When a loan is made to a person or an entity, it must be guaranteed by the government of the foreign state benefiting from the loan.

Regarding the international assistance innovation program, section 4(a) of the IFAA allows the minister to guarantee, in whole or in part, any obligation undertaken by an entity, subject to regulations.

Sections 3(1)(b) to 3(1)(e) and 4(b) to 4(e) of the IFAA allow the minister, subject to regulations, to acquire, hold, surrender, realize, exchange, assign, sell or otherwise dispose of a security or security interest for the due discharge of obligations in relation to loans or guarantees made under sections 3(1)(a) and 4(a). Sections 3(1)(f) and 4(f) allow the minister to acquire, hold, assign, exchange, sell or otherwise dispose of shares within the meaning of section 90(5)(e) of the *Financial Administration Act* (FAA). Section 6 of the IFAA also allows the minister to charge fees or interest as determined under regulations for the purposes of the loans and guarantees made under sections 3(1)(a) and 4(a) and provides that the *Services Fees Act* does not apply in relation to such fees and interest.

Section 5 of the IFAA allows the minister to acquire, hold, assign, exchange, sell or otherwise dispose of shares within the meaning of section 90(5)(e) of the FAA for an

international assistance program that provides repayable contributions to support the mitigation of or adaptation to climate change.

Section 7(1) of the IFAA provides that the *Surplus Crown Assets Act* and section 61 of the FAA do not apply in relation to activities undertaken under sections 3(1)(b) to 3(1)(f), 4(b) to 4(f) and 5 of the IFAA. Section 7(2) of the IFAA authorizes the acquisition of shares for the purposes of clauses 3 to 5 of the IFAA notwithstanding section 90 of the FAA, which requires parliamentary approval for certain types of transactions, including in relation to the acquisition of shares.

Section 8 of the IFAA provides for the making of regulations in relation to clauses 3 to 6 of the IFAA by the Governor in Council, on the recommendation of the Minister of Foreign Affairs and the Minister for International Development with the concurrence of the Minister of Finance.

Lastly, clause 660 of Bill C-86 provides for the coming into force of clauses 654 to 659 on a day or days to be fixed by the Governor in Council.

2.5.18 Division 18: Enactment of the Department for Women and Gender Equality Act

Division 18 of Part 4 of Bill C-86 enacts the Department for Women and Gender Equality Act (DWGEA). The Department for Women and Gender Equality replaces the Office of the Co-ordinator, Status of Women, and is given an expanded mandate. Clause 661 of Bill C-86 contains the text of the DWGEA, which has a preamble and nine sections.

Under section 4 of the DWGEA, the powers, duties and functions of the Minister for Women and Gender Equality include all matters relating to women and gender equality under Parliament's jurisdiction that are not specifically assigned to any other federal department, board or agency. The minister is responsible for the advancement of equality with respect to sex, sexual orientation and gender identity or expression in Canada, as well as the promotion of a greater understanding of the intersection of sex and gender with other identity factors.

Sections 7 to 9 of the DWGEA provide for the transition from the Office of the Co-ordinator, Status of Women, to the Department for Women and Gender Equality. Clauses 662 to 674 of Bill C-86 make consequential amendments to other legislation.

2.5.19 Division 19: Enactment of the Addition of Lands to Reserves and Reserve Creation Act and Repeal of Part 2 of the *Manitoba Claim Settlements Implementation Act* and the *Claim Settlements (Alberta and Saskatchewan) Implementation Act*

Clause 675 of the bill, under Division 19 of Part 4, enacts An Act to facilitate the setting apart of lands as reserves for the use and benefit of First Nations and the addition of lands to reserves (short title: Addition of Lands to Reserves and Reserve Creation Act [ALRRCA]).

Essentially, the new ALRRCA provides for the expansion to the rest of Canada of the Additions to Reserve tools that currently exist in Manitoba, Saskatchewan and Alberta (under the *Manitoba Claim Settlements Implementation Act* (MCSIA) and the *Claim Settlements (Alberta and Saskatchewan) Implementation Act* (CSASIA)).

Section 2 of the ALRRCA sets out the definitions applicable to the Act ("band," "First Nation," "governing body," "interest," "Minister," "reserve" and "right"). The term "governing body" means, for a First Nation that is a band, the "council of the band" as defined in the *Indian Act*, or for a First Nation that is a party to a self-government agreement, the council, government or other entity that acts on its behalf.

Section 3 provides that the Governor in Council may designate any minister as the minister for the purposes of the ALRRCA.

Section 4(1) authorizes the minister, by order and at the request of a First Nation governing body, to set land aside for addition to a reserve and creation of reserves. This contrasts with the current practice outside Manitoba, Saskatchewan and Alberta, whereby such land is set aside through an order in council. Through section 8, the ALRRCA also provides that voluntary land exchange (exchanging certain lands in the First Nation's reserve for lands that are to be set apart as a reserve) is to be approved by ministerial order, under certain conditions.

Section 5(1) provides for the designation of an interest or a right in the land by a First Nation governing body. Section 6(1) provides for the issuance of permits by the minister for a person or entity to occupy or use or reside on lands to be set apart as reserves or to exercise rights on them. The consent of the First Nation governing body is required for permits exceeding one year. Section 7(1) sets out a process under which the minister may authorize a transfer or grant of any of the lands being set apart, subject to the consent of the First Nation governing body. Permits, authorizations and designations may be issued or made either before title to the land is transferred to Canada or before the lands are to be set apart as reserves. Sections 5(5), 6(3) and 7(2) specify that designations are subject to the *Indian Act*, and that permits and authorizations are deemed to have been issued or made under the *Indian Act*.

Section 4(2) provides for the protection of third-party rights and interests in the land to be set apart under certain circumstances, such as where the third party is granted a right or interest by way of a designation or permit in accordance with the ALRRCA.

Finally, clauses 676 to 678 of Bill C-86 provide transitional provisions under the ALRRCA, the MCSIA and the CSASIA. Clauses 679 to 683 make consequential amendments to the *Saskatchewan Treaty Land Entitlement Act* and to the MCSIA. Clause 684 of the bill repeals the entirety of the CSASIA. Under clause 685, the new ALRRCA comes into force on a day to be fixed by order of the Governor in Council.

2.5.20 Division 20: Amendments to the *Criminal Code*

The *Budget Implementation Act, 2018, No. 1* created a new diversionary process: the remediation agreement – also known as a "deferred prosecution agreement" – for organizations accused of economic offences under the *Criminal Code*. These new provisions in Part XXII.1 of the Code came into force in September 2018. The amendments made by Bill C-86 to this new regime concern only the publication of remediation agreements.

A remediation agreement is an agreement between a company and the prosecutor in which criminal charges are suspended for the duration of the agreement. If the organization complies with the terms of the remediation agreement, the charges are dropped and no other prosecution may be initiated against it for the same criminal offence.

Deferred prosecution agreements were introduced in the United States in the 1990s, and their numbers increased considerably with the financial scandals of the 2000s, particularly after the loss of 75,000 jobs in the wake of the Enron affair.

In Canada, during a federal government consultation in the fall of 2017, opponents of this new diversion regime said they fear that remediation agreements could be perceived as a way of favouring large companies and would undermine public confidence (the "too big to jail" argument).[85] Others pointed out that the new regime would alter the primary role of the prosecutor, which is to bring criminal cases to trial, especially where remediation agreements provide for corrective corporate measures such as the appointment of a monitor (the "prosecutors in the boardroom" argument).

It was also intended that the penalty negotiated under the agreement would serve as a deterrent, in order to prevent remediation agreements from becoming a "cost of doing business." Regarding the issue of the role of the courts, the Canadian legislation draws mainly from the United Kingdom model, where deferred prosecution agreements and their terms must be approved by a judge before taking effect.[86]

For the purposes of transparency and general deterrence, the *Budget Implementation Act, 2018, No. 1* provided that the court must in most cases publish the text of the remediation agreement (section 715.42(1) of the Code).

However, the Code also provides that the court may decide not to publish the remediation agreement, in whole or in part, if it is satisfied that the non-publication is necessary for the "proper administration of justice"[87] (section 715.42(2)). Bill C-86 retains this criterion to justify the non-publication of a remediation agreement. However, it adds three factors to govern the publication of a remediation agreement:

- New section 715.42(4) of the Code gives the court discretion to subject a remediation agreement non-publication order to a condition limiting its duration.[88]
- New section 715.42(5) allows any person to apply to the court to have the initial remediation agreement non-publication decision reviewed.
- New section 715.42(1)(c) provides that the court's decision on the above application for review must be published in all cases.

2.5.21 Division 21: Enactment of the Poverty Reduction Act

Clause 687 of Bill C-86 enacts An Act respecting the reduction of poverty, establishing the two poverty reduction targets to which the government aspires:

- 20% below the 2015 level of poverty by 2020; and
- 50% below the 2015 level of poverty by 2030.

It also provides the Act's short title, the Poverty Reduction Act.

The title of Division 21 – "Poverty Reduction Measures, Phase 1" – indicates that this is the first phase of the Government of Canada's measures for reducing poverty. The Poverty Reduction Strategy, released in September 2018, proposed the introduction of a Poverty Reduction Act to "entrench" three elements of the strategy:

- the targets for poverty reduction;
- the Official Poverty Line; and
- the National Advisory Council on Poverty.[89]

The two provisions in clause 687 are included in Bill C-87, also called the Poverty Reduction Act, which was introduced in the House of Commons on 6 November 2018. That bill includes the other elements mentioned above, as well.[90]

2.5.22 Division 22: Amendments to the *Canada Shipping Act, 2001*

Transport Canada describes the *Canada Shipping Act, 2001* (CSA, 2001)[91] as "the principal legislation governing safety of marine transportation and recreational boating, as well as protection of the marine environment."[92] The legislation applies to all Canadian vessels and to foreign vessels operating in Canadian waters (i.e., from canoes to tankers and cruise ships).

Bill C-86 amends a number of provisions of the CSA, 2001. Among other things, it gives new powers to the Minister of Transport, allowing the making of temporary regulations by interim order when there is a direct or indirect risk to marine safety or to the marine environment. It also gives Fisheries and Oceans Canada's pollution response officers powers to enter private property and take action with respect to structures or vessels that are currently discharging oil or are at risk of doing so, and it creates additional regulatory authority to protect the marine environment.

Clause 688 expands the application of portions of the CSA, 2001 to Canadian vessels everywhere and to foreign vessels and pleasure craft in Canadian waters or within Canada's exclusive economic zone, subject to some restrictions.

Clause 689(1) expands the Minister of Transport's authority to enter into agreements respecting the administration and enforcement of the Act with organizations to include provincial, municipal and Indigenous authorities. These authorities may exercise the powers or perform the duties under the Act that are specified in any agreement that is concluded.

Clause 689(2) creates for research vessels a ministerial exemption from marine safety or environmental requirements for a period of up to three years. Exempted research and development vessels must enhance marine safety or environmental protection and are subject to any conditions the minister deems appropriate.

Clause 690 gives the Minister of Transport the new power to make interim orders with respect to any regulation-making power contained in the Act. This power may only be used if "immediate action is required to deal with a direct or indirect risk to marine safety or to the marine environment." An interim order is valid for up to one year; it can be extended for up to two years by order of the Governor in Council.

Interim orders are exempt from the *Statutory Instruments Act*, but must be published in the *Canada Gazette* within 23 days of being made and must be tabled in both houses of Parliament within 15 days of being made. They must be made available on the Department of Transport's website.

Clause 692 authorizes the Governor in Council, on the recommendation of the Minister of Transport, to make regulations with respect to the protection of the marine environment. Regulations may be made with respect to, among other things, vessel construction and design requirements, compulsory routing of vessels and the testing and inspection of vessels, their machinery, equipment and supplies.

Under clause 693, the contravention of an interim order or a regulation constitutes an offence that carries a maximum penalty of $1 million or 18 months' imprisonment or both.

Clauses 698 to 707 clarify the language used in the CSA, 2001 with respect to oil pollution incidents. Notably, the bill allows the Minister of Transport to act with respect to oil pollution incidents that may occur, rather than only with respect to oil pollution incidents that have already occurred.

Clauses 700 through 705 authorize pollution response officers designated by the Minister of Fisheries and Oceans to respond to an oil pollution incident. Amendments allow officers to enter property that is not a dwelling and take any necessary actions to respond to such an incident. Pollution response officers also benefit from immunity from civil liability in responding to any oil pollution incident.

Clauses 708 and 709 authorize the use of compliance agreements with respect to pollution prevention and response, while increasing from $25,000 to $250,000 per infraction the maximum penalty for violations that may be proceeded with by the issuance of notices of violation.

2.5.23 Division 23: Amendments to the *Marine Liability Act*

Transport Canada describes the *Marine Liability Act* (MLA)[93] as "a comprehensive Act dealing with the liability of marine operators in relation to passengers and other third parties, cargo, pollution and property damage."[94] Bill C-86 amends a number of provisions of the MLA; for example, it removes the existing per-incident limit of liability in the case of an oil spill. Other amendments aim to bring the Act back into alignment with the oil pollution conventions Canada has signed, while also better reflecting how oil pollution responses are undertaken.

Clauses 713 through 716 provide clarification that the owner of a ship is liable only for the costs incurred by the Minister of Fisheries and Oceans or any other person in response to an oil spill if the occurrence causes oil pollution damage or poses a grave and imminent threat of causing such damage. This is consistent with Canada's obligations under the *1992 Civil Liability Convention*. In addition to persistent oil spills, non-persistent oil spills not covered by an international convention are also added to the types of occurrences to which these amendments apply. Additionally, definitions for "receiver" and "significant incident" are added to the MLA.

Clause 718 authorizes the Minister of Finance to allow payments out of the Consolidated Revenue Fund if the Ship-source Oil Pollution Fund (SOPF) is insufficient to cover the costs related to an oil pollution event. The Minister of Finance may specify any terms that the minister considers appropriate for the transfer.

Clause 719 creates a conflict-of-interest reporting requirement for the Administrator and Deputy Administrator of the SOPF.

Clauses 721 to 723 specify that the SOPF is liable for the compensation of all losses, damages and expenses resulting from an occurrence of oil pollution, including economic losses resulting directly or indirectly from the oil pollution damage. Claims may be filed directly with the Administrator of the SOPF by any person that has suffered a loss resulting from an oil pollution event.

Clauses 723(2) and 723(3) stipulate that claims made to the SOPF must be made within two years of the date of oil pollution damage or within five years of the date of the event that caused the damage if there is no oil pollution damage or there are multiple oil pollution events linked to the same oil spill.

Clauses 725 and 726 create an expedited process for small claims. This process may be used for claims of up to $35,000 or up to $50,000 for a significant incident. A "significant incident" is defined in clause 716 as "a discharge of oil that, due to its severity, size or location and to its impact – actual or potential – on the environment, requires extraordinary resources to respond to it."

Clause 727 gives the Minister of Fisheries and Oceans the authority to request a funds advance of up to $50 million per fiscal year from the SOPF, subject to approvals by the Governor in Council, Minister of Transport and SOPF Administrator, when faced with a significant oil spill.

Clause 728 adds definitions of "contributing oil" and "non-persistent oil" to the MLA, aligning domestic legislation with Canada's international agreements.

Clauses 729 to 743 create a new requirement for both importers and exporters of persistent and non-persistent oil products to pay levies into the SOPF indefinitely or as specified by the Minister of Fisheries and Oceans. An additional levy may be implemented if the SOPF is required to borrow money from the Consolidated Revenue Fund. The SOPF Administrator and Deputy Administrator are given the power to order the provision of information to calculate these levies.

Clause 744 creates administrative monetary penalties of up to $50,000 for an individual and $250,000 for “any other person,” for each violation of the MLA (new section 130.01(2)). A procedure for the review and amendment of notices of violation is included in the clause, in addition to provision for a public record of violations.

The Minister of Transport may enter into an assurance of compliance agreement with an alleged offender as an alternative to issuing an administrative monetary penalty or prosecution (new section 130.02(1)(a)). Under clause 745(1), offences under the Act may also be prosecuted, with fines having been increased from a maximum of $100,000 to a maximum of $250,000.

Clause 746 includes a number of coordinating amendments with respect to portions of the *Safeguarding Canada’s Seas and Skies Act*, passed in 2014, that are not yet in force. These amendments will align the MLA with the *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996*, to which Canada is a signatory.

Clause 747 states that clauses 713 to 730, 731(1), 732, 733, 734(1), 735(1), 735(3), 736 to 742, 743(1), 744(1), 745(1) and 746 will come into force on a day to be fixed by order of the Governor in Council.

NOTES

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• Clare Annett	Section 2.5.9
• Andrew Barton	Sections 2.1.6, 2.3.4 and 2.5.4
• Isabelle Brideau	Sections 2.5.15.2 and 2.5.19
• Elizabeth Cahill	Section 2.5.16
• Brett Capwell	Sections 2.1.11, 2.1.14, 2.1.15, 2.1.16, 2.1.17, 2.3.5, 2.4.2, 2.4.3 and 2.5.6
• Brittany Collier	Section 2.5.11
• Xavier Deschênes-Philion	Section 2.5.5
• Havi Echenberg	Section 2.5.21
• Sylvain Fleury	Sections 2.1.3, 2.1.4, 2.1.5, 2.3.1, 2.3.2, 2.3.3 and 2.4.1
• Sylvain Fleury and Nicole Sweeney	Section 2.1.13
• Sara Fryer	Section 2.5.12
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- Michaël Lambert-Racine — Sections 2.1.19, 2.4.5, 2.5.2 and 2.5.17
- Dominique Montpetit — Section 2.5.18
- Mayra Perez-Leclerc — Sections 2.5.8 and 2.5.15.1
- Shaowei Pu — Sections 2.1.8, 2.1.9, 2.1.10
- Zackery Shaver — Sections 2.5.22 and 2.5.23
- Brett Stuckey — Sections 2.5.3 and 2.5.10
- Marlisa Tiedemann — Section 2.5.14
- Dominique Valiquet — Section 2.5.20
- Adriane Yong — Sections 2.1.1, 2.1.2, 2.1.7, 2.1.12, 2.1.18, 2.2, 2.3.6 and 2.4.4

1. Bill C-86, A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures, 1st Session, 42nd Parliament (S.C. 2018, c. 27).
2. *Income Tax Act* [ITA], R.S.C. 1985, c. 1 (5th Supp.).
3. *Income Tax Regulations*, C.R.C., c. 945.
4. ITA, s. 95(1).
5. Ibid.
6. Department of Finance Canada, *Equality + Growth: A Strong Middle Class*, Budget 2018, 27 February 2018, p. 70.
7. ITA, s. 96(2.2).
8. *Canada v. Green*, 2017 FCA 107 (CanLII).
9. Bill C-74, An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures, 1st Session, 42nd Parliament (*Budget Implementation Act, 2018, No. 1*, S.C. 2018, c. 12).
10. Maurice C. Cullity, "Charity and Politics in Canada – A Legal Analysis," *The Philanthropist*, Vol. 25, No. 4, 26 February 2014. Note that the ITA further categorizes charitable foundations as either private foundations or public foundations.
11. *McGovern v. A.G.*, [1982] 3 All E.R. 439, discussed in Government of Canada, "Guidelines for registering a charity: Meeting the public benefit test," *Policy statement*, Reference number CPS-024, 10 March 2006.
12. Adam Parachin, "Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purposes," *Alberta Law Review*, Vol. 45, No. 4, 2008, p. 871.
13. Donald J. Bourgeois, *The Law of Charitable and Not-for-Profit Organizations*, 4th ed., Butterworths, 2012, p. 428.
14. Consultation Panel on the Political Activities of Charities, "B. Current Legislative and Administrative Framework," *Report of the Consultation Panel on the Political Activities of Charities*, 31 March 2017.
15. Ibid.
16. Prime Minister of Canada, *Minister of National Revenue Mandate Letter*, 12 November 2015.

17. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
18. *Canada Without Poverty v. AG Canada*, 2018 ONSC 4147 (CanLII).
19. See discussion in Cullity (2014). See also Senate, Special Committee on the Charitable Sector, *Evidence*, 1st Session, 42nd Parliament, 5 November 2018 (Adam Parachin, Associate Professor, Osgoode Hall Law School, York University, as an individual).
20. *Mutual Legal Assistance in Criminal Matters Act*, R.S.C. 1985, c. 30 (4th Supp.).
21. Retraite Québec, *Changes to the Québec Pension Plan*, accessed 2 November 2018.
22. The amendments to the *Canada Pension Plan* and the *Canada Pension Plan Investment Board Act* came into force on 3 March 2017. The amendments to the ITA will come into force on 1 January 2019. See *An Act to amend the Canada Pension Plan, the Canada Pension Plan Investment Board Act and the Income Tax Act*, S.C. 2016, c. 14.
23. *Criminal Code*, R.S.C. 1985, c. C-46.
24. *Excise Tax Act*, R.S.C. 1985, c. E-15.
25. *Financial Services and Financial Institutions (GST/HST) Regulations*, SOR/91-26.
26. *Selected Listed Financial Institutions Attribution Method (GST/HST) Regulations*, SOR/2001-171.
27. *Excise Act, 2001*, S.C. 2002, c. 22.
28. *Air Travellers Security Charge Act*, S.C. 2002, c. 9, s. 5.
29. *Customs Tariff*, S.C. 1997, c. 36.
30. For example, some of the repealed tariff items are redundant, including duty-free tariff items that apply to product categories that are part of broader product categories to which other duty-free tariff items apply.
31. *Canada Pension Plan*, R.S.C. 1985, c. C-8.
32. *Trust and Loan Companies Act*, S.C. 1991, c. 45.
33. *Bank Act*, S.C. 1991, c. 46.
34. *Insurance Companies Act*, S.C. 1991, c. 47.
35. Canadian Business Growth Fund, "Mission Statement," *Learn about*.
36. *Canada Deposit Insurance Corporation Act*, R.S.C. 1985, c. C-3.
37. *Financial System Review Act*, S.C. 2012, c. 5.
38. *Office of the Superintendent of Financial Institutions Act*, R.S.C. 1985, c. 18 (3rd Supp.), Part I.
39. *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17.
40. *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*, S.C. 1987, c. 3.
41. *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186.
42. Newfoundland and Labrador's greenhouse gas pricing regime exists under the province's *Management of Greenhouse Gas Act*, S.N.L. 2016, c. M-1.001.
43. *Offshore Health and Safety Act*, S.C. 2014, c. 13.

44. "Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC," *Official Journal of the European Union*, Document L 141/73 (EUR-Lex Document 32015L0849).

45. *Canada Business Corporations Act*, R.S.C. 1985, c. C-44.

46. Department of Finance Canada, *Agreement to Strengthen Beneficial Ownership Transparency*.

47. Innovation, Science and Economic Development Canada, "Government of Canada launches Intellectual Property Strategy," News release, 26 April 2018.

48. Ibid.

49. *Patent Act*, R.S.C. 1985, c. P-4.

50. *Trade-marks Act*, R.S.C. 1985, c. T-13.

51. *Economic Action Plan 2014 Act, No. 1*, S.C. 2014, c. 20.

52. *Combating Counterfeit Products Act*, S.C. 2014, c. 32.

53. *Copyright Act*, R.S.C. 1985, c. C-42.

54. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

55. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

56. *Access to Information Act*, R.S.C. 1985, c. A-1.

57. *Privacy Act*, R.S.C. 1985, c. P-21.

58. *Pest Control Products Act*, S.C. 2002, c. 28.

59. *National Research Council Act*, R.S.C. 1985, c. N-15.

60. *Employment Insurance Act*, S.C. 1996, c. 23.

61. Department of Finance Canada (2018), pp. 45–49. See also Department of Finance Canada, "Canada's New Parental Sharing Benefit," Backgrounder.

62. *Canada Labour Code*, R.S.C. 1985, c. L-2.

63. *Financial Administration Act*, R.S.C. 1985, c. F-11, Schedule VI. Departments listed in Part I of Schedule VI of the *Financial Administration Act* are the following: Department of Agriculture and Agri-Food; Department of Canadian Heritage; Department of Citizenship and Immigration; Department of Employment and Social Development; Department of the Environment; Department of Finance; Department of Fisheries and Oceans; Department of Foreign Affairs, Trade and Development; Department of Health; Department of Indian Affairs and Northern Development; Department of Industry; Department of Justice; Department of National Defence; Department of Natural Resources; Department of Public Safety and Emergency Preparedness; Department of Public Works and Government Services; Department of Transport; Department of Veterans Affairs; and Department of Western Economic Diversification.

64. Financial Consumer Agency of Canada [FCAC], *Domestic Bank Retail Sales Practices Review*, 20 March 2018.

65. FCAC, *Report on Best Practices in Financial Consumer Protection*, 31 May 2017.

66. "Consumer provision" is any provision referred to in paragraph (a) or (a.1) of the definition of consumer provision in section 2 of the *Financial Consumer Agency of Canada Act*, S.C. 2001, c. 9.

67. Clause 57.3 of the *Framework Agreement on First Nation Land Management* stipulates that after 1 September 2003, amendments require the consent of Canada and two-thirds of the First Nations that have ratified the framework agreement before, on or after that day. See the *Framework Agreement on First Nation Land Management*, found on the First Nations Land Management Resource Centre website.

68. *First Nations Land Management Act* [FNLMA], S.C. 1999, c. 24.

69. The First Nations land management regime permits First Nations to opt out of 32 sections of the *Indian Act* pertaining to land management. According to section 6 of the FNLMA, a First Nation that wishes to establish a land management regime shall adopt a land code which must include, among other matters, the general rules and procedures applicable to the use and occupancy of First Nations land.

70. The appointment of a verifier is described in section 8 of the FNLMA:

> 8(1) The Minister and a First Nation shall jointly appoint a verifier, to be chosen from a list established in accordance with the Framework Agreement, who shall
>
> (a) determine whether a proposed land code and the proposed process for the approval of the land code and an individual agreement are in accordance with the Framework Agreement and this Act and, if they are in accordance, confirm them;
>
> (b) determine whether the conduct of a community approval process is in accordance with the process confirmed under paragraph (a); and
>
> (c) certify the validity of a land code that has been approved in accordance with the Framework Agreement and this Act.
>
> 8(2) The verifier shall determine any dispute arising between a First Nation and the Minister before a land code comes into force regarding the terms of the transfer of administration of land or the exclusion of a portion of a reserve from the application of a land code.

71. Indian moneys are "all moneys collected, received or held in trust by INAC [Indigenous and Northern Affairs Canada] for the use and benefit of First Nations and First Nations peoples." See Indigenous and Northern Affairs Canada, *Indian moneys*.

72. *First Nations Fiscal Management Act*, S.C. 2005, c. 9.

73. *Export and Import Permits Act*, R.S.C. 1985, c. E-19.

74. To facilitate actions taken pursuant to certain sections of the *Customs Tariff* that address customs duties, tariff rate quotas, surtaxes and specific special measures, section 5(6) of the *Export and Import Permits Act* allows the Governor in Council to control imports of any good or to collect information regarding those imports by issuing an order to include those goods on the *Import Control List*.

75. House of Commons, Special Committee on Pay Equity, *It's Time to Act*, First Report, 1st Session, 42nd Parliament, June 2016.

76. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

77. *Parliamentary Employment and Staff Relations Act*, R.S.C. 1985, c. 33 (2nd Supp.).

78. Clauses 496 and 506 add similar provisions for complaints brought in relation to genetic testing and reprisal matters.

79. Part IV (administrative monetary penalties) of the *Canada Labour Code* (CLC) was introduced in Bill C-44, An Act to implement certain provisions of the budget tabled in Parliament on March 22, 2017 and other measures. Clause 377 of that bill created new sections 268 to 295, which establish a system of administrative monetary penalties for contraventions of certain provisions of the CLC, of directions issued under the CLC, or of orders or classes of orders made or issued under the CLC. The new sections under Part IV are not yet in force.

80. *Wage Earner Protection Program Act*, S.C. 2005, c. 47, s. 1.

81. *Bretton Woods and Related Agreements Act*, R.S.C. 1985, c. B-7.

82. *European Bank for Reconstruction and Development Agreement Act*, S.C. 1991, c. 12.

83. *Official Development Assistance Accountability Act*, S.C. 2008, c. 17.

84. House of Commons, Standing Committee on Finance, *Twenty-sixth Report*, 1st Session, 42nd Parliament, 22 November 2018.

85. Government of Canada, "What we heard on a possible Canadian deferred prosecution agreement regime," *Expanding Canada's toolkit to address corporate wrongdoing: What we heard*, 22 February 2018.

86. United Kingdom, *Crime and Courts Act 2013*, c. 22, Schedule 17, "Deferred prosecution agreements." In the United States, no formal role was granted to the courts, for fear of slowing the system and creating uncertainty about the validity of deferred prosecution agreements.

87. The factors that the court is to consider are listed in section 715.42(3) of the *Criminal Code*.

88. The current legislation does not prevent the court from imposing such a time limit.

89. Employment and Social Development Canada, *Opportunity for All: Canada's First Poverty Reduction Strategy*, 2018, p. 53.

90. Bill C-87, An Act respecting the reduction of poverty, 1st Session, 42nd Parliament.

91. *Canada Shipping Act, 2001*, S.C. 2001, c. 26.

92. Government of Canada, *Canada Shipping Act (CSA) 2001*.

93 *Maritime Liability Act*, S.C. 2001, c. 6.

94. "Regulatory Impact Analysis Statement," *Regulations Amending Schedule 1 to the* Marine Liability Act, SOR/2015-98, 1 May 2015, in *Canada Gazette*, Part II, Vol. 149, No. 10, 20 May 2015, p. 1327.

APPENDIX – ACRONYMS AND INITIALISMS

Title	Acronym or Initialism
Addition of Lands to Reserves and Reserve Creation Act	ALRRCA
Bankruptcy and Insolvency Act	BIA
Canada Business Corporations Act	CBCA
Canada Child Benefit	CCB
Canada Deposit Insurance Corporation	CDIC
Canada Deposit Insurance Corporation Act	CDICA
Canada Labour Code	CLC
Canada–Newfoundland and Labrador Atlantic Accord Implementation Act	C–NLAAIA
Canada Pension Plan (Italicized when referring to the Act)	CPP
Canada Revenue Agency	CRA
Canada Shipping Act, 2001	CSA, 2001
Canada Workers Benefit	CWB
Canadian-controlled private corporation	CCPC
Canadian Gender Budgeting Act	CGBA
Canadian Human Rights Act	CHRA
Claim Settlements (Alberta and Saskatchewan) Implementation Act	CSASIA
College of Patent Agents and Trade-mark Agents Act	CPATAA
Combating Counterfeit Products Act	CCPA
Companies' Creditors Arrangement Act	CCAA
Convention on Mutual Administrative Assistance in Tax Matters	CMAATM
Criminal Code	Code
Department for Women and Gender Equality Act	DWGEA
Economic Action Plan 2014 Act, No. 1	EAP 2014, No. 1
Employment Insurance Act	EIA
Excise Tax Act	ETA
Financial Administration Act	FAA
Financial Consumer Agency of Canada	FCAC
Financial Consumer Agency of Canada Act	FCACA
First Nations Financial Management Board	FNFMB
First Nations Fiscal Management Act	FNFMA
First Nations Land Management Act	FNLMA
Goods and Services Tax/Harmonized Sales Tax	GST/HST
Greenhouse Gas Pollution Pricing Act	GGPPA
Income Tax Act	ITA
Income Tax Regulations	ITR
Insurance Companies Act	ICA
intellectual property	IP

Title	Acronym or Initialism
International Financial Assistance Act	IFAA
Manitoba Claim Settlements Implementation Act	MCSIA
Marine Liability Act	MLA
Mutual Legal Assistance in Criminal Matters Act	MLACMA
National Research Council Act	NRCA
National Research Council Canada	NRC
Official Development Assistance Accountability Act	ODAAA
Organisation for Economic Co-operation and Development	OECD
paid-up capital	PUC
Parliamentary Employment and Staff Relations Act	PESRA
Pay Equity Act	PEA
Proceeds of Crime (Money Laundering) and Terrorist Financing Act	PCMLTFA
Québec Pension Plan	QPP
refundable dividend tax on hand	RDTOH
selected listed financial institution	SLFI
Selected Listed Financial Institutions Attribution Method (GST/HST) Regulations	SLFI Regulations
Ship-source Oil Pollution Fund	SOPF
Trust and Loan Companies Act	TLCA
Wage Earner Protection Program	WEPP
Wage Earner Protection Program Act	WEPPA