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ADVANCED CORPORATE AND M&A PRACTICE

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This publication provides a broad array of in-depth tools to address all matters needed by the practitioners of corporate and M&A law. It begins its coverage of corporate legal issues with the initial stages of starting a corporate or non-corporate organization, including shareholder rights and remedies, corporate governance, director liabilities, debt and equity financing to the ongoing challenges of a business such as fundamental changes, restructurings, audits and shareholder meetings, corporate records and mergers and acquisitions.

This release features updates to the commentary in Chapter 82 (Negotiation of Assets or Share Purchase Agreements) and the addition of a new Chapter 82A (Indemnities, Representations, Warranties and Disclosure Schedules in Purchase Agreements).

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Highlights

Mergers and Acquisitions – Negotiation of Assets or Share Purchase Agreements – Purchase Agreement - Purchase Price – Working Capital Adjustments – Defining Closing Working Capital – Accrued taxes should be included in the calculation of current liabilities. However, deferred tax liabilities should be expressly excluded from the definition of “current liabilities” because they do not represent certain and quantifiable tax liabilities. Deferred tax liabilities reflect a notional liability – characterized by differences between the timing of income and expense items (such as depreciation of capital assets) for accounting and Canadian income tax purposes. Current liabilities should include tax credits claimed by the target corporation in the tax year ending before closing that are added in the corporation’s income in its first post-closing tax year at the corporate tax rate payable by the corporation post-closing. In 2024, the general corporation tax rate in Ontario (after factoring into account the provincial abatement, general federal corporate tax rate reduction and Ontario basic corporate tax rate) is 26.5%. To the extent that the corporation is entitled to the small-business deduction on the first \$500,000 of its annual active business income in Canada, the effective combined federal and Ontario rate in 2024 is 11.2%. These tax rates differ in other jurisdictions.

Mergers and Acquisitions – Indemnities, Representations, Warranties and Disclosure Schedules in Purchase Agreements – Representations and Warranties – Typical Vendor R&W – In a share purchase transaction, the purchaser wants the vendor to warrant the accuracy of certain cost amounts that can affect the future or post-closing tax liability of the target corporation (such as the adjusted cost base of capital property, undepreciated capital cost of depreciable property and the amounts and timing of the target’s non-capital loss carryforwards). Even where the vendor does not give specific R&W as to the target corporation’s cost amounts, the purchaser may still receive the same protection from the more general R&W that the target corporation’s tax returns were correctly prepared: *Boliden Minerals AB v. FQM Kevista Sweden Holdings AB*, 2023 ONCA 105, 2023 CarswellOnt 1853 (C.A.), affirming 2021 ONSC 6844, 2021 CarswellOnt 15229 (S.C.J. [Commercial List]).