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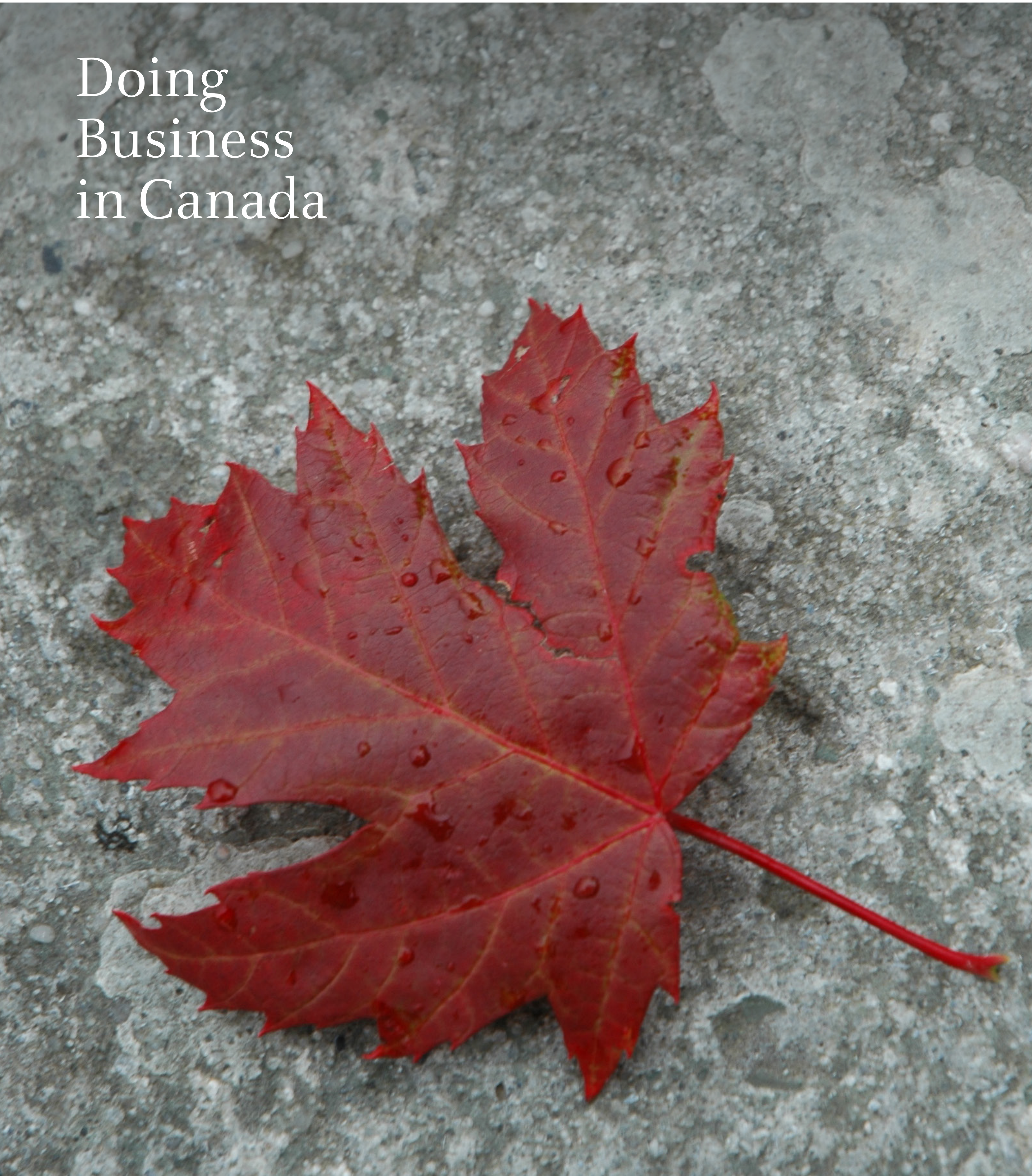
Osler, Hoskin & Harcourt LLP

Doing Business in Canada



Doing Business in Canada

Osler first produced *Doing Business in Canada* in 1997 and this guide continues to be one of our most popular and respected publications. Laws change and evolve and to ensure the information is current, we review the guide regularly.

Foreword

Canada is an excellent country in which to do business. With stable, independent governments and courts, strategic investments in terms of education, training and literacy, an innovative R & D environment and a technology-driven workforce; Canada welcomes business owners and those with entrepreneurial interests by providing a wide-range of opportunities for companies requiring skilled employees.

Canada has a diversified economy and has experienced economic growth in recent years. From 2008 to 2012, Canada led the G-7 with an average real GDP growth rate of 1.2%, and is expected to remain among the top G-7 performers through 2017. During the 2008 economic crisis, Canada's banks were internationally admired and fared better during the global economic turmoil due in part to the government's solid approach to risk and regulatory management within the financial system. Canada is a multilingual country with over 200 languages reported and is officially bilingual (English and French).

Since our last edition of the Doing Business in Canada guide in 2011, many changes have taken place from a business law perspective. Canada enacted what may be the most comprehensive spam law in the world; there has been increased recognition of the significance of Aboriginal interests particularly in matters impacting on resource development among Aboriginal groups and Canadian society as a whole regarding Aboriginal rights and the need to respect them; and Saskatchewan and New Brunswick agreed to join the federal government, Ontario and British Columbia in the Cooperative Capital Markets Regulatory System (CCMR), in a significant move toward a more uniform securities regulatory structure. The guide is designed to give business executives, counsel and potential investors from foreign countries a concise overview of Canada's legal and economic framework and key business legislation.

Each chapter aims to provide an overview of a particular subject and the relevant laws most likely to impact your business decisions. Beginning with an introduction to Canada's government and legal systems, the guide includes an introduction to Canada's tax system, competition law in Canada, foreign investment considerations, executive transfers and business visits and employment and labour law, to name a few topics. With this latest edition we have included the addition of two chapters, Aboriginal Law and Regulatory and Risk Management, to reflect the growing importance of these areas.

What this guide does not provide is a full analysis of the law. This guide provides general information only and does not constitute legal or other professional advice or an opinion of Osler, Hoskin & Harcourt LLP or any member of the firm on the points of law discussed herein. Each of the chapters has been authored (co-authored) by a subject matter expert in that specific area. We invite you to contact the contributing author(s) of this publication or any other firm members in our five offices to discuss the legal issues outlined in this publication or other questions you have about Canadian business law matters.
We look forward to talking with you.

– Clay Horner

We are involved in many of the leading matters in the country and appreciate the opportunity to assist businesses from other countries in assessing the opportunities for growth in Canada.

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An Introduction to Canada's Government and Legal System

By Laura Fric & Larry Lowenstein

Canada has invested strategically in terms of education, training and literacy and welcomes business owners and those with entrepreneurial interests by providing a wide-range of opportunities. With its stable, independent governments and courts, an efficient border system, skilled workers and a high standard of living, Canada is an excellent country in which to do business. To help you better understand and plan a course of action for doing business in Canada, here is an introduction to Canada's government and legal structure; from the Constitution, to the *Canadian Charter of Rights and Freedoms*, to the country's governing and legal systems.

Canada's Constitution

The Constitution of Canada is the supreme law of the country and is based on the principles of "peace, order and good government." It sets out the basic doctrine of a democratic government and defines the three branches of government: executive, legislative and judicial. The Constitution also divides law-making power and responsibility between the federal and provincial levels of government.

Charter of Rights and Freedoms

The *Canadian Charter of Rights and Freedoms (Charter)*, under which several important legal decisions have been rendered since 1982, is also contained in the Constitution. Unlike the U.S. *Bill of Rights*, the *Charter* has only very limited application to the regulation of economic rights.

Levels of Government

Canada has an elected, parliamentary system of government, divided among a federal government, 10 provincial governments and three territorial governments. At the federal level, Canadian citizens elect the prime minister and at the provincial and territorial levels, the premier.

Legislative authority and the ability to make laws are divided between various levels of government, including the Parliament of Canada, the legislatures of Canada's provinces and territories, and various local governments or municipalities.

When establishing or acquiring a business in Canada, business owners and investors must be aware of the federal laws as well as those of provinces or territories where the business will be conducted. The federal government is responsible for areas such as foreign affairs and international trade, defence, the monetary system, criminal law, patents, bankruptcy/insolvency and certain "national" sectors, such as financial services and telecommunications. The provinces are responsible for education, health care, municipal affairs and national resources along with other specified areas.

In addition, unique arrangements have been developed for Aboriginal peoples in various regions of the country. For example, Aboriginal groups may have a range of rights and powers over certain lands under the *Indian Act* and pursuant to historic and treaty rights. (For more information, see Chapter 18, Aboriginal Law in Canada.)

Laws can also vary by province, such as Bill 101 (or the Charter of the French Language as it's also known), in Québec, the only province in Canada where French is the sole official language.

Two Systems of Laws

While Canada is quite similar to many western democracies, it is also unique with the existence of two systems of law. The criminal law system governs the whole country and the civil law system governs most jurisdictions in Canada, both are based on the English precedent-based system of common law. The civil law system, in the province of Québec only, is based on the French *Code Napoléon*. Foreign companies and investors interested in doing business in Canada nationally should ensure that their Canadian legal advisors are well versed in both systems.

Canadian Courts

Historically, Canada tended to attach more importance to British then to American precedent but in recent years; American case law has become increasingly influential with Canadian courts and legislators, particularly with respect to commercial matters. Business owners are most likely to meet in courts regarding commercial matters.

Canada's judiciary is completely independent from other branches of government and all government action is subject to judicial scrutiny. Canadian judges are fair and well-respected.

Should a company find themselves facing legal action, they will deal with court proceedings in the federal courts or in the superior courts of the provinces (which are also presided over by federally appointed judges). Canada generally has a "loser pays" civil litigation system, meaning that the losing side of any court battle can usually expect to pay some portion of the successful party's legal costs.

Canadian courts will generally recognize court orders made by foreign jurisdictions, where certain criteria are met e.g., the judgment was obtained pursuant to a fair and unbiased process.

In addition to pursuing legal action in the courts, business owners should be aware that commercial disputes may result in class actions proceedings or in mediation and arbitration.

Canadian Class Actions

Canada's approach to class actions is relatively welcoming. The number of class proceedings being brought in Canada has grown substantially in the last 15 years, with the plaintiff's bar becoming larger and more experienced. It is now not uncommon to have similar actions commenced in many provinces at the same time and in a coordinated way.

It is also common for Canadian proceedings to be brought that mirror proceedings brought in other countries – for example securities and consumer class actions.

The number of class proceedings being brought in Canada has grown substantially in the last 15 years, with the plaintiff's bar becoming larger and more experienced.

Arbitrations and Mediations

It is increasingly common for companies to litigate matters in private, confidential arbitrations. Canada has been host to many complex international arbitrations, and Canadian courts will generally recognize arbitration decisions.

Canada also hosts a number of mediations, with many sophisticated former judges and senior business people and lawyers available to mediate complex commercial disputes and litigious matters. Canadian courts will generally recognize and enforce arbitration decisions made in other jurisdictions.

Regulatory Environment

Each of the 10 provinces and three territories in Canada has enacted laws that govern securities transactions, and each has established a securities commission or similar securities regulatory authority. Unlike the United States, Canadadoes not have a single federal securities regulator. The provincial securities legislation and regulations are augmented by rules and policies enacted by the respective securities authorities and although the securities regulatory authorities attempt to harmonize their rules nationally (through the Canadian Securities

Administrators, an umbrella organization compromising representatives of each securities regulatory authority in Canada), some have been harmonized, others have not. Canadian securities laws must be considered before any acquisition of disposition of outstanding shares of a company in Canada. (For more information, see Chapter 20, Regulatory Environment and Risk Management.)

This guide is simply a supplementary road map as you prepare for your business needs and gather information. As you navigate your way through the following chapters, our hope is that you will find the information in the following chapters helpful to better prepare you going forward.

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Osler's Litigation Group provides strategic litigation services and advice on class actions to many leading domestic and international enterprises. Laura Fric and Larry Lowenstein are partners in our group.

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Forms of Business Organizations in Canada

By Andraya Frith & David Vernon

There are several different forms of business organizations available for conducting business in Canada, each with its own advantages and disadvantages. In selecting the most appropriate choice, a foreign entity should consider key factors including: tax issues; the circumstances of the investor; and the nature of and potential liabilities associated with the business to be conducted.

Branch Versus Subsidiary Operation

One of the key initial considerations for establishing a business in Canada is whether the entity will undertake the business directly, as a branch of the foreign entity, or whether to create a separate Canadian subsidiary to carry on the business.

Since the use of a branch subjects the foreign corporation to provincial and federal laws, consider first creating a wholly owned subsidiary in the home jurisdiction of the foreign corporation. That subsidiary would then carry on business in Canada through a branch. Depending on the laws in the home jurisdiction, the foreign parent might then avoid direct liability for actions of the Canadian operation, and might still be able to consolidate any losses of the Canadian branch into its own financial statements for tax purposes.

Use of a branch operation would require an application for an extra-provincial licence describing the structure of the applicant and designating an “agent for service” in the province. The business or corporate name under which the licence is to be granted must be approved by the applicable provincial authority.

A Canadian subsidiary may not generally be consolidated with other operations for foreign tax purposes. Consequently, in the initial period when losses may be expected, starting a business through a branch operation may permit losses in Canada to be offset against income in the home jurisdiction, depending on the laws of the home jurisdiction.

Federal Versus Provincial Incorporation

If a foreign entity decides to incorporate a Canadian subsidiary, the subsidiary can be incorporated as a federal corporation under the laws of Canada, or as a provincial corporation under the laws of one of the provinces of Canada. Such incorporation is, generally speaking, a very simple process and does not require any substantive government approvals. A simple filing is necessary and the corporation must be registered with various tax (and other government) bodies. The capitalization of a corporation is a matter of private choice. No approvals are required, although there are tax rules that should be considered. Share capital and other financial information about the corporation do not have to be publicly disclosed unless the corporation is a publicly-listed company.

The *Canada Business Corporations Act* (CBCA) applies to federally incorporated businesses. Canada's 10 provinces have comparable legislation, although their laws differ in various respects. Generally, a federal corporation has the capacity and the power of a natural person and may carry on business anywhere in Canada and use its name in any province. Note that all provinces regulate the corporate activities of federal corporations operating in their jurisdiction through laws of general application requiring registration, the filing of returns and the payment of fees.

A federally or provincially incorporated business must register or obtain an extra-provincial licence in each province in which it carries on business (other than, for a provincially incorporated business, the province in which it was incorporated). If the name of the corporation is not acceptable in the province where the licence is being sought (for example, because a corporation with a similar name is already registered in that province), registration may not be granted. In the province of Québec, a corporation must either have a bilingual name or a French version of its name, unless the name is a registered trade-mark. (For more information, see Chapter 4, Doing Business in Québec.)

Meetings of the directors of both federal and, for example, Ontario corporations, may be held either in or outside of Canada; however, in certain cases, the articles or bylaws of the corporation must specifically provide for such meetings.

Directors' Residency Requirements

For most CBCA (federally incorporated) corporations, the Canadian residency requirement is 25% at the board level. (There is no residency requirement at the board *committee* level.) The minimum number of resident Canadian directors that must be present for business to be transacted at a board meeting is also 25% for CBCA corporations unless the absent Canadian director (whose presence would otherwise be required) approves the business transacted at the meeting in writing or by electronic means.

For boards with fewer than four directors, there must be at least one resident Canadian on the board. For business to be transacted at a board meeting, this member must be present or, if absent, he or she must approve the business conducted at the meeting in writing or by electronic means. For CBCA corporations to which statutory or regulatory Canadian ownership requirements apply, a majority of the board (and board committee) members must be resident Canadians.

Note that some foreign investors choose to incorporate in British Columbia, New Brunswick, Québec, Yukon or Nova Scotia. The applicable business corporation statute in each of these provinces does not have a director residency requirement.

For information on directors' responsibilities in Canada, you can download a copy of our guide, *Directors' Responsibilities in Canada* at osler.com/directors.

The Canada Business Corporations Act (CBCA) applies to federally incorporated businesses. Canada's 10 provinces have comparable legislation, although their laws differ in various respects.

Partnerships and Joint Ventures

The use of a partnership or joint venture, in combination with one or more persons or corporations in Canada, may, in certain circumstances, be an attractive option from a tax perspective (but may be unattractive in other circumstances as the existence of a non-Canadian partner may cause payments to or from the partnership to be subject to Canadian withholding tax). If a non-resident holds its partnership or joint venture interest through a subsidiary incorporated in Canada, the same tax considerations as are noted above for subsidiaries are relevant. Participation of a non-resident in a partnership or joint venture directly (for foreign tax or other reasons) is equivalent to operating through a branch in Canada. The non-resident partner must obtain an extra-provincial licence in each province where the joint venture or partnership carries on business.

A detailed partnership agreement is customary in the case of a partnership, in part to avoid certain legislative provisions that would otherwise apply. Limited partnerships are commonly used for investment purposes to permit tax deductions for limited partners while retaining their limited liability. Structuring the partnership so that the general partner (with unlimited liability) is a corporation preserves all of the limited liability aspects of the corporate form. Ontario's *Limited Partnerships Act*, for example, is similar to comparable statutes in other provinces and in various states in the U.S.

True joint ventures or co-ownership arrangements, commonly involving one or more corporations, avoid the unlimited joint and several liability applicable to partners. They also permit the venturers or co-owners to regulate their tax deductions without being forced to do so on the same basis as other co-venturers. (This would not be possible in the case of a partnership.) A joint venture agreement must be carefully drafted to ensure that the venture is not considered a partnership.

Flow-Through Entities

In some situations, for U.S. tax reasons, a U.S. investor will want to hold Canadian interests through a "flow-through entity." While this objective is not usually possible with a Canadian or a provincial corporation, the provinces of Alberta, British Columbia and Nova Scotia permit the creation of an Unlimited Liability Company (ULC). A ULC may be treated in the United States as the equivalent of a partnership or "check the box" flow-through entity. However, the use of such flow-through entities has become significantly more complex as a result of recent amendments to the Canada-U.S. Income Tax Treaty which may deny the benefits of that treaty to such entities.

Franchising and Licensing

A licence or franchise may be granted directly by a non-resident carrying on business in a foreign country to a Canadian licensee or franchisee. The operation is run from outside Canada, with the licensee or franchisee in Canada being an arm's-length entity operating in Canada. There is no need for a separate Canadian business structure. Provided that the non-resident does not carry on business in Canada for Canadian income tax purposes, the non-resident will receive income from its Canadian resident licensee or franchisee, less any applicable Canadian withholding taxes.

Alternatively, a Canadian entity can be set up through which Canadian licences or franchises may be granted; this entity would parallel its foreign parent's activities. For a non-Canadian not already operating in Canada in this field, the creation of such an entity would require notification under the *Investment Canada Act* and may require review. (For more information, see Chapter 7, Regulation of Foreign Investment in Canada.) Regardless of the method chosen, the licensor's or franchisor's intellectual property (such as trade-marks, patents and copyright) must be properly protected in Canada.

Foreign entities considering franchising in Canada must be aware of the franchise-specific laws currently in effect in five of Canada's provinces: Alberta, Ontario, Prince Edward Island, New Brunswick and Manitoba. Each statute imposes a pre-sale disclosure requirement on the franchisor, a duty of good faith and fair dealing and a protected right to associate. Foreign franchisors should note that failure to comply with any of these obligations gives rise to significant remedies for franchisees and a franchisee cannot contract out of the rights granted to it or grant a waiver of the obligations imposed on franchisors under Canada's provincial franchise legislation.

In these five regulated provinces, franchisors must provide a disclosure document to a prospective franchisee, subject only to certain limited exemptions. Generally speaking, the franchise disclosure document must be received by a prospective franchisee at least fourteen days before the earlier of: (1) the signing by the prospective franchisee of any agreement relating to the franchise, or (2) the payment of any consideration by the prospective franchisee relating to the franchise. Current business practice for many national franchisors is to prepare a combined disclosure document for use in the five disclosure provinces and on a voluntary basis in other provinces in Canada.

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Osler's Franchise Group advises North American and international brands of all sizes in almost every product and service category. Andraya Frith is Chair of our National Franchise and Distribution Practice Group. David Vernon is an Associate in the Corporate Group. Our Corporate Group advises on private placements, public offering and alternative listing methods such as reverse takeovers and CPC transactions.

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An Introduction to Canada's Tax System

By D'Arcy Schieman & Jack Silverson

Several federal and provincial tax considerations are relevant to non-residents seeking to do business in Canada. While Canadian residents are subject to tax on worldwide income, non-residents of Canada are generally subject to tax on their Canadian source income only. You are considered a non-resident for tax purposes if you:

- customarily live in another country and are not considered a resident of Canada; or
- do not have significant residential ties in Canada;
  - and you live outside Canada throughout the tax year; or
  - stay in Canada for less than 183 days in the tax year.

General Tax Considerations

Canada's tax regime for businesses (and individuals) is largely governed by the federal *Income Tax Act* (ITA) and its regulations, as well as by the sales tax, corporate tax and other laws of the provinces and territories. More general considerations include capital taxes, the taxation of individuals, tax matters for partnerships and joint ventures and sales and commodity taxes.

ORDINARY INCOME TAX

A non-resident who, in a particular taxation year, was employed in Canada or carried on a business in Canada, is liable to pay income tax on the non-resident's taxable income earned in Canada. Also, the disposition of "taxable Canadian property" (defined in the ITA) may result in a non-resident being subject to tax in Canada. Provincial taxes are also payable by a non-resident on taxable income earned in a province where the non-resident carries on business through a permanent establishment located in that province. The following is a list of key definitions (and their implications) for considerations.

RESIDENCE

A corporation will generally be resident in Canada if its "central management and control" is located in Canada (e.g., if the corporation's board of directors meets in Canada). In addition, generally a corporation that was incorporated in Canada after April 26, 1965 is deemed by the ITA to be resident in Canada for the purposes of the ITA.

An individual will generally be resident in Canada if the centre of his or her vital interests (i.e., family, home, personal property, etc.) is in Canada. An individual who is present in Canada for one or more periods that in total amount to 183 days or more in a taxation year, will be deemed to have been resident in Canada throughout that year.

CANADIAN WITHHOLDING TAX

Income earned by a non-resident that is not subject to ordinary income tax may still be subject to a withholding tax at a rate of 25% (unless reduced or eliminated by an applicable tax treaty) on certain Canadian source income. This includes management fees, interest, dividends, rent royalties and some distributions from trusts. An amendment to the ITA eliminates withholding tax on most interest payments paid to persons dealing at arm's length with the payer.

TAX TREATIES

Canada has entered into over 85 income tax treaties with other jurisdictions. These tax treaties generally provide that the business profits of a non-resident of Canada that is a resident of the other jurisdiction are not subject to tax under the ITA, except to the extent that such profits are attributable to a permanent establishment (i.e., a fixed place of business) of the non-resident in Canada. These tax treaties also usually reduce both the withholding tax rate imposed under the ITA and the branch-profits tax rate.

Amendments to the Canada-U.S. Tax Convention eliminate withholding tax on almost all interest, including interest paid between related persons. In addition, these amendments address "treaty shopping" by ensuring that treaty benefits are only available to residents of Canada or the U.S. that satisfy certain tests. The provinces generally adhere to (although they are not bound by) the provisions of the treaties.

TRANSFER PRICING IN NON-ARM'S LENGTH TRANSACTIONS

The ITA deems related persons to not deal with each other at arm's length; whether unrelated persons deal with each other at arm's length is a question of fact. Under the transfer pricing rules, a Canadian taxpayer and a non-arm's length non-resident must conduct their transactions in a manner similar to that which would have applied had the parties been dealing at arm's length. If the terms and conditions of the non-arm's length transaction differ from those that would have prevailed between arm's length persons, the rules provide that the terms and conditions may be adjusted to reflect those that would have existed had the parties been dealing at arm's length.

GENERAL ANTI-AVOIDANCE RULE

The ITA's general anti-avoidance rule allows the re-characterization of transactions and amounts in certain circumstances where taxpayers have entered into tax-motivated transactions that result in a misuse or abuse of the provisions of the ITA.

Methods of Carrying on Business in Canada

One of the most important considerations for a non-resident is whether to incorporate a Canadian subsidiary or to establish a branch operation. (There is a third option which involves the non-resident corporation carrying on the business in Canada but restricting its Canadian presence such that it does not have a permanent establishment in Canada (assuming that the non-resident corporation is resident in a country with which Canada has an international tax treaty)).

Whether a non-resident chooses to carry on business in Canada through a Canadian subsidiary or a Canadian branch, in both cases, the profits of the Canadian operation will be subject to Canadian income tax.

One of the most important considerations for a non-resident is whether to incorporate a Canadian subsidiary or to establish a branch operation.

USE OF A CANADIAN SUBSIDIARY

A Canadian subsidiary of a non-resident corporation will be considered a resident of Canada for the purposes of the ITA and will be subject to Canadian income tax on its worldwide income. Under Canada's domestic rules, there is no withholding tax on non-participating interest paid to arm's length persons, and under the Canada-U.S. Income Tax Convention, withholding tax on arm's length or non-arm's length non-participating interest paid to U.S. persons is generally nil.

REPATRIATION OF FUNDS

Since a Canadian subsidiary is a Canadian corporation, it is not subject to branch profits tax; however, upon the repatriation of funds by the Canadian subsidiary to the NRC by way of dividend, a 25% withholding tax is payable, subject to reduction by an applicable tax treaty.

THIN-CAPITALIZATION RULES

The thin-capitalization rules can disallow a deduction for interest payable by a Canadian subsidiary on debts owing to "specified non-resident persons" when such debts exceed the subsidiary's equity by a ratio of 1.5:1.

WITHHOLDING TAX

Subject to treaty relief, a Canadian subsidiary must withhold tax on several types of payments to non-residents, including dividends, interest paid to non-arm's length parties, participating interest, certain management or administration fees and rentals, royalties and similar payments.

USE OF A CANADIAN BRANCH

A non-resident corporation carrying on business in Canada through a Canadian branch is liable for income tax on its Canadian-source business income at the same rates that apply to Canadian residents.

BRANCH PROFITS TAX

In addition to federal and provincial income taxes, a non-resident corporation (NRC) carrying on business in Canada will be subject to the so-called "branch profits tax" which is intended to approximate the withholding tax that would have been paid on taxable dividends from a Canadian resident subsidiary if the NRC had incorporated a Canadian subsidiary to carry on business in Canada, rather than using a branch. Under the ITA, the branch profits tax is generally levied at a rate of 25% which may be reduced under certain tax treaties on the profits of the branch, after Canadian taxes and an allowance for investment in Canada.

BRANCH ACCOUNTING

The ITA requires a non-resident taxpayer that carries on business in Canada to calculate income or loss from its Canadian business. Expenses incurred exclusively and directly for the Canadian branch should be deductible in computing the income of the branch.

FINANCING THE BRANCH

As a result of recent amendments, the "thin-capitalization" has been extended to apply to NRCs carrying on business in Canada.

WITHHOLDING TAX

Canadian non-resident withholding tax generally only applies to payments made by residents of Canada to non-residents of Canada. However, a non-resident of Canada who carries on a business though a branch in Canada may be deemed, for purposes of the withholding tax rules, to be resident in Canada; so, certain payments made by the non-resident to another non-resident may be subject to Canadian withholding tax, unless such tax is reduced by an applicable tax treaty.

CONVERTING A BRANCH TO A SUBSIDIARY

Under the ITA, a branch generally may be incorporated without incurring immediate significant income tax or branch tax liability.

Sales, Excise and Other Commodity Taxes

The federal government imposes a sales tax, in some cases at a combined federal-provincial rate, in all provinces. Some provinces also impose a separate provincial sales tax.

FEDERAL GOODS AND SERVICES TAX AND HARMONIZED SALES TAX

Subject to certain exemptions, the federal Goods and Services Tax (GST) is imposed at each stage of distribution. A vendor (registrant) must maintain books and records sufficient to determine its GST liabilities and collect GST from the purchaser at the rate of 5% of the amount payable for taxable supplies made in Canada. An importer is required to account directly for tax at the rate of 5% on taxable imported goods or services. A business may deduct the GST payable on its purchases as an "input tax credit" against the GST collectible on its sales and may claim a refund of input tax credits in excess of tax collectible on sales during the relevant reporting period.

The federal sales tax is referred to as the "Harmonized Sales Tax" (HST) in those provinces that have repealed their former separate provincial retail sales taxes in favour of receiving a share of the federal sales tax. The HST is essentially the GST levied at a higher rate that includes a federal (5%) component and a provincial component that varies by each HST-participating province. The HST generally has the same basic rules of operation as the GST described above. The current HST-participating provinces are Ontario, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador.

GST/HST – NON-RESIDENTS

Non-residents must register under the GST/HST legislation and charge and collect GST/HST if they are carrying on a business in Canada that involves making taxable supplies therein. A foreign firm with a permanent establishment in Canada is deemed to be a resident of Canada, for GST/HST purposes, with respect to activities carried on through that establishment in Canada and may be required to register for GST/HST and collect tax on supplies made through the permanent establishment. Non-resident registrants without a permanent establishment in Canada are required to post security with the Canada Revenue Agency.

GST/HST – PARTNERSHIPS AND JOINT VENTURES

For GST/HST purposes, a partnership is considered to be a separate legal entity. Accordingly, a commercial activity carried on in a partnership is deemed to be an activity of the partnership, and not of the partners. As such, partnerships must be registered for GST/HST purposes if the business of the partnership involves making taxable supplies. The GST/HST collectible, and any input tax credits, must be reported/claimed in GST/HST returns filed at the partnership level.

Joint ventures that do not constitute partnerships are not treated as separate persons. Therefore, each joint venturer generally is responsible for GST/HST registration, reporting and remittance obligations in respect of its own share of the joint venture sales. Some special rules apply, however, in the cases of oil and gas, real estate and other specified types of joint ventures.

EXCISE TAXES

Federal excise taxes, which may be a fixed monetary amount or based on a percentage of value, are levied on certain specified goods such as tobacco and gasoline. The excise tax rate varies with the class of goods taxed and is in addition to any other taxes or duties payable.

PROVINCIAL SALES TAXES

Single-stage provincial retail sales taxes are imposed by Saskatchewan, Manitoba and British Columbia at rates that vary with each of those provinces. These retail sales taxes are generally applicable to all goods and, to a limited extent, services purchased by consumers and other end users. Québec imposes a multi-staged sales tax, the Québec Sales Tax (QST), which is substantially consistent with the GST/HST. The Québec Revenue Ministry administers both the GST and the QST for businesses operating in Québec.

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Consistently at the heart of major, innovative business transactions both in Canada and abroad, Osler's Tax Group is the Canadian tax advisor of choice for leading domestic and foreign businesses. D'Arcy Schieman and Jack Silverson are partners in our group.

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Doing Business in Québec

By Anne-Marie L. Lizotte

Québec is Canada's largest province by area and its second most populous province. Its forests cover more than 750,000 km^2 (the size of Norway and Sweden combined), making Québec an important producer of pulp and paper in Canada. Québec offers investors and business owners a unique and strategic location for its urban neighbours in New York, Boston and Toronto. Foreign entities considering doing business in Québec will be interested in its distinct language, culture and legal systems. According to the Chambre de Commerce du Montréal Métropolitan (Board of Trade of Metropolitan Montreal), 93% of the population speak French. Foreign businesses interested in the Québec marketplace must adhere to the province's French language requirements.

The *Charter of the French language* (Charter) establishes French as the official language of Québec and governs the use of the French language in a broad range of activities. The Charter sets forth the fundamental right of every person to have all firms doing business in Québec communicate with him or her in French. The Office québécois de la langue française (OQLF) is the provincial authority that oversees the use of French in commerce and business. The OQLF considers that a firm maintaining an address in Québec or conducting business in Québec by soliciting Québec residents is carrying on business in Québec and, therefore, is subject to the Charter.

Business Name in French

The *Act respecting the Legal Publicity of Enterprises* and the Charter require companies carrying on business in Québec to have a firm name in French. The French firm name does not have to be adopted as a French version of the firm's corporate name. However, generally, this is preferable to avoid situations where, on the one hand, Québec law requires the use of the French firm name alone (i.e., without the English name) and, on the other hand, corporate law requires the use of the corporate name under which the legal entity has been constituted.

Generally, a French firm name may be accompanied by its English version, provided that the French version appears at least as prominently as the English version; however, in some cases, use of the English version of a firm name is only permitted if the French version is "markedly predominant" – meaning that the French text must have a much greater visual impact than the text in another language.

Common Business Applications in French

In addition, all documents used in common business applications must be translated into French, and the French must be displayed at least as prominently as the English translation. The Charter includes specific instructions:

PRODUCT LABELLING

Every inscription on a product, its container or wrapping, or on a leaflet, brochure or card supplied with it, including the directions for use and warranty certificate, must be drafted in French. This requirement extends to labels containing, for example, washing instructions and sizes.

EMPLOYMENT FORMS, ORDER FORMS, INVOICES, ETC.

Employment application forms, order forms, invoices, receipts, catalogues, brochures and practically every other document designed for use by employees or customers must be produced in French or in a bilingual version.

PUBLIC SIGNS, POSTERS AND COMMERCIAL ADVERTISING

Public signs, posters and commercial advertising may also be bilingual, provided that the French translation is "markedly predominant." However, large billboards or signs that are visible from any part of a public highway must be exclusively in French, unless they are displayed on the firm's premises. Likewise, signs on public transportation vehicles, such as buses and subways, must be exclusively in French, unless they are used regularly to transport passengers or merchandise both inside and outside of Québec, in which case the signs may be bilingual.

WEBSITES

Commercial advertising posted on a website must also be drawn up in French. Alternatively, it may be bilingual, provided that the French version is displayed at least as prominently as the English version.

TRADE-MARKS

However, any "recognized" trade-mark within the meaning of the Canadian *Trade-marks Act* (which includes both registered and unregistered marks) may appear in English only in a business firm's catalogues, brochures, public signs, posters and commercial advertising, provided that a French version of such trade-mark has not been registered.

The OQLF has advanced in the past years a more restrictive interpretation of its regulation regarding the trade-mark exception. It claimed that a trade-mark name needed to be accompanied by a generic descriptive in French (e.g. "Les magasins Best Buy"). On April 9, 2014, in *Magasins Best Buy Ltée v. Québec (Procureur général)*, the Québec Superior Court found that the former broader interpretation should prevail and that a trade-mark name can be used alone. This decision is currently under appeal.

If this judgment is maintained by the Court of Appeal and becomes final, the legislator, as mentioned by the judge, will ultimately have to decide if a legislative change is required. Notwithstanding the interpretation of the regulation, the judge noted that nothing prevents businesses to voluntarily add a French descriptor. As a matter of fact, many businesses in Québec have made that choice.

Language as a Condition of Employment

Employers are prohibited from dismissing, laying off, demoting or transferring a staff member for the sole reason that he or she is exclusively French-speaking or has insufficient knowledge of the English language. An employer is prohibited from making knowledge of the English language a condition of obtaining employment, unless the nature of the duties requires such knowledge. Normally, in Québec, people who work in retail stores and who are dealing with customers need at least a basic knowledge of English to enable them to serve customers in either language.

Employers are prohibited from dismissing, laying off, demoting or transferring a staff member for the sole reason that he or she is exclusively French-speaking or has insufficient knowledge of the English language.

Francization Programs

An enterprise in Québec which employs more than 50 employees must register with the OQLF. If the Office considers that the use of French is not generalized at all levels of the enterprise, the enterprise will have to adopt a francization program. The francization program includes managerial staff and the Office considers the total number of employees who are located in Québec, even those who may be located at different locations within the province. It is important to note, however, that these measures and requirements do not have to be met on day one. They may be implemented gradually, over a certain period of time.

An enterprise employing 100 or more persons must form a francization committee. Where necessary, the committee will have to devise a francization program and supervise its implementation. Certificates of francization will be issued in each case where the Office is satisfied with the enterprise's linguistic situation.

Penalties for Non-Compliance

Any entity that contravenes the Charter is liable for each offence to a fine of $1,500 to $20,000. The fines are doubled for a subsequent offence. Liability extends to those distributing, selling by retail trade, renting, offering for sale or rental or otherwise marketing a product, computer software or a publication not in compliance with the Charter. A judge may also, upon request, impose in addition a fine equal to the financial gain realized.

Québec Tax Considerations

Several tax considerations are relevant to Canadian corporations seeking to do business in Québec. Québec's income tax regime for businesses is governed by the *Taxation Act* (Québec) (the QTA) and its regulations, and its sales tax regime is established under the *Act respecting the Québec sales tax* (AQST) and other laws of the province of Québec.

Employment and Labour Law

Québec's employment laws share many similarities with those of other Canadian provinces in areas such as occupational health and safety, workers' compensation and pay equity; however, there are some unique aspects to consider. Three major statutes govern employment in Québec.

Civil Code of Québec (CCQ)

Generally, the CCQ governs the employment contract. It provides that the employer has to take measures consistent with the nature of the work to protect the health, safety and dignity of the employee. It also confirms the right of the parties to include a non-competition clause in a contract, provided it is limited as to time, place and type of employment. The CCQ provides that an employment contract will not be terminated by a sale of the business or any change in its legal structure by way of amalgamation or otherwise, and will be binding on any successor employer.

Either party to an employment contract with an indeterminate term may terminate the contract, subject to reasonable prior notice. One of the parties may always terminate the contract, without prior notice, for a serious reason. The CCQ also provides that a "choice of law" clause in an employment contract may be unenforceable if it results in depriving the worker of the protection to which he or she is entitled under the mandatory provisions of the law of the country where the worker habitually carries on his or her work. The "choice of law" cannot be forced upon a worker. Article 3149 of the CCQ provides as follows:

> A Québec authority also has jurisdiction to hear an action involving a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.

Québec Labour Code

Unionized employees are governed by the Québec *Labour Code*. The *Canada Labour Code* and the Québec *Labour Code* are essentially similar, except that the *Canada Labour Code* is broader. The latter Code includes issues that are dealt with in Québec under other legislation, such as *An Act respecting labour standards* or *An Act respecting occupational health and safety*. One distinction between the two Codes that may be important is that the *Canada Labour Code* does not include anti-scab measures.

Labour Standards Act

An *Act respecting labour standards* applies to employees regardless of where they work. It includes employees who perform work both within and outside of Québec for an employer whose undertaking is in Québec. The Commission des normes du travail supervises the implementation and application of labour standards. Any employer who pays remuneration to an employee must also pay a contribution to the Minister of Revenue and file an annual statement. An employer's contribution is equal to the product obtained by multiplying the rate fixed by regulation by the remuneration, subject to the contribution paid by the employer during the year.

SIGNIFICANT PROVISIONS

Other employment standards provisions include the following:

- Equal rates or wages have to be paid for the same tasks;
- There is also a minimum wage, determined by regulation, which is currently $10.35 per hour (May 2014) and generally revised annually;
- Employees must be paid at intervals not greater than 16 days;
- The regular work week is 40 hours. Overtime work entails a premium of 50% of the prevailing hourly wage paid to the employee;
- Minimum annual leave with pay is two weeks after one year of uninterrupted service and three weeks after five years;
- Prior written notice of termination or layoff of one week is required if the employee has worked for more than three months but less than one year. The notice period is two weeks for an employee who has worked between one to five years; four weeks for an employee who has worked between five to ten years; and eight weeks for an employee who has worked ten years or more;
- Sale or concession of the whole or part of a business does not invalidate a claim arising from the application of the Act; the former employer and new employer are bound jointly and severally;

- Work performed by children under the age of 14 is prohibited;
- Labour standards contained in the *Labour Standards Act* and the regulations are mandatory; and
- Fines between $600 and $6,000 may be levied, depending on the offence. Fines of $1,500.00 per week may be imposed in case of a collective dismissal for technological or economic reasons without the appropriate notice to the Minister of Employment and Social Solidarity.

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Osler's Montréal office offers fully integrated services and seamless service in both French and English, providing exceptional service to companies doing business in Québec. Anne-Marie Lizotte is a partner in our Montréal office.

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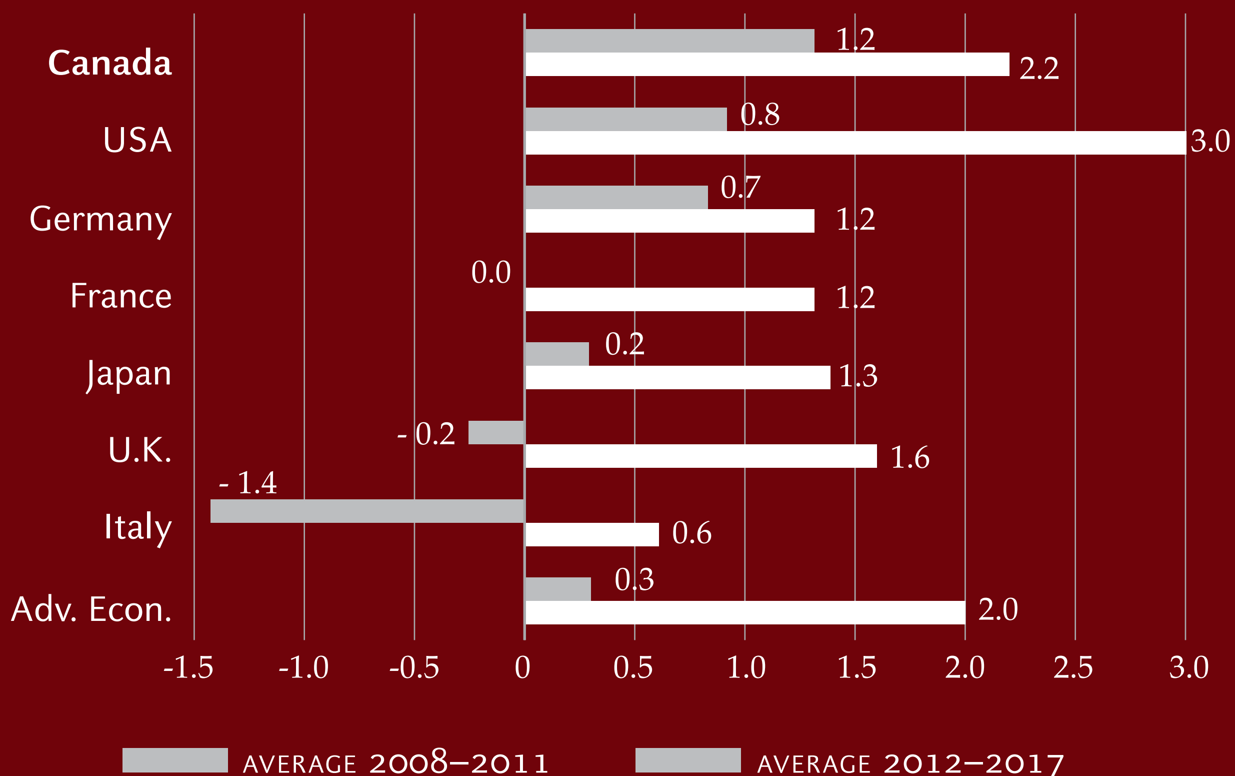
Why Conduct Business in Canada?

Canada provides a stable environment through the diversity and strength of its economy. Canada topped the G-7 with an average real GDP growth rate of 1.2 percent between 2008 and 2012, and is now expected to be among the top G-7 performers through 2017.

G-7 Real GDP Annual Growth Rate 2008–2017 (In percentage)



Source: International Monetary Fund, World Economic Outlook Database April 2013
Note: Forecast Data for 2013–2017

Financing a Foreign Business Operating in Canada

By Kevin Whittam

Canada offers business opportunities to those seeking to finance a foreign business in Canada and there is a wide range of financing options available in Canada for new and expanding businesses. These options range from shareholder infusions of capital to sophisticated institutional financing.

A Canadian entity (whether corporation or partnership) operating as a new business in a Canadian province such as Ontario, is often initially funded solely by its shareholders by way of equity, debt or a combination of the two.

External Debt Financing

When a Canadian entity needs external financing, third-party lenders will typically require that any shareholder loans (and any security for such loans) be deeply subordinated to the third-party debt.

TYPES OF LOANS

Third-party financiers typically offer a business an operating or term loan, or a combination of the two, which can be provided on an unsecured or secured basis.

Operating or revolving loans are typically provided on a short- to medium-term basis to finance the company's working capital requirements, acquisitions, recapitalizations and capital expenditure projects.

Term loans are usually medium- to long-term loans available for a fixed period of time and repayable on the occurrence of prescribed events of default or on demand. They are often amortized over the term of the loan, with required periodic payments of principal and a bullet payment at the end of the term. Regularly scheduled interest payments are usually required.

Loans will most commonly be made available in Canadian or U.S. dollars, with interest charged on the basis of a Canadian bank prime rate for Canadian dollar loans or U.S. base rate for U.S. dollar loans. There is also a LIBOR (London Interbank Offered Rate) option for U.S. dollar loans. Bankers' acceptances are also available.

SECURITY

Lenders often require a borrower to provide, at a minimum, security over the assets being financed and, in many cases, over all of the borrower's personal and real property, including after-acquired property. If a revolving facility (a type of credit facility which allows a company the flexibility to drawdown, repay and re-draw on the loans advanced under the credit facility) is being provided to a company by a different lender than the term lender, the term lender may require a second lien on the primary collateral security of the revolving lender and vice versa. Lenders also may require parent holding companies, subsidiary companies and individual shareholders to provide guarantees and security as additional credit support.

Each of the common-law provinces in Canada has enacted personal property security legislation that is similar to the U.S. *Uniform Commercial Code* Art. 9 regime that governs the creation, registration and enforcement of security on personal property. Ontario and most of the other provinces in Canada have also enacted securities transfer legislation, modeled on the U.S. *Uniform Securities Transfer Act*, creating a comprehensive set of rules for the transfer of securities and other investment property (including the creation of security interests in such property). The *Civil Code of Québec* governs such matters in Québec. The federal *Bank Act* also permits banks to receive security over raw materials, work in progress and finished goods inventory, as well as other specified assets and equipment. Sources of debt financing include domestic Canadian banks, foreign banks (which operate subsidiaries and branches in Canada), "near" banks and other financial institutions.

DOMESTIC AND FOREIGN BANKS

The domestic Canadian banks offer debt financing and provide cash management and investment services. Most domestic chartered banks have a highly developed network of branch operations throughout the country. Since some of them also have a presence in the U.S. and internationally, these banks can be a useful liaison for a foreign investor establishing a business in Canada.

The federal *Bank Act* governs the activities of domestic and foreign banks operating in Canada. It authorizes Schedule I (domestic) banks and Schedule II (foreign subsidiary) banks that are controlled by foreign banks to conduct a full banking business in Canada including the ability to accept retail deposits. As well, Schedule III banks (foreign bank branches of foreign banks), are able to conduct a full banking business in Canada except they may not accept retail deposits.

NON-BANKS

While unable to take deposits, life insurance companies in Canada manage segregated investment funds, including pension funds, and provide medium- to long-term financing. Trust and loan companies in Canada are generally incorporated under the federal *Trust and Loan Companies Act* and take deposits and provide debt financing.

Credit unions, "caisses populaires" in Québec and the financing arms of major industrial companies and hedge funds also provide financing. In addition, financing can be secured from conventional real estate mortgage lenders for real property.

OTHER FINANCING SOURCES

Acquiring capital assets from a manufacturer on a conditional sale basis or by way of a lease, either on an operating or capital basis, allows a company to pay for assets from its regular cash flow over time, reduce or eliminate the need for a substantial initial payment, and secure tax and/or accounting advantages. Many lease finance companies will buy assets specified by the company and then lease those assets to the company, allowing the company to convert its existing assets to capital while retaining use of those underlying assets in the business.

A company may sell its accounts receivables to a factor who will advance a percentage of the amount of the receivables. When its receivables are paid in full, the company will receive the balance of the amount, less any fees and interest charged by the factor.

In a securitization, certain assets of a corporation are pooled and transferred into a separate legal entity which finances the purchase of this portfolio by issuing debt or debt-like instruments into the capital markets, secured by the portfolio assets. Securitization can offer competitive pricing since pricing is based on the quality of the assets and credit enhancements, rather than on a company's corporate covenants.

External Equity Financing

Private equity (PE) funds provide equity capital to companies that typically have high growth potential. In Canada PE funds have been particularly active in financing buyouts. The strategies adopted by PE funds can vary significantly, depending on the stage of a company's life at which the investment is made. These funds may provide "seed" or start-up capital, as well as financing for expansion and development, to assist in a rescue/turnaround or to fund a buyout. Many private equity funds will focus in a particular industry or geographic niche.

Venture capitalists (VCs) are considered a subset of private equity. VCs are private or publicly sponsored pools of capital that are interested in taking a minority equity position in a company in exchange for significant influence over the management and direction of the company. VCs may also make debt financing available, for example, through subordinated, convertible or mezzanine debt.

VCs often invest in a company at the early stages of development, before sufficient predictable cash flows have been generated to attract institutional debt financing. VCs have a fairly strong presence in the IT, clean technology and life-science sectors.

In Canada, private equity funds have been particularly active in financing buyouts.

Government Assistance Programs

Many federal direct subsidy programs have shifted toward repayable loans. Others no longer offer government loans, but rather facilitate financing through commercial loans and bank financing. The federal Business Development Bank of Canada provides business loans, loan guarantees and export financing; offers management training programs; and has formed strategic alliances with many domestic banks. Export Development Canada provides financial assistance to exporters.

Also, both the federal and provincial governments offer investment programs which will provide equity capital to businesses, often partnering with private equity or venture capital firms. Examples of these include BDC Venture Capital and the Ontario Energy Technologies Fund.

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Osler's Financial Services Group acts for leading North American and international financial institutions and a wide variety of global industry leaders. With a network of offices across Canada and in New York, Osler's Financial Services practice group is a fully integrated team that offers extensive knowledge of all aspects of financial services combined with an efficient cross-jurisdictional platform. Kevin Whittam is an associate in our group.

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Insolvency and Restructuring in Canada

By Sandra Abitan & Tracy C. Sandler

Canada's insolvency and restructuring regime consists primarily of two separate statutes that have been substantially amended in recent years to align their restructuring provisions. Despite some similarities with its U.S. counterpart, the Canadian regime remains distinct. The following chapter introduces the Acts that govern corporate restructurings in Canada and some notable differences between insolvency and restructuring law in Canada and the United States.

Corporate Restructurings

Corporate restructurings in Canada are generally governed by either the *Companies' Creditors Arrangement Act* (CCAA) or the proposal provisions of the *Bankruptcy & Insolvency Act* (BIA), both of which are broadly akin to Chapter 11 of the U.S. Bankruptcy Code. The CCAA provides tremendous flexibility to the supervising court and the debtor in conducting restructuring proceedings, but the CCAA is only available to debtors with total debts of over $5 million. In contrast, the BIA proposal provisions are available to all corporate debtors and provide a much more structured set of rules and regulations. Nonetheless, both statutes provide for a stay of creditors' rights and remedies; the filing of a plan or proposal to compromise the debtor's debts; meeting(s) of affected classes of creditors for voting on the debtor's plan or proposal; followed by court sanction. It is also possible for a debtor to seek court approval of a sale of some or all of its assets as an alternative to a plan. In both cases, a court appointed officer, called the "monitor" in CCAA proceedings and the "proposal trustee" in BIA proposal proceedings, is engaged to monitor the debtor's affairs and to report to the court and the creditors with respect to the proceedings.

In certain circumstances, other statutes could be used by a Canadian company seeking to restructure. For example, Canadian corporate statutes (such as the *Canada Business Corporations Act*) contain provisions that may be used to effect certain fundamental changes in corporate structure through a court approved plan of arrangement, which can include a compromise of bond debt.

A corporation's circumstances, its goals and its relationships with its creditors will determine which statute is the most appropriate tool for its restructuring.

Liquidations

Liquidations are generally conducted under the bankruptcy provisions of the BIA, which is broadly akin to Chapter 7 of the U.S. Bankruptcy Code. Upon bankruptcy, all of the assets of the bankrupt debtor vest with a trustee in bankruptcy who is responsible for realizing upon the assets of the debtor and administering a claims process to distribute value to creditors. The trustee's rights are generally subject to the interests of secured creditors, who can continue to exercise their rights and remedies against secured assets. Typically, secured creditors seek the appointment of a receiver (or receiver and manager) through application to court under the BIA or under provincial law in most provinces, or, less frequently, through private appointment under the applicable security agreement. A receiver will proceed to sell the debtor's assets, manage the debtor's business or otherwise realize upon the collateral, with the proceeds from its activities payable in accordance with the established priorities.

Treatment of Certain Claims

The Canadian insolvency regime (in conjunction with certain other federal and provincial law) establishes a hierarchy of priorities for certain claims against the insolvent debtor. Among other things, Canadian law provides super-priority status to certain claims, such as payroll deductions relating to employee income taxes, government operated pension plans and employment insurance, as well as for certain private pension contributions (if any), unpaid wages and employee disbursements and, in some circumstances, collected and unremitted Goods and Services Tax and Harmonized Sales Tax. These super-priority status claims are secured on certain assets of the debtor and such security may rank in priority to the security interests of existing secured creditors.

In addition, it is not unusual for a court to grant super-priority security interests or charges (which could be in priority to the security interests of existing secured creditors) on the assets of a debtor company to secure the payment of certain amounts, including amounts to be borrowed under an interim financing agreement (often called debtor-in-possession or DIP financing) entered into facilitate the restructuring, any amounts owing for the fees and costs of professionals involved in the restructuring (including the fees of the court appointed monitor in CCAA proceedings or of the court appointed receiver) and certain obligations of directors of the company with respect to their statutory liabilities.

Recognition of Foreign Insolvency Proceedings

In a cross-border insolvency, Canadian courts generally encourage coordination among the various proceedings in all jurisdictions so that the restructuring or liquidation can proceed in a fair and orderly manner. Part IV of the CCAA and Part XIII of the BIA facilitate coordination of cross-border insolvencies by permitting Canadian courts to recognize certain orders made in foreign insolvency proceedings. These provisions of the CCAA and BIA embody certain essential features of the United Nations Commission on International Trade Law's Model Law on Cross-Border Insolvency, and are broadly akin to Chapter 15 of the U.S. Bankruptcy Code.

Where a primary insolvency proceeding is taking place outside of Canada, a foreign representative from those proceedings can appear in a Canadian court and obtain recognition of the relevant foreign court order(s), a stay of proceedings in respect of the exercise of rights and remedies against the debtor or the debtor's property in Canada and other appropriate relief. Canadian courts have also authorized numerous court-to-court protocols to facilitate cases with complicated cross-border aspects.

Despite certain similarities with the U.S. Bankruptcy Code, there are still many notable differences between insolvency and restructuring law in Canada and the United States. For instance, unlike the United States, neither the CCAA nor the BIA authorizes a court to consolidate the assets or liabilities of different entities; however, Canadian courts have exercised their equitable authority under both statutes to consolidate the estates of *related* debtors. In addition, while the doctrine of equitable subordination is an accepted and codified feature of the U.S. legal landscape, it may not be applicable in Canada.

Despite certain similarities with the U.S. Bankruptcy Code, there are still many notable differences between insolvency and restructuring law in Canada and the United States.

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Osler's Insolvency & Restructuring Group offers our corporate, institutional and public sector clients a team-based, multi-disciplinary approach to devising and implementing innovative, integrated solutions to complex insolvency and restructuring matters. Sandra Abitan and Tracy C. Sandler are partners in our group. We would like to acknowledge Patrick Riesterer, Associate, Insolvency & Restructuring Group, for his assistance with this chapter review.

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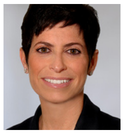

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Regulation of Foreign Investment in Canada

By Peter Glossop

The federal *Investment Canada Act* (ICA) governs both the acquisition of control of a Canadian business by a non-Canadian investor (as defined in the legislation), and the establishment of a new Canadian business by a non-Canadian investor.

Investments Requiring Review and Approval

Under the ICA, the Canadian government reviews a non-Canadian's acquisition of a business in Canada where its value exceeds specified thresholds (as outlined below). The ICA applies whether or not the business being acquired is Canadian controlled. Review is generally limited to direct acquisitions of control of large Canadian businesses by non-Canadians. Generally, if an acquisition is reviewable, a non-Canadian investor must obtain approval prior to closing the transaction.

A review may be required in the case of a smaller acquisition or the establishment of a new business by a non-Canadian in prescribed "cultural" businesses (such as the publication or distribution of books and magazines). In addition, special policies prohibit or limit foreign investment in certain cultural businesses. On a case-by-case basis, the federal Cabinet may order a review of an acquisition of a cultural business where the requisite threshold is not met.

Review Thresholds

A *direct* acquisition of control of a Canadian business by a non-Canadian investor, which is controlled by nationals of a World Trade Organization (WTO) member state, is generally only reviewable in 2014 where the Canadian business has assets with a worldwide book value of more than $354 million.

An *indirect* acquisition of control by a non-Canadian WTO investor, involving an acquisition of a non-Canadian corporation which has a Canadian subsidiary, is generally not reviewable.

These rules also apply if the target business is controlled by WTO nationals, but the investor is not so controlled.

The ICA describes what constitutes a "Canadian business" and what proportion of voting interests or assets must be acquired in order to constitute an "acquisition of control."

For transactions involving neither a WTO buyer nor a WTO-controlled seller/target, the relevant threshold in a direct acquisition is $5 million worldwide book value of assets for the Canadian business, and in an indirect acquisition, $50 million of such assets (where the Canadian business represents less than half of the worldwide assets acquired). These thresholds also apply to an acquisition of a cultural business, even if the buyer or seller is controlled by WTO nationals. However, indirect transactions under these rules are reviewable on a post-closing basis.

In a limited number of cases, an investment may be subject to a national security review if it is considered potentially injurious to national security, even where none of the foregoing review thresholds are met.

In a limited number of cases, an investment may be subject to a national security review if it is considered potentially injurious to national security...

Investments Requiring Notification

A non-Canadian investor must notify the Canadian government in the prescribed form no later than 30 days following an acquisition of control of a Canadian business with an asset value falling below the above thresholds.

Similarly, a non-Canadian investor must notify the Canadian government concerning the establishment of a new business that is unrelated to any business then being carried on in Canada by the non-Canadian. (It is generally not necessary to notify Industry Canada of a new business investment that represents an expansion of a non-Canadian's business in Canada, or an investment related to an existing business.)

Notifiable investments are not reviewable, except potentially for transactions involving cultural businesses (described above.)

Authority and Timing

The Minister of Industry has authority for the review and approval of investments in all industries, except cultural industries. The Minister of Canadian Heritage has authority for the review and approval of investments in cultural industries. The initial review period is up to 45 calendar days. This period may be extended by the responsible Minister for an additional 30 days. A further extension may occur with the consent of the non-Canadian investor.

Test: Net Benefit to Canada

For an acquisition to secure approval under the ICA it must be of "net benefit to Canada." To demonstrate net benefit, it is usually necessary for the non-Canadian investor to give undertakings to the Canadian government. These undertakings, in relation to the acquired business, may include maintaining certain levels of employment, Canadian management and a Canadian head office and making certain capital expenditures, for a period of at least three years.

Special Rules

The ICA does not prescribe a separate filing process for national security reviews. Specific guidance should be sought where an investment might be considered by the Canadian government to be injurious to national security.

An investor that is controlled or influenced, either directly or indirectly, by a foreign government (a state-owned enterprise or SOE) is subject to additional scrutiny in determining whether its investment meets the "net benefit to Canada" test. The government will assess whether the investor adheres to Canadian standards of corporate governance, and whether a Canadian business to be acquired by the SOE will continue to have the ability to operate on a commercial basis. An SOE investor also may be subject to a national security review.

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Osler's Competition/Antitrust Group provides strategic competition law counseling and litigation advice to leading Canadian, U.S. and international businesses and law firms. Peter Glossop is a partner in our group.

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Competition Law in Canada

By Peter Franklyn

In most of the world's large developed economies, non-compliance with competition/antitrust laws carries potentially serious consequences and Canada is no exception. Under the Canadian *Competition Act*, anti-competitive conduct can result in significant criminal and regulatory sanctions, as well as significant economic consequences.

Canadian competition laws are similar in many respects to the antitrust laws in the United States. However there are a number of important differences that are worth noting:

United States – Canada: Similar But Not Identical

Historically there has been less active and effective government enforcement of antitrust laws in Canada, particularly in the area of anti-competitive agreements among competitors. This is now changing as the Competition Bureau has begun to step up its enforcement activity.

The penalties for antitrust violations in Canada have historically been considerably less severe than in the U.S. In addition, in Canada, jail sentences are rarely imposed for anti-competitive conduct. However this too is changing – the new Canadian conspiracy provision (the equivalent of section 1 of the U.S. *Sherman Act*) now provides for substantially increased maximum fines of up to $25 million per count and maximum jail terms of up to 14 years.

The Competition Bureau has historically relied more heavily than its U.S. counterparts on voluntary compliance as an enforcement tool. However, the Bureau is now using formal investigatory powers with increasing frequency, with the result that enforcement practices are becoming more formalized and adversarial.

Private antitrust litigation is different in Canada as well. While private parties that have suffered injury or loss as a result of criminal anti-competitive conduct are permitted to sue to recover damages, their recovery is limited to their actual losses (and certain costs), but not treble damages as is the case in the United States. Canada also has a "loser pays" system, under which an unsuccessful party may be liable to pay certain of the legal costs of the successful party.

While class action litigation has been less common in Canada in the past, this is changing and the Canadian courts are becoming increasingly willing to certify antitrust class actions.

What Types of Conduct Are Prohibited?

The *Competition Act* prohibits certain types of anti-competitive conduct without the need to prove that competition was actually lessened. Other types of conduct may result in enforcement action where it is shown to be likely to have a substantial adverse effect on competition in Canada. The former category is treated as a criminal violation. It includes price fixing, market allocation and output restriction agreements among competitors, and is prohibited outright (i.e., without the need to demonstrate that such conduct actually injured competition). The latter category includes other types of agreements or arrangements among competitors, as well as certain types of exclusionary conduct where proof of an adverse effect on competition is required. In addition to possible government enforcement action, private parties are permitted to bring actions for the recovery of damages resulting from conduct that is contrary to the criminal provisions of the *Competition Act* (e.g., price fixing), as well as to seek non-monetary relief in respect of certain non-criminal practices.

Merger Review

As is the case in the U.S., Canada has a pre-merger notification regime that requires notice to be given to the Competition Bureau and pre-closing review and approval of transactions that exceed prescribed thresholds (which are based on the assets/revenues of the parties to the transaction, including their affiliates, and the assets/revenues of the Canadian assets/business being acquired). In the case of a voting share acquisition, certain voting share thresholds must also be exceeded.

Where the prescribed thresholds are exceeded, a reportable transaction must undergo a review process that is similar to the Hart Scott Rodino process in the U.S. This involves an initial 30-day waiting/no close period, which may be extended by the Bureau by issuing a request for additional information (referred to as a supplementary information request or SIR). Where a SIR is issued, the waiting period is extended until 30 days have expired following compliance with the SIR. Where no SIR is issued, expiry of the initial 30 day waiting period effectively constitutes competition law clearance, although the Commissioner of Competition retains a residual power to challenge a completed merger for up to one year following closing.

In addition to complying with the waiting periods referred to above, transacting parties often await the issuance of "no action letter" before completing their transaction. In cases where there is minimal or no competitive overlap, parties will often seek the issuance of an Advance Ruling Certificate (ARC), which exempts the transaction from the formal pre-merger notification requirements referred to above.

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Osler's Competition/Antitrust Group provides strategic competition law counseling and litigation advice to leading Canadian, U.S. and international businesses and law firms. Peter Franklyn is a partner in our group.

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International Trade and Investment Law

By Riyaz Dattu

Canada is a great country in which to live, invest and work. With its financial stability and sound banking system, highly educated workforce and welcoming business environment, companies contemplating the acquisition, establishment or expansion of a business in Canada may be afforded certain preferences under international trade and investment agreements. Governed by federal legislation, companies also need to be mindful of customs duties, trade remedies measures, safeguard measures, economic sanctions laws, import and export controls, and marking and labelling requirements.

Businesses whose operations include imports and exports, or whose competitors deal in cross-border trade, should include Canada's international trade legislation in their due diligence reviews. Companies that anticipate selling their Canadian businesses should monitor compliance with such laws to avoid accruing liabilities under these legal requirements.

Canada's regulation of international trade is applied and enforced by an administrative structure based in Ottawa, the nation's capital.

International Trade and Investment Agreements

Canada is party to many international trade agreements, including the multilateral World Trade Organization agreements, the regional *North American Free Trade Agreement* (NAFTA), and bilateral trade agreements with Chile, Columbia, Costa Rica, Honduras, Israel, Jordan, Panama, Peru, and with the European Fee Trade Association (Iceland, Liechtenstein, Norway and Switzerland). Recently, Canada signed a free trade agreement with South Korea and concluded a landmark comprehensive economic and trade agreement with the European Union.

Canada also has a network of foreign investment promotion and protection agreements, with 28 Foreign Investment Promotion and Protection Agreements (FIPAs) currently in force, two that have been signed but are not yet in force, 11 where negotiations have been concluded but are awaiting signature, and 12 where negotiations are ongoing. Canada's most recent foreign investment promotion and protection agreement was with China.

Businesses should review the preferences and protections afforded by these agreements, such as reduced duty rates and preferential market access, and non-discrimination and investment protection rights.

Customs Duties

All goods entering Canada must be reported to the Canada Border Services Agency (CBSA), which verifies compliance with Canadian law, collects statistical information and levies applicable customs duties as well as goods and services, excise and, in some cases, provincial taxes. The customs duty rate is determined by tariff classification under the *Customs Tariff*, country of origin according to the appropriate rule of origin, and value for duty under the *Customs Act*. Goods that meet the rules of origin under NAFTA and other trade agreements and that can be so certified are entitled to enter Canada duty-free or at preferential rates.

Anti-dumping and Countervailing Duties

Anti-dumping and countervailing duties assist Canadian producers experiencing unfair competition from imports. Under the *Special Import Measures Act* (SIMA), the CBSA has jurisdiction to determine whether there is dumping or subsidization, and the Canadian International Trade Tribunal has jurisdiction to determine whether there is injury or a threat of injury to the domestic industry. Recently, Chinese imports into Canada have been the most frequent target of anti-dumping and/or countervailing duty actions in Canada. During the five-year term of an injury finding (which may be renewed), the CBSA will review (usually annually) normal values assigned to exporters. Injury findings not reviewed by the Canadian International Trade Tribunal within five years automatically expire.

Safeguards

Import safeguards address large surges of imports. A safeguard remedy under the *Canadian International Trade Tribunal Act* can be initiated by a federal Cabinet referral or a complaint from a domestic producer that a product has been imported in such increased quantities and at such lower prices as to cause or threaten serious injury to the domestic industry.

Import and Export Controls

Canada limits or prescribes conditions on the export and import of certain goods which are enforced by the CBSA and the Department of Foreign Affairs and International Trade (DFAIT) in conjunction with federal government agencies with regulatory authority over particular products.

Restrictions on imports reflect Canadian security, agricultural and industrial policies, and are authorized by the *Export and Import Permits Act* and the *Import Control List*. They are administered by DFAIT, which allocates import quotas and issues import permits.

Canada controls the export of certain goods to all countries and of all goods to certain countries. Exporting such goods requires an individual permit or a General Export Permit for continuing exports. Permits are required if the goods are destined for countries on Canada's *Area Control List* or on Canada's *Export Control List*, which includes all goods of U.S. origin. Exports to countries with which the U.S. has foreign policy or economic concerns, such as China, may receive closer scrutiny by Canadian authorities.

Moreover, economic sanctions which have been imposed under the *Special Economic Measures Act* or the *UN Act* restrict a broad range of dealings with certain countries such as Belarus, Iran, North Korea and Syria. Recent examples include restrictions and prohibitions of financial transactions with named institutions and individuals in Russia and Ukraine.

In addition to obtaining permits, the *Defence Production Act* requires any person or company dealing in "controlled goods" (including permitting foreign nationals access to such goods) to be registered under the Controlled Goods Program. "Controlled goods" include military, nuclear weapon-related and missile technology and related goods. Non-registration can result in civil or criminal penalties, including fines or imprisonment.

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Marking and Labelling of Imported Goods

The *Marking of Imported Goods Regulations* requires prescribed goods to be indelibly marked with their country of origin. Since Canada has two official languages, English and French, all imports must meet bilingual labelling requirements. Foreign exporters planning sales into Canada need to review these requirements and determine where exceptions may apply. (For more information, see Chapter 4, Doing Business in Québec.)

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Osler's International Trade and Investment practitioners offer astute guidance on critical compliance issues and strategic advice on how best to exploit bilateral, regional and multilateral trade and investment agreements. Riyaz Dattu, partner, Corporate Group, leads this multi-disciplinary practice area made up of corporate, financial services and litigation lawyers.

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Employment and Labour Law in Canada

By Colin Kelly & Sven Poysa

Frequent changes in Canadian employment and labour law present a significant challenge for employers doing business here. That challenge is compounded by the fact that employers with operations across Canada may be subject to differing employment and labour laws in each province.

Both the federal and provincial levels of government have jurisdiction over employment and labour matters for certain types of employers. The level of government that has jurisdiction is determined by the industry in which an employer operates. For example, industries that are inter-provincial by nature – such as airlines, telecommunications and railways – are regulated by the federal government. Most other industries – which account for the majority of employers in Canada – fall under provincial jurisdiction.

Employment Standards

Employment standards legislation in each jurisdiction sets out mandatory minimum conditions of employment in areas such as hours of work, overtime pay, minimum wages, holidays, vacations, employee benefit plans, leaves of absence, notice of termination of employment, and severance and termination pay. Certain categories of employees may be exempt from certain standards, although these exemptions are not identical to U.S. classifications of "exempt" and "non-exempt." As a result of the varying legislative requirements, U.S. employment policies on the above issues need to be adapted for use in Canada.

Termination of Employment

"At-will" employment does not exist in Canada. As such, unless an employer has "just cause," which is a very high standard to meet, it cannot terminate an employee's employment without notice (or pay in lieu thereof). Terminating employees in Canada can be costly for employers. Employees terminated without cause are guaranteed certain minimum entitlements under applicable employment standards legislation, and may also claim common law and/or contractual termination entitlements.

A) STATUTORY NOTICE OF TERMINATION

Each jurisdiction's employment standards legislation establishes minimum written notice of termination requirements for employees terminated without cause. Employers can satisfy these individual termination requirements by providing working notice, pay in lieu thereof, or some combination of both. Statutory notice of individual terminations typically ranges from one to eight weeks, based on an employee's length of service.

In addition to statutory notice, some jurisdictions also provide for statutory severance pay where an employee is terminated without cause, and all jurisdictions impose additional notice and other requirements in the event of a "group" or "mass" layoff or termination.

B) COMMON LAW OR CIVIL LAW REQUIREMENTS

In addition to minimum requirements under employment standards legislation, non-union employees are entitled to "reasonable" notice of termination under the common law (or under the *Civil Code of Québec* for employees in Québec). Such notice is often substantially longer than the statutory minimums and depends on such factors as the employee's position, length of service, compensation, re-employment prospects and age.

In the absence of an enforceable contractual provision limiting termination entitlements, an employee who has been terminated with notice in accordance with the applicable employment standards legislation, may still sue the employer for more pay in lieu of reasonable notice. Although courts approach each case on an individual basis, court awards of a year or more are not unusual for senior management employees, with awards of up to (and sometimes exceeding) 24 months possible for long service employees.

C) CONTRACTUAL TERMINATION PROVISIONS

An employer and employee may enter into a written contract that specifies the employee's termination entitlements. This contractual termination entitlement will displace the employee's entitlement to reasonable notice of termination at common law, provided it meets or exceeds minimum statutory requirements. Contractual termination provisions can limit the employer's exposure while also providing certainty to both parties. However, such provisions must be carefully drafted in order to be enforceable, and courts will strike down provisions that fail to comply with statutory requirements.

Executive Compensation

Executive compensation refers to both financial payments and non-monetary benefits provided to senior management (for example: corporate presidents; chief executive officers; chief financial officers; vice-presidents; and other senior executives of the corporation). It is a typically a mix of salary, bonuses, shares of the company's stock, benefits, and other privileges. Designing, implementing and administering compensation and benefits arrangements for foreign businesses operating in Canada must take into account Canadian tax and employment laws, securities disclosure and compliance requirements, and heightened scrutiny by shareholders and other stakeholders, regulators and the courts.

Director and Officer Liability

If a company fails to pay its employees due to insolvency or other reasons, legislation in certain Canadian jurisdictions can impose personal liability on directors and officers of the company for unpaid wages and other amounts that may be owing to employees.

Human Rights/Non-Discrimination

All jurisdictions in Canada have legislation designed to address discriminatory practices in the workplace based on prohibited grounds of discrimination, such as race, age, sex, sexual orientation, marital status, citizenship, place of origin, family status, record of offences and disability.

Employers are required to go to considerable lengths to provide time off, modified duties and other assistance that may be required to accommodate employees. Although accommodation issues frequently arise with respect to disabled employees, employers are also commonly called up to provide accommodation in respect of other prohibited grounds for discrimination (e.g. modified work schedules to accommodate childcare arrangements or religious days of worship). Otherwise, prohibited discrimination may be permitted if the distinction, exclusion or preference is based on a bona fide occupational qualification, although the employer must be able to demonstrate that it cannot accommodate an employee without suffering “undue hardship.”

All jurisdictions in Canada also have administrative bodies that handle human rights complaints. These administrative bodies may award monetary compensation; order reinstatement of a terminated employee; and require an employer to take steps to prevent discrimination and harassment.

Labour Relations

Approximately one third of the Canadian labour force is unionized. By law, employees are free to join a union of their own choice and to participate in its lawful activities.

The rules for certifying unions vary between jurisdictions. Many jurisdictions require that a union win a vote after a minimum number of the employees have signed union cards. Other jurisdictions provide for unionization without a vote when a certain percentage of employees (usually a majority) have signed union membership cards.

An employer faced with a union organizing campaign may not make threats or promises intended to influence the employees’ decision; otherwise, the labour relations tribunal charged with adjudicating the dispute may, in certain jurisdiction, automatically certify the union. Following certification, the parties must bargain in good faith in an attempt to reach a collective agreement. Strikes and lockouts are not permitted during the term of a collective agreement.

Employers are required to go to considerable lengths to provide time off, modified duties and other assistance that may be required to accommodate employees.

Workers' Compensation

Canada's provinces and territories have no-fault insurance systems in which most employers must participate to compensate employees for workplace injuries. There is no federal workers' compensation legislation and thus federally regulated employers often have the choice of "opting-in" to the provincial regime. Generally, an employee cannot sue an employer for an injury or an accident arising in the course of employment, but may claim compensation from the insurance accident fund. The workers' compensation board in each province is responsible for the applicable legislation and has broad enforcement powers.

Occupational Health and Safety

Occupational health and safety legislation in every Canadian jurisdiction requires that employers provide workers with a safe workplace. Most provinces also impose a number of specific duties, including requirements that employers prepare written health and safety policies and establish joint health and safety committees. In most jurisdictions, a worker has the right to refuse unsafe work. Health and safety legislation violations can result in significant fines, criminal charges, and ultimately jail sentences for senior managers, officers and directors of corporations. Several jurisdictions have also introduced requirements to protect workers from workplace violence and harassment.

Employment Equity/Affirmative Action

Most provinces have abandoned employment equity legislation. The *Canada Employment Equity Act*, however, applies to federally regulated employers, as well as provincially regulated employers that have entered into a contract with the federal government valued at $200,000 or more. The Act requires, amongst other things, that employers prepare and submit annual reports about their workplaces, including information about occupational groups, salary ranges, hirings and terminations.

Pay Equity

In Canada, "pay equity" refers to wage parity between male and female job classes that perform work of equal value. Ontario's *Pay Equity Act* is one of the most far-reaching pieces of legislation of its kind in any Canadian jurisdiction. For employers in the province who have not maintained pay equity arrangements, an employee complaint may result in significant potential liability in the form of retroactive wage adjustments for current and former employees. The Act provides for proactive enforcement mechanisms under which employers can be found liable for non-compliance even if no employee lodges a complaint. The Pay Equity Office ensures legislative compliance through periodic audits and by investigating complaints. Legislation in some other provinces provides for a complaint-driven process under which an employer may be held accountable only if an employee or union files a complaint.

Sale of a Business – Successor Employers

The purchaser of a business can inherit a wide variety of employment-related liabilities and obligations as a "successor employer" to the vendor. These can include termination costs, employment standards violations, workers' compensation costs, pay equity adjustments, collective agreements and union bargaining rights. Only careful due diligence can bring to light the liabilities being acquired along with a business. To reduce exposure for such liabilities, transactions can be structured in various ways and vendors may provide appropriate indemnities.

Unique Québec Considerations

The province of Québec has language and employment law considerations that are unique to that province. For a general understanding of these laws, please see Chapter 4, Doing Business in Québec.

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Osler's Employment and Labour Department delivers clear, practical and results-oriented advice that recognizes the value and importance of human resources to an organization's success. Colin Kelly is an associate in the department and Sven Poysa is a partner in the department.

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The Employee Benefits Landscape in Canada

By Anthony Devir

Canadians are living longer and facing increased responsibility to save for their retirement. Because life expectancies are on the rise, retirement savings will have to last longer. It's important for employees to begin saving earlier and to consider all their retirement options. In this chapter we consider two of the three pillars supporting retirement income in Canada – government sponsored retirement benefit plans and employer sponsored retirement plans.

Government Sponsored Social Security Benefit Plans

Government sponsored retirement benefit plans are considered as one of the three pillars supporting retirement income in Canada – the other two being employer sponsored retirement plans (discussed below) and the individual's own retirement savings. Employer sponsored retirement plans are often presented to employees in this context. The Government sponsored retirement benefit plans consist of the Canada Pension Plan (or, if the employee resides in Québec, the almost identical Québec Pension Plan) (CPP/QPP), Old Age Security (OAS) and the Guaranteed Income Supplement (GIS).

CPP/QPP – Both employees and employers are required to contribute to either the CPP or QPP (as applicable) based on "pensionable earnings" up to certain maximums. Upon retirement, CPP/QPP provides benefits based on an employee's average earnings and years of participation, up to certain maximums.

OAS and GIS – No employee or employer contributions are required for either of OAS or GIS. Entitlement to the GIS benefit is means-tested. Entitlement to the OAS benefit is not means-tested up-front, but it is subject to a "clawback" based on an income threshold.

In Canada there is also an Employment Insurance (EI) program that provides unemployment benefits for qualifying individuals. Employers and employees are required to contribute towards EI based on the amount of "insurable earnings" up to certain maximums.

Employer Sponsored Retirement Plans

Benefit plans provided by employers for their Canadian employees are typically divided into three broad categories: (i) registered retirement plans, which include pension plans and other registered retirement arrangements; (ii) unregistered retirement plans; and (iii) other employee benefit plans (i.e., other than registered or unregistered retirement plans). The legal framework that overlays these employee benefit plans depends on the type of employee benefit plan, whether federal or provincial governments have jurisdiction over the employment relationship and the province of employment.

Subject to one small exception in Québec (see below), there is currently no legislative requirement for employers to establish or participate in any type of retirement plan for the benefit of their employees. However, where employers establish retirement plans for their employees, the employer must comply with the governing legislative requirements.

For employers with Québec employees, the *Voluntary Retirement Savings Plan Act* requires an employer to provide a Voluntary Retirement Savings Plan (VRSP) to employees if the employer does not provide to its employees, a registered pension plan or a registered retirement savings plan or a Tax Free Savings Account Plan. Employers are not, however, required to contribute to a VRSP.

REGISTERED PENSION PLANS

Pension plans that qualify as "registered pension plans" are subject to minimum standards legislation and income tax legislation. In Canada, there is no single code which regulates registered pension plans. Instead, the federal government and nine of the 10 provinces have their own minimum standards legislation (note that Prince Edward Island does not yet have minimum standards pension legislation). The pension plan must comply with the legislated minimum standards of the applicable jurisdiction(s) with respect to covered employees and with the requirements under the *Income Tax Act* (ITA).

As is the case in relation to labour and employment law (see Chapter 10), the level of government that has jurisdiction regarding minimum standards pension legislation is determined by the industry in which an employer operates and is the same jurisdiction that applies for the purposes of labour and employment law. The majority of employers in Canada fall under provincial jurisdiction. In these cases, the applicable provincial jurisdiction that governs pension plan minimum standards is usually the jurisdiction where the employee works.

Where the employer has employees in more than one Canadian jurisdiction, multiple jurisdictions may apply with respect to a single registered pension plan. There is a lack of uniformity in the minimum standards legislation across the country and this has a significant impact on how pensions are managed in Canada. Nevertheless, while such minimum standards legislation is not identical and important differences do exist, the minimum standards legislation generally imposes similar requirements in respect of such things as eligibility for membership; locking in; the need for regulator consent for pension plan asset transfers; duties of plan sponsors and administrators; funding and solvency requirements; and pension plan investments.

In addition, the interpretation of registered pension plan documents and legislation is governed by the common law (except in the province of Québec as detailed below). As a result, the roles, obligations, liabilities and entitlements of plan sponsors, plan administrators, plan members and trustees of pension funds are shaped and affected by the applicable legislation, the plan documents and the common law.

COMMON LAW

The underlying documents which create a pension plan (i.e., the pension plan rules and trust agreements) are also subject to the common law (the only exception being plans with Québec members who are not employed in federally regulated industries). Accordingly, the terms of the plan documents, as interpreted through the common law, may prevail to provide greater rights to members than those provided for under pension legislation or otherwise govern the employer's rights or responsibilities with respect to the plan.

QUÉBEC

In Québec, the *Civil Code of Québec* (CCQ) sets out the substantive law applicable in the province, subject to specific statute law. Accordingly, where Québec is the applicable jurisdiction, the administration of employer-sponsored registered pension plans will generally be governed by the minimum standards legislation applicable in that province. However, specific issues, such as fiduciary obligations, will also require the application of the CCQ.

INCOME TAX ACT

In addition to complying with applicable minimum standards pension legislation, a pension plan must be registered under the federal ITA in order to qualify for preferential tax treatment. Essentially, the ITA limits the amount that may be contributed to a registered pension plan on a tax-sheltered basis and limits the benefits that may be paid from a registered pension plan.

EMPLOYER SPONSORED SAVINGS PLANS

In addition to, or as an alternative to, a registered pension plan, an employer may sponsor other types of retirement savings arrangements, such as group registered retirement savings plans (Group RRSPs) and deferred profit sharing plans (DPSPs). These plans are defined contribution in nature, and contributions are typically invested at the direction of the employees and the benefits payable are typically equal to the balance of the member's account.

While Group RRSPs and DPSPs are not subject to minimum standards regulation, they are regulated by the ITA. Among other things, the ITA prescribes the maximum contribution limits applicable to such plans.

While no minimum standards legislation applies to Group RRSP and DPSPs, there are guidelines published by regulators overseeing the financial services sectors, which may apply and set the standard to which such plans should be administered.

In Canada, there is no single code which regulates registered pension plans. Instead, the federal government and nine of the 10 provinces have their own minimum standards legislation.

Unregistered Retirement Plans

SUPPLEMENTAL PLANS

An employer may establish a supplemental plan for certain employees to "top-up" their pension plan benefits. Such plans provide benefits above the ITA limits applicable to registered pension plans and they are not subject to minimum standards legislation. However, where such a plan is funded or secured in some fashion, it may be subject to classification under the ITA as a Retirement Compensation Arrangement and will be subject to particular tax requirements.

NON-REGISTERED DC PLANS

Employers may also provide a non-registered plan to receive defined contribution amounts in excess of amounts permitted under registered plans. These types of non-registered plans are typically provided in conjunction with Group RRSPs and/or DPSPs. Contributions to these plans are not tax deductible to the employee and income earned in these plans is not tax exempt.

Other Employee Benefit Plans

HEALTH AND WELFARE BENEFITS

In addition to sponsoring pension and retirement savings arrangements, employers may offer health and welfare benefit plans to their employees, on an insured, self-insured or partially insured basis. These benefits vary widely among employers and in general, there is no legislation which regulates the provision of benefits under these plans. Thus, these employer plans generally are not (as such) subject to minimum standards legislation.

Typical health and welfare benefits include life insurance, accidental death and dismemberment insurance, long-term disability, short-term disability, health care and dental care. Because Canada currently has a system of universal health care, private health care benefits offered by employers are typically top-up benefits covering such expenses as semi-private or private hospital care, drugs and vision care.

Collective Bargaining Regime

In a unionized environment, the terms of a pension plan may be collectively negotiated, which may restrict an employer's ability to alter or amend the plan terms without union consent. This issue may need to be considered in a transaction where the existence of a collective agreement may affect the range of choices available to a vendor or purchaser concerning the treatment of benefit plans applicable to unionized employees.

A collective agreement may also require an employer to make contributions for unionized employees to a multi-employer pension plan or a multi-employer benefits plan that is not maintained or administered by the employer. Whether the employer has additional contribution obligations under such a plan, other than to make the contributions required under the collective agreement, may be an issue.

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Osler's Pensions and Benefits Department offers a dedicated team of lawyers with experience in every aspect of this complex, multi-jurisdictional area of the law. Anthony Devir is a partner in our department. Further information on Registered Pension Plan, proposed regulatory amendments and changes to pension investment rules can be accessed at our Pension and Benefits Law blog, www.pensionsbenefitslaw.com.

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Health Law in Canada

By Michael Watts

Health care in Canada is a complex subject, some health care services are public, some are private and there are a number of different entities involved in regulating and providing their delivery. While there is a perception that all health care in Canada is publicly funded, the publicly funded system is generally restricted to "medically necessary" hospital and physician services, and provincial or territorial drug plans that provide access to prescription drugs to residents over the age of 65 or those residents who rely on social assistance programs. Publicly funded services are delivered through a combination of public and private providers and funding comes from the Canadian federal government, which sets national standards, and the provincial and territorial governments, which regulates the delivery of services and determines those services that are deemed "medically necessary" (i.e., publicly funded) within the context of their own unique fiscal and political environment. In addition, there are a wide array of health products and services that are not subject to coverage under the public health insurance plans that are provided on a private payer basis.

Constitutional Division of Power

As is the case for many important industries and economic sectors, neither the federal, nor the provincial/territorial level of government has exclusive jurisdiction over health. Instead, the Constitution Act, 1867, divides the legislative powers relevant to the regulation of the delivery of health products and services between the federal and provincial levels of government.

The federal government is responsible for regulating important aspects of various health industries or sectors including the regulation of selling, importing, distributing and marketing of drugs and medical devices and maintains significant influence over health policy and national objectives through the use of its spending power.

The provincial/territorial level of government has comprehensive authority over the delivery of health care services. Other examples of provincial responsibility include the regulation of hospitals and other health facilities, administration of health insurance plans, distribution of prescription drugs and regulation of health professionals.

However, many health industry sectors are subject to at least some degree of regulation or oversight by both levels of government.

Canada's National Health Insurance Program

Canada's "national" health insurance program, a publicly funded single-payer system often referred to as "Medicare," is designed to ensure that all Canadian residents have universal access to medically necessary hospital and physician services. However, it is important to note that there is no single national health insurance plan. Canada's publicly funded health insurance program actually comprises 13 separate provincial and territorial health insurance plans that are each independently governed and administered based on the requirements and common criteria established by the Canada Health Act.

THE CANADA HEALTH ACT

The Canada Health Act is the federal legislation that provides the foundation for the Canadian health care system. The Act is administered by Health Canada, the federal department with primary responsibility for maintaining and improving the health of Canadians. However, neither the Canada Health Act nor Health Canada have direct authority to regulate the health insurance plans that give effect to the publicly funded health insurance system that is in place across the country. Instead, the Act establishes certain values and principles and sets out criteria and conditions that each publicly funded health insurance plan is required to meet in order to qualify for federal funding through the Canada Health Transfer. As federal funding is critical to the ability to fund "medically necessary" hospital and physician services, each provincial and territorial health insurance plan must satisfy the requirements of: public administration; universality; portability; comprehensiveness; and accessibility.

Notably, these requirements relate only to funding and administration and establish broad principles rather than a prescriptive code. In addition, the Canada Health Act is silent with respect to the delivery of health services and does not prohibit or discourage the delivery of insured health services by the private sector. As a result, there is significant variation in the funding and administration of health insurance plans from one jurisdiction to another. However, most provinces permit the delivery of a broad range of publicly funded health services through a combination of both public and private providers. Indeed, many publicly funded services in Canada are privately delivered.

The requirement that publicly funded health insurance plans be comprehensive requires that "medically necessary" hospital and physician services be covered. If a service is determined to be "medically necessary" then the full cost of the service must be covered by the public plan. However, the term is not defined and the services that must be covered are intentionally and broadly defined in order to accommodate the ability of each province and territory to make its own coverage decisions within the context of its unique fiscal and political environment. Typically, such decisions are made in consultation with the relevant medical associations in the jurisdiction. However, determining whether a particular service is "medical necessary" is a determination that has both a fiscal and political dimension. Ultimately, these coverage decisions are decisions about the allocation of scarce public resources.

The products and services available to Canadians through the publicly funded health insurance system are supplemented by a wide array of health products and services that are not, as a general matter, subject to coverage under the public health insurance plans. For example, prescription drug coverage, dental services and vision care are generally provided on a private payer basis. However, many jurisdictions provide coverage for these types of services to seniors and those who face financial or other barriers to privately funded health care. There are also a growing number of providers offering non-medically necessary and other ancillary health services. Examples include elective surgical or cosmetic procedures.

Regulation of Health Professionals and Health Facilities

Health professionals and health care facilities are subject to federal laws of general application, but the regulation of such matters is largely a matter of provincial jurisdiction.

HEALTH PROFESSIONALS

Through legislation, the provinces have delegated the regulation of health professionals to self-governing professional bodies (with varying degrees of discretion). Such legislation generally seeks to protect the public through a combination of "input regulations" that focus on who is entitled to provide a particular health service and "output regulations" that focus on the quality and delivery of the service being provided. Such regulations also generally include conflict of interest (or anti-kickback) provisions, as such matters are generally dealt with as part of the regulation of health professions rather than the regulation of health facilities.

Health industry participants offering a particular service need to understand how the service is regulated. If the service involves the performance of a regulated or controlled act (i.e., acts that can only be performed by a particular category or categories of regulated health professionals or their delegates) then the involvement of one or more duly qualified health professionals will likely be required. Also, it may be necessary to implement certain protocols and procedures in order to comply with the requirements of the regulatory colleges that govern the practices of any such professionals. Complying with such requirements can have significant commercial implications.

HEALTH FACILITIES

Operating a regulated health facility can be challenging and often involves a degree of regulatory risk. Purchasers, lenders and investors must have a thorough understanding of the legal framework and broader policy objectives of the system in order to adequately assess the risks and to take advantage of opportunities in this sector.

The products and services available to Canadians through the publicly funded health insurance system are supplemented by a wide array of health products and services that are not, as a general matter, subject to coverage under the public health insurance plans.

Residential health care facilities other than hospitals, such as nursing homes, long-term care facilities, pharmacies, laboratories and specimen collection centres are, in most jurisdictions, privately owned and operated pursuant to provincial licences and oversight. However, the degree to which such health facilities and other providers are regulated generally depends on the nature of the products and services being provided.

The operation of health facilities by private sector entities still typically involves some element of reimbursement through public funds. Where public funds are being used to acquire goods and services, additional accountability measures such as procurement requirement requirements often apply. Such accountability measures, as well as the significant role played by shared service organizations and other buying groups, can give rise to complex commercial, legal and regulatory issues.

Structuring a successful health investment or supplying certain health products and services generally requires sophisticated commercial and legal advice. This is particularly true in the case of investments or supplies involving multiple jurisdictions, as both the nature and scope of regulations generally varies from one jurisdiction to another.

Regulation of Drugs and Medical Devices

The process of obtaining marketing authorizations and approvals of prescription drugs and medical devices is administered by Health Canada's Therapeutic Products Directorate (TPD).

The TPD applies the Food and Drugs Act and the regulations applicable to prescription drugs and medical devices to ensure that drug products and medical devices sold in Canada are safe and effective. Except for low risk medical devices, no medical device or drug product can be offered for sale in Canada unless and until, after review, it is issued a marketing authorization by Health Canada.

In addition to its review of drug products and devices, Health Canada is responsible for the ongoing monitoring of drug products and medical devices being sold in Canada, as well as the regulation of good manufacturing practices and establishment licences, which are required in connection with the import, manufacture, distribution and/or sale of drug products and medical devices.

THE PATENTED MEDICINES PRICES REVIEW BOARD

In the United States, the price of pharmaceutical drugs is set by the market forces largely without government interference. This is not the case in Canada. The Patented Medicines Prices Review Board (PMPRB) is an independent quasi-judicial body created in 1987 under amendments to the Patent Act. The PMPRB is responsible for regulating the prices that patentees charge for prescription and non-prescription patented drugs sold in Canada. Based on a review of the information required to be filed by a patentee, the PMPRB considers whether the price of a medicine appears excessive based on certain factors including: (i) the prices that the patented medicine is sold in the Canadian market; (ii) the prices at which other medicines in the same therapeutic class are sold in the Canadian market; and (iii) the prices at which the medicine and other medicines in the same therapeutic class have been sold in other countries other than Canada. If the PMPRB considers the price of a medicine appears excessive, revised pricing is the usual outcome.

PUBLIC MARKET ACCESS

Each province has a provincial drug plan that allows certain individuals to access drugs at a reduced cost. Products that will be paid for by the provincial government (in some provinces, for all residents, while in others for certain prescribed individuals such as seniors and individuals receiving social assistance), are typically listed on provincial formularies. For innovator products, the manufacturer negotiates the pricing for inclusion on the provincial formulary with the provincial government. For generic products, the price to be paid for the generic product is determined by a sliding scale of fixed prices related to when such products enter the market and the price of the innovator product (i.e., a percent of the price of the innovator pharmaceutical product depending on whether they are first, second or third entry products). If a drug is a generic product and listed as interchangeable on the provincial formulary, a pharmacist is permitted to dispense the interchangeable product for the innovator product. Under most provincial benefit plans, interchanging a generic product for the innovator product by pharmacists is mandatory and generally most provinces will only reimburse the pharmacist for the lowest cost interchangeable product. Government drug plans account for approximately 50% of all sales of prescription drugs in Canada.

Telemedicine and eHealth

TELEMEDICINE

Telemedicine and mobile technology are having a profound impact on the accessibility and delivery of health care services. However, when a health industry participant wishes to make a health service available through the use of mobile technology or other advanced information and communication systems complex legal and regulatory issues often arise. Various national organizations are working to develop common standards. However, the delivery of a health service that crosses a domestic or international border often involves complex regulatory and compliance issues. Managing compliance with the rules of a single health care system can be difficult. Developing efficient business solutions that comply with the varying requirements of multiple jurisdictions requires deep legal and industry knowledge and a sophisticated understanding of commercial issues.

EHEALTH

Canadian governments, at all levels, are actively pursuing eHealth initiatives with varying degrees of scope and complexity. The federal government is playing a significant role in supporting funding and setting national priorities through Canada Health Infoway, a federally funded, independent, not-for-profit organization, which works with provinces and territories to invest in eHealth projects. It is widely expected that significant investment in eHealth projects and initiatives will continue and may ultimately exceed investments in other health care infrastructure costs.

Health industry participants pursuing opportunities in Canada should avail themselves with legal counsel who possess a comprehensive knowledge of the complex Canadian health care system, a strong commercial perspective and expertise in the relevant industry sector. Successfully investing or participating in Canada in any health industry sector can present challenges for even the most sophisticated health industry participants, particularly where an investment or participation crosses a provincial or national border.

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Osler's Health Industry Group is uniquely qualified to assist health industry participants in all health industry sectors to successfully navigate the complexities of the Canadian health care system. Osler has advised numerous U.S. and other international organizations on how to enter or invest in the Canadian market and has advised in connection with many of Canada's most complex and transformative health industry projects and initiatives. Michael Watts is the chair of our Health Industry Group. The author would like to acknowledge Jeffrey Murray, Associate, Health Industry Group, for his assistance with this chapter.

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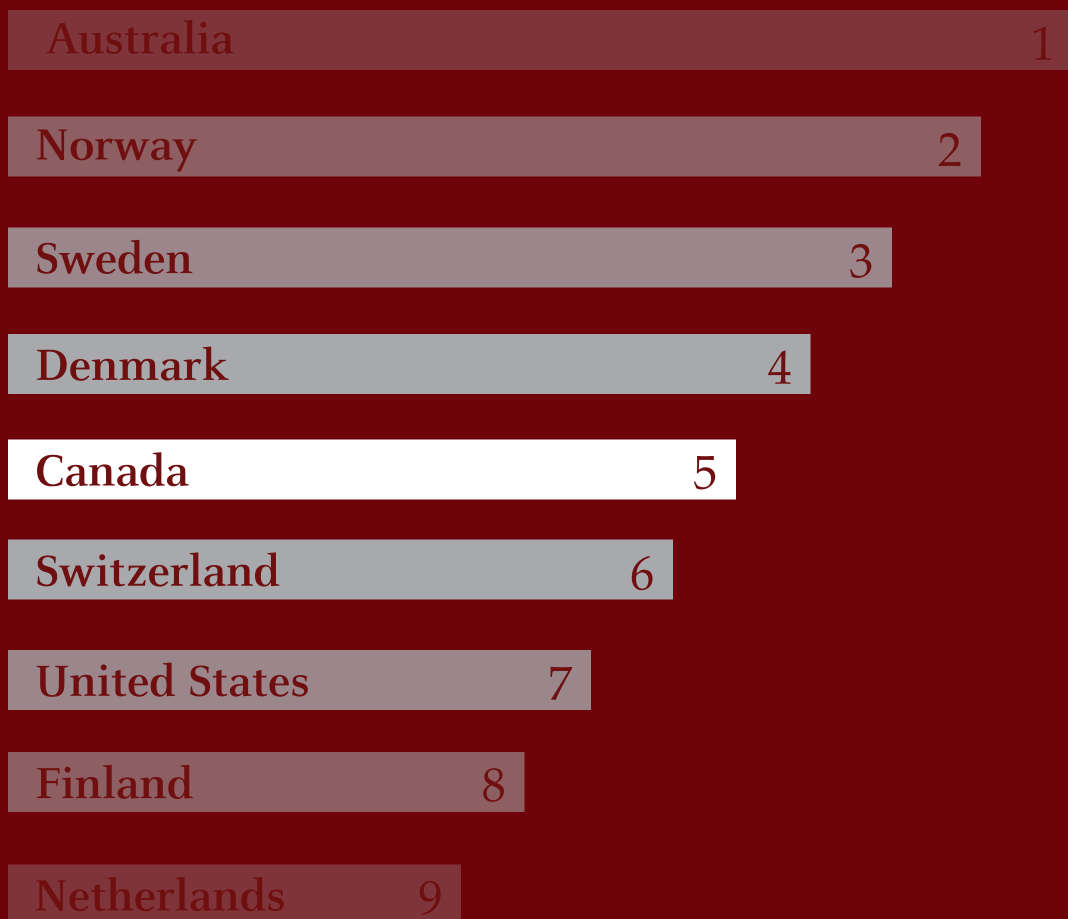
Why Reside in Canada?

Canada is a great place to live and prosper.



The OECD Better Life Initiative focuses on developing statistics to capture aspects of life that matter to people and that shape the quality of their lives. This allows for a better understanding of what drives the well-being of people and nations, and what needs to be done to achieve greater progress for all. Canada ranks fifth on the OECD's Better Life Index (BLI), behind Australia, Norway, Sweden and Denmark.

Temporary Business Visits, Executive Transfers and Permanent Relocations

By Damian Rigolo

Canada's participation in several free trade agreements, coupled with its national *Immigration and Refugee Protection Act* (IRPA), determine whether a foreign business person may live and work in Canada on either a temporary or indefinite basis.

The IRPA provides that only Canadian citizens or permanent residents of Canada may work in Canada without a valid work permit. As a general rule, if no qualified Canadian is available, a person who is neither a citizen nor a permanent resident may be employed in Canada to fill the position in question. However, business people wishing to relocate temporarily or permanently to Canada do have a number of other options open to them (as outlined below).

Temporary Business Visits

Many foreign nationals may enter Canada without a work permit to work temporarily (generally for a period of 90 days or less) if they are permanent employees of corporations based outside Canada that carry on business in Canada, either directly or through a parent or subsidiary company.

Such employees may only be in Canada to meet and consult with other employees, sell goods to parties other than the general public, or purchase Canadian goods or services. They may not directly enter the Canadian labour market and their primary source of remuneration for the business activity must be outside Canada.

Business Visits under Trade Agreements

The *North American Free Trade Agreement* (NAFTA) and the *General Agreement on Trade in Services* (GATS) set out additional categories of business visitors who may temporarily enter Canada for a period not exceeding six months to market their goods or services here or to take the steps necessary to establish a commercial presence in Canada to sell those goods or services here.

North American Free Trade Agreement

Under NAFTA, business visitors from the U.S. and Mexico may enter Canada to sell goods or negotiate contracts for goods or services for a company of a signatory country provided they are not delivering goods or providing services. Direct sales to the general public are permissible provided the goods or services are not delivered or made available to the buyer at the time of the sale (i.e., on the same business trip).

A business visitor who practises a "Designated Professional Occupation" under NAFTA may participate in business meetings, negotiate the purchase or sale of goods or services, or market, distribute or provide after sales services. Similar rules apply to Chilean business people coming to Canada under the Canada-Chile Free Trade Agreement (CCFTA).

General Agreement on Trade in Services

To be eligible under GATS, a business visitor may not receive remuneration from within Canada and may not engage in making direct sales or supplying services to the general public. He or she may only participate in business meetings, including negotiations for the sale of services or other similar activities, including setting up a business in Canada.

Short-term business visitors should carry an employment letter confirming their continuing employment with the foreign company and indicating the duration, purpose and temporary nature of their visit to Canada. They may request a visitor record if they will be coming to Canada regularly over an extended period of time and the reason for the visit remains the same. A visitor record is issued by an immigration officer at his or her discretion and allows entry to Canada on subsequent visits.

Intra-company Transfers

Securing status as an "intra-company transferee" (which is the rough equivalent of an L-1 Visa in the U.S.) offers the quickest and most convenient method by which a foreign business visitor may temporarily relocate to Canada. To qualify, amongst other criteria, a proposed intra-company transferee must carry a letter from a company carrying on business in Canada which identifies the holder as an employee of a branch, subsidiary or parent of the company located outside of Canada. The individual also must seek entry to Canada to work in an executive or managerial position for a temporary period. A written job offer from a senior officer of the Canadian company, addressed to Citizenship and Immigration Canada, is required to satisfy this criterion. The offer must describe the job in sufficient detail to demonstrate that it is at the senior executive or managerial level, the nature of the corporate affiliation between the offering company and the company from which the employee is being transferred, and the period of time for which the transfer is required.

Under NAFTA, CCFTA and GATS, companies within signatory countries may also arrange intra-company transfers for employees with specialized knowledge. The applicant must possess knowledge at an advanced level of expertise or have proprietary knowledge about the Canadian entity's product, service, research, equipment, techniques, management or processes and procedures.

Under NAFTA, intra-company transferee and specialist employees must demonstrate continuous employment with the foreign company over a period of not less than one year within the three-year period immediately preceding the application. Under GATS, they must be employed by the foreign company for a period of not less than one year immediately prior to the application. Note that length of employment is one indicator of specialized knowledge. For American and Mexican citizens, NAFTA is generally a more advantageous route to obtain entry to Canada as an intra-company transferee than is GATS.

For American and Mexican citizens, NAFTA is generally a more advantageous route to obtain entry to Canada as an intra-company transferee than is GATS.

Spouses of Intra-Company Transferees

Neither GATS nor NAFTA accommodates spouses of intra-company transferees who wish to work in Canada. However, Citizenship and Immigration Canada will grant work permits to eligible spouses of senior executives, managers and highly skilled individuals without the need of a specific Human Resources and Skills Development Canada (HRSDC) temporary foreign worker approval in the form of a labour market opinion. This policy applies to spouses of intra-company transferees whose occupation is eligible for the spousal work permit program under a list maintained by Citizenship and Immigration Canada.

Professionals

Many classes of professionals may gain temporary admission to Canada under either GATS or NAFTA. GATS cover six occupations: engineers, agrologists, architects, forestry professionals, geometrics professionals and land surveyors. NAFTA covers more than 60 occupations, including accountants, computer systems analysts, economists, management consultants, and lawyers as well as biochemists, biologists, chemists and other types of scientists.

Under GATS, a professional may be admitted for a maximum of three months. An extension may be granted with an HRSDC labour market opinion. A professional admitted under NAFTA will be granted a work permit for one year, with one-year renewals possible thereafter, provided the individual continues to occupy a *temporary* professional position in Canada (usually less than seven years).

Employment Categories Requiring HRSDC Approval

HRSDC must approve applications from those who do not come from a country that is a signatory to NAFTA, GATS or CCFTA or who do not qualify for temporary admission to Canada as a business visitor or intra-company transferee or as an applicant in another foreign worker approval-exempt category. This process is similar to obtaining an employment certification in the U.S.

While HRSDC approval is challenging, may be expensive and usually takes 8 to 10 weeks, an application will be approved where there is proof that no qualified Canadians are available to assume the position, or where granting the approval will create or maintain significant employment benefits or opportunities for Canadian citizens or permanent residents of Canada (i.e., generally through training, the creation of new jobs, or the preservation of jobs that might otherwise disappear).

Permanent Resident Status

Those wishing to reside and work indefinitely in Canada must obtain permanent resident status. Many business people qualify to apply for this status as a skilled foreign worker. A permanent resident may work for any employer in Canada and his or her spouse and dependent children may also accept employment or attend school in Canada without authorization. However, while a temporary work permit can be obtained in a matter of weeks, an application for permanent residence can take 12 to 24 months (or longer) to process and complete. New immigration targets and restrictions are set each year. Those applying for permanent residence in Canada are assessed on standard point-scoring selection criteria including education, experience, knowledge of English or French, ties to Canada and whether the applicant has "validated" employment in Canada. Note that independent immigrants (i.e., investors and entrepreneurs) are assessed on different points and criteria.

Business Categories

After abuses and cases of money-laundering were revealed in the late 1990s, Citizenship and Immigration Canada tightened its rules for "business class" permanent residents or landed immigrants. Today, there are business class programs for self-employed individuals, entrepreneur and investors.

Self-employed Program

A "self-employed person" is someone who has the relevant experience and ability in cultural, athletics or farm management to be self-employed in Canada (i.e., he or she will, at a minimum, establish a business that creates employment for at least his- or herself). The capital investment in the business of a self-employed applicant need not be as high as that required for entrepreneurs (see below), nor does the business proposal need to be as detailed.

Entrepreneur Program

An "entrepreneur" is someone who has or will fulfill the following requirements:

- Has managed and controlled a percentage of equity of a qualifying business;
- Has a certain required minimum amount to invest in that business;
- Has the intention and ability to control a percentage of a qualifying business in Canada;
- Will provide ongoing and active management of the business; and
- Will create at least one full-time new job for a Canadian citizen or permanent resident.

The last three requirements must be fulfilled within three years of the entrepreneur's acceptance as an immigrant under this program.

Investor Program

An "investor" is an immigrant who has adequate business experience; a legally obtained net worth at a specified amount; and indicates in writing that he or she intends to make (or has made) an investment in Canada. The investor places a prescribed investment of $400,000 with the Receiver General of Canada. That investment, which is used by participating provinces to build their economies and create jobs, is returned, without interest, approximately five years after the applicant has obtained landed immigrant status.

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Osler's Employment and Labour Department offers practical and results-oriented advice, recognizing the value and importance of human resources to an organization's success. Damian Rigolo is a partner in our department.

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Privacy Law in Canada

By Michael Fekete & Patricia Wilson

Federal and provincial privacy legislation has a profound impact on the way virtually all organizations carry on business across the country. Canada's privacy laws, while likely the most comprehensive in the world, are generally consistent with European privacy laws. U.S. privacy laws are sectoral in nature and do not apply across the business sector as they do in Canada.

In addition, Canada has enacted comprehensive anti-spam and anti-spyware legislation that regulates the sending of commercial electronic messages and the installation of computer programs by legitimate businesses in Canada, not just those engaged in deploying spam and spyware.

Tough New Spam and Spyware Law

The new wide-ranging legislation is known as Canada's Anti-spam Law (or CASL), and goes much further than regulating bulk, unsolicited email communications. Rather, it creates a prescriptive "express" or "opt-in" consent-based regime that applies to almost all electronic messages, including email, text and instant messages and some social media messages that encourage participation in a commercial activity. As well, it sets out prescriptive rules governing, among other things, unsubscribe mechanisms, sender identity and contact information.

CASL also includes an express consent regime, with related disclosure requirements, for the installation of computer programs. Although the principal policy objective of the new rules is to deter the distribution of "spyware," CASL's computer program rules will apply to virtually all computer programs, regardless of whether the program is installed for a malicious purpose.

CASL came into force on July 1, 2014, although the computer program rules do not become effective until January 15, 2015.

Organizations that fail to comply with CASL are exposed to stiff penalties, including administrative monetary penalties of up to $10,000,000 for corporations ($1,000,000 for individuals). CASL will be enforced primarily through complaints to and investigations by, the Canadian Radio-Television and Telecommunications Commission. As well, as of July 1, 2017, consumers and businesses will be able to commence private actions (including by way of class proceedings) and recover damages for CASL breaches, including statutory damages of up to $1 million a day.

Public Sector Privacy Laws

Public sector privacy laws apply in the federal and most provincial and municipal jurisdictions. Similar to the U.S. federal *Privacy Act*, the federal *Privacy Act* and provincial counterparts require government departments, agencies, most Crown corporations and municipal government bodies to define, and notify individuals of, the lawful, authorized purposes for their collection of an individual's personal information and to provide access to personal information they hold that is requested by individuals. Some provincial public sector privacy laws restrict public sector bodies and/or their service providers from permitting access to or disclosure of personal information from or to a place outside Canada. (See International Personal Data Transfers below.)

Private Sector Privacy Laws

Canadian businesses are subject to federal or provincial privacy protection legislation governing both customer and (with some exceptions) employee information. The federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) applies to all private sector organizations in Canada, except in provinces that have enacted "substantially similar" legislation. PIPEDA also applies when personal information is disclosed across a provincial border in the course of commercial activity and in most situations where an organization in Canada receives or transmits personal information from or to a destination outside Canada.

Québec, B.C. and Alberta, each of which has been recognized as "substantially similar" to PIPEDA, applies to employee information. Manitoba has enacted a private sector law that is not yet in force. Personal health information laws in Ontario, New Brunswick and Newfoundland and Labrador have also been declared substantially similar to PIPEDA.

There is uneven privacy law coverage of employee personal information in Canada. Potential business owners and/or investors will wish to familiarize themselves with individual provincial privacy laws, which apply to employees. PIPEDA only applies to information about employees if an organization is regulated federally for employment and labour relations purposes. Businesses operating in the provinces where PIPEDA applies will not be subject to privacy laws in relation to their employees unless the business is federally regulated for purposes of employment and labour relations.

PIPEDA and provincial privacy statutes also do not apply to the journalistic, artistic or personal collection, use or disclosure of personal information.

Requirements of Private Sector Privacy Legislation

PIPEDA requires compliance with the 10 "fair information management principles" of the *Model Code for the Protection of Personal Information* (Model Code) developed by the Canadian Standards Association.

The Model Code requires organizations to:

- be accountable for personal information in the organization's possession or custody, including personal information transferred to third parties for processing, and to take contractual or other measures to provide a comparable level of protection during such processing;
- notify individuals of the purposes of, and obtain their consent for, the collection, use or disclosure of their personal information (PIPEDA sets out limited exceptions to this notice and consent requirement);
- have reasonable and appropriate purposes for their collection, use or disclosure of personal information;
- limit the amount of personal information that the organization collects, uses, discloses or retains to that necessary for the purpose for which it was collected;
- avoid tying the provision of goods or services to consent from individuals to a collateral collection, use or disclosure of personal information;
- meet standards for accuracy and the security of the personal information they hold;
- implement a privacy policy and appoint a privacy officer who will be responsible for representing the organization in privacy matters; and
- provide individuals with access to their personal information (with limited exceptions) and correct inaccurate information at the request of individuals.

Provincial privacy statutes in Québec, B.C. and Alberta contain similar requirements and exceptions, although differences between provincial statutes and PIPEDA necessitate close examination of each law in many situations involving personal data collection, use and disclosure. Notably, the Alberta privacy law requires notification to the Alberta *Information and Privacy Commissioner* (IPC) of data breaches involving residents of Alberta (the federal and other provincial Commissioners recommend such notification.)

Federal and provincial Privacy Commissioners have made numerous findings with significant impact on business practices, ranging from decisions on the standards for notice and consent for marketing communications, affiliate sharing, purchase histories, international data transfers and social media applications, to decisions on large international personal data breaches, the use of voice recognition and GPS technologies for data collection, restrictions on collection of drivers' licences for fraud prevention purposes, use of publicly available and aggregate personal information, standards for video surveillance, inappropriate collection and use of personal information by psychological profiling services and data retention by online dating services. The Privacy Commissioner of Canada has also issued guidelines to organizations regarding privacy compliance and

The Model Code requires organizations to... limit the amount of personal information that the organization collects, uses, discloses or retains to that necessary for the purpose for which it was collected.

notices for international data transfers, on-line consent, behavioural advertising and cloud computing that address common issues that arise in cross border business activities.

Privacy law requirements relating to service providers and outsourcing, data breach notification and international personal data transfers are summarized below.

Health Sector Privacy Law Requirements

For those considering business opportunities in the health care industry, whether in the public or private sector, be aware that some provinces have passed legislation dealing specifically with the collection, use and disclosure of personal health information protection laws. Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Newfoundland and Labrador and Nova Scotia have passed laws that apply to public and private sector health care providers, called custodians or trustees. Health information protection laws also apply, directly or indirectly, to agents who act for health care custodians, as well as to service providers that manage information, such as data storage and system management providers.

Health information statutes require custodians to notify and obtain express consent from patients for all collection, use or disclosure of personal health information, with limited exceptions for disclosures to other health information custodians within a patient's circle of care. Subject to detailed, limited exceptions, each statute contains provisions entitling patients to access their personal health information, limiting access to and use of health information within a custodian's organization, prohibiting disclosure for purposes other than those to which a patient has consented and setting standards for service providers that process personal health information for health care providers.

Enforcement of Privacy Laws

The Privacy Commissioner of Canada (PCC) oversees the enforcement of both the federal *Privacy Act* and PIPEDA and will investigate both domestic and international organizations under PIPEDA.

DOMESTIC

The PCC may audit the privacy practices of organizations suspected of a breach of PIPEDA, and may receive and investigate complaints of non-compliance. The PCC can make recommendations regarding PIPEDA compliance and report to Canada's Parliament organizations that are found not to comply. Both the PCC and complainants may seek remedies for non-compliance in the Federal Court of Canada, which has wide remedial authority to award damages and issue mandatory compliance orders.

Provincial privacy laws are enforced by provincial Information and Privacy Commissioners (IPCs) or Ombudsmen, who can investigate complaints and issue binding orders requiring compliance. In addition, individuals have a private right of action for privacy breaches in Québec, B.C., Alberta and under the health information protection laws in Canadian provinces where a Commissioner has made an order or recommendation finding a breach.

INTERNATIONAL

Because PIPEDA also applies to non-residents of Canada, they too are able to complain to the PCC regarding breaches by an organization in Canada. The PCC will also seek to investigate foreign organizations that are involved in complaints under PIPEDA.

The PCC can co-operate and share investigation information with foreign authorities, such as the U.S. Federal Trade Commission, when investigating an international privacy breach involving Canada. Both the PCC and IPCs investigate and make findings regarding alleged breaches of PIPEDA or provincial privacy laws that may originate or be caused outside Canada but involve the personal information of Canadians.

The PCC can co-operate and share investigation information with foreign authorities, such as the U.S. Federal Trade Commission, when investigating an international privacy breach involving Canada.

Data Breach Notification

The *Alberta Personal Information Protection Act* requires notification to the Alberta IPC by businesses that have experienced a data breach and empowers the IPC to order organizations to notify individuals of data breaches, in both cases where the data breach represents a "real risk of significant harm" to individuals. The Alberta IPC has issued numerous notification orders in cases of data breaches involving organizations in Alberta as well as organizations outside Alberta and/or Canada where individuals in Alberta may be affected.

Proposed amendments to PIPEDA would require businesses to notify the PCC and individuals (and other organizations capable of mitigating the harm) of a data breach where the breach presents a real risk of significant harm to individuals, as soon as feasible after the detection and assessment of the risk of harm caused by the breach. Direct, clear and conspicuous notification including sufficient information for a person to understand the significance of the breach and, if possible, mitigate any resulting harm would be required. The PCC has previously issued guidance in advance of the PIPEDA amendments that the PCC expects to be notified of data breaches presenting a real risk of significant harm.

Outsourcing and Service Providers

Organizations that outsource or contract for services retain responsibility for privacy compliance in respect of the personal information transferred to the service provider. While this puts service providers – including those providing services from outside the country – in the position of ensuring information is handled or processed in compliance with PIPEDA, the contracting organization is generally responsible for providing notice to individuals about the processing of their information and for ensuring, through contractual means, that service providers provide comparable protection for the personal information that they process or store for organizations subject to Canadian privacy laws.

International Personal Data Transfers

PRIVATE SECTOR PRIVACY LAWS

The European Union's (E.U.) "safe harbour" rule requires organizations to ensure that any jurisdiction to which they are sending personal data has enacted legislation providing "adequate" privacy protection. The E.U.'s designation of PIPEDA as providing "adequate protection" enables the exchange of personal data between E.U. member states and Canada (where PIPEDA applies) without the necessity of a safe harbour agreement.

PIPEDA and provincial privacy laws require organizations to notify individuals of out-of-country personal data processing or storage by the organization or its service providers. Alberta's PIPA also requires organizations to disclose their related policies and practices and to provide a contact person to answer questions regarding service providers handling personal information outside Canada. In addition, the Alberta and B.C. PIPAs and most health information protection laws require consent for disclosure of personal information to law enforcement and investigatory bodies outside Canada.

The Québec PPIPS (An *Act Respecting the Protection of Personal Information in the Private Sector*) makes organizations responsible for compliance when they use, transfer or disclose personal information outside Québec, and prohibits the transfer or disclosure if it cannot be assured that the personal information will not be used or disclosed for other purposes than those for which it was transferred or disclosed to third parties without consent.

PUBLIC SECTOR PRIVACY LAWS

In response to public concerns about threats to privacy arising under the *USA PATRIOT Act*, B.C. and Nova Scotia have enacted data-blocking measures that prohibit public sector bodies (including utilities, hospitals and Crown corporations in those provinces) from permitting out-of-country access or disclosure.

These data-blocking restrictions place significant limits on the storing, accessing and disclosing of B.C. and Nova Scotia public sector data by or to service providers located outside Canada. Alberta and Québec have public sector privacy laws and also limit disclosure of personal information to law enforcement bodies outside Canada.

In addition, the federal and most provincial governments have adopted a risk assessment approach in connection with trans-border personal data processing or storage by their service providers.

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Osler's Privacy team has helped shape the privacy landscape in Canada and can help clients identify practical solutions to privacy issues. Michael Fekete and Patricia Wilson are partners in the Privacy and Data Management Group of our firm.

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Protecting Intellectual Property in Canada

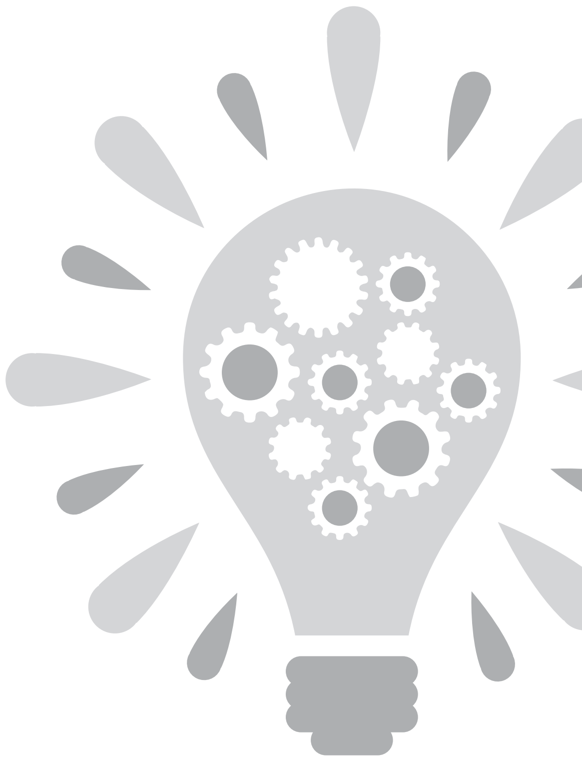
By Kelly L. Moffatt

In this fast-paced age of advancements in scientific research, technological progression and business endeavors; it is increasingly important to adequately protect intellectual property (IP).

The Canadian intellectual property regime comprises six federal statutes that have evolved in response to issues such as global technological developments, international treaties and public access needs. Foreign companies carrying on business in Canada must familiarize themselves with both the requirements of and protections afforded by this legislation.

Intellectual property in Canada is governed under six pieces of federal legislation:

1. The *Patent Act*;
2. The *Trade-marks Act*;
3. The *Copyright Act*;
4. The *Industrial Design Act*;
5. The *Integrated Circuit Topography Act*; and
6. The *Plant Breeders' Rights Act*.



The Canadian Intellectual Property Office (CIPO), an agency of Industry Canada, administers the first five acts, sharing responsibility with the Department of Canadian Heritage for the *Copyright Act*. CIPO also maintains databases of registered patents, copyrights, trade-marks, industrial designs and integrated circuit topographies. The Canadian Food Inspection Agency administers the *Plant Breeders' Rights Act*.

The following information provides a high level overview of the legislation.

Patents

For an invention to be patentable in Canada, it must be

- novel (i.e., not already publicly disclosed elsewhere);
- useful (functional and operative); and
- non-obvious to someone skilled in the art (i.e., demonstrate "inventive ingenuity").

A Canadian patent gives the inventor the right to exclude others from "making, using or selling" the invention for 20 years from the filing date; no patent term extensions of any kind are available in Canada. Canadian patents are granted to inventors who are the first to file a patent application, not the first to invent. This means that it is essential to prepare and *file a patent application* at the earliest opportunity.

An applicant who previously filed a patent application in a member country of the *Paris Convention* may claim the benefit of that early filing date for an application for the same invention that is filed in Canada within the following 12-month period. This benefit also extends to applicants who first filed in any World Trade Organization member country.

PROTEST AND RE-EXAMINATION

Before a patent is granted, the *Patent Act* provides for formal opposition proceedings on the basis of prior patents, published applications and printed publication. There is also a procedure for re-examination of an issued patent.

MAINTENANCE FEES

The Patent Office charges maintenance fees both during prosecution of the patent application and after a grant. These fees are payable annually from the second anniversary of filing in amounts that increase over the term of the patent.

INFRINGEMENT

Although an infringement action can be commenced in the Superior Court of any province, generally it is brought in the Federal Court. The action is heard by a judge alone (there are no jury trials) and the resulting court order is effective across the country. If infringement is found, the successful party is entitled to injunctive relief, damages or an accounting of profits, deliver up and costs.

While there are exceptions, the current trend favours the patentee; claims are construed liberally and held valid unless clearly without merit. Accordingly, a foreign enterprise seeking to establish a business in Canada that might involve a patented process, method or product, should conduct a careful search of Canadian patents in force and have the search results interpreted by someone familiar with Canadian patent law.

Trade-marks

A trade-mark is a word, symbol or design (or a combination of these) that is used to distinguish the wares or services of a person or organization from those of others in the marketplace. A Canadian trade-mark registration can often be obtained within 20 to 24 months of filing and gives the registrant the exclusive right to use the mark across Canada for a period of 15 years, with renewal for successive 15-year periods on payment of renewal fees.

Foreign businesses that are considering setting up a business in Canada should take steps to protect their trade-marks in Canada before actually starting to sell products or perform services here. This move will minimize the possibility that someone else, observing the use abroad, will file in Canada first and preclude registration by the true owner of the mark. Obtaining a Canadian trade-mark registration will also assist foreign entities in obtaining a .ca domain name registration (as there are certain Canadian presence requirements associated with obtaining .ca domain names). A trade-mark application may be based on use of the trade-mark in Canada as well as *proposed* use.

Obtaining a Canadian trade-mark registration will also assist foreign entities in obtaining a .ca domain name registration.

Before registration of a proposed use trade-mark will be granted, the applicant must confirm that use in Canada has started. A Canadian application may also be based on registration and use of the mark in the applicant's country of origin, without use in Canada.

SUMMARY CANCELLATION

A trade-mark that has stood on the register for three years may be subject to summary cancellation. At the request of any person and on receipt of the prescribed fee, the Registrar sends a notice requiring the registrant to either establish that the mark was in use for each of the defined wares or services at some time during the three-year period immediately before the date of the notice, or offer satisfactory reasons to excuse the absence of use. If the registrant's evidence or explanation is not accepted, the registration will be cancelled or restricted. This procedure provides a relatively inexpensive method of pruning the "deadwood" from the register.

LICENSING

In Canada, there is no requirement to record licensees. To maintain the distinctiveness of a licensed mark, however, the trade-mark owner must have and exercise control over the character or quality of the wares and services to which the licensed mark is applied. Corporate control over the licensee will not, in and of itself, be sufficient to establish the requisite level of control. Under the *Trade-marks Act*, if notice is given of the fact that the mark is used under licence and the identity of the trade-mark owner, it will be presumed that the use is a licensed use and that the character or quality of the licensed wares or services is controlled by the owner (although such presumption may be rebutted and, as such, it is important for licensors to exercise true control with respect to the use of the licensed marks).

AMENDMENTS TO THE *TRADE-MARKS ACT*

In June 2014, the federal government passed legislation which will significantly impact Canadian trade-marks law. Although the legislation has not yet been proclaimed in force and the draft regulations have not yet been tabled, some of the key anticipated impacts are as follows:

- Implementation of Nice Classification: The statement of goods and services in applications will be required to follow the Nice Classification codes. Currently, the Canadian Trade-marks Office does not use the classification system.
- Term: The term of trade-mark registrations will be reduced from 15 to 10 years.
- Use: Subject to limited exceptions, use of a trade-mark in Canada is required before an application to registration. The new legislation removes this requirement.
- Madrid Protocol: The new legislation adopts the Madrid Protocol which allows applicants to file a single “international” application.

Copyright

Copyright subsists in all original literary, artistic, dramatic and musical works, including computer programs, provided that the author is a citizen or resident of a treaty country or the work, if published, was first published in a treaty country (see International Treaties below). Copyright gives the owner the sole right to produce or reproduce a work, or a substantial part of it, in any form.

While copyright protection generally lasts for the life of the author, plus 50 years, the Canadian government has considered extending this term to 70 years, as is the case in the United States and the European Union. Under the *Copyright Act*, the Copyright Board certifies tariffs which set out royalties payable for certain uses of copyright material.

Registration, while not necessary, provides certain presumptions that are useful if the copyright is litigated and prevents any person from relying on the defence of “innocent infringement” (i.e., where the infringer did not know and had no reason to suspect that copyright existed in the work). If there is no registration, an infringer who successfully proves the defence of innocent infringement could be prohibited from further copying but would not be liable for damages.

International Treaties

Canada is a member of the *International Copyright Convention* (the *Berne Convention*) and of the *Universal Copyright Convention*. Under the latter agreement, each of the contracting nations agrees to protect works first published in other contracting nations, provided that the published copies of the work are marked with the symbol © followed by the date of first publication and the name of the copyright owner.

Industrial Design

Ornamental shapes or the configuration of industrial objects may be registered under the *Industrial Design Act* for patent-like protection for a period of five years, renewable for one further five-year period. To be valid, a design application must be filed in Canada within one year of its first publication in Canada or elsewhere. Only the "proprietor," who is the author, may validly apply for registration, unless the author has executed the design for another party for consideration or payment; in this case, the other party is the first proprietor. If the design is then assigned (i.e., sold), the assignee will be considered a subsequent proprietor and either the first or subsequent proprietor may apply to register. Care must be taken to correctly assess the facts, to name the correct "proprietor" and to file the application in a timely manner.

Integrated Circuits

Canada's *Integrated Circuits Topography Act* provides exclusive rights in the design or "topography" of integrated circuits (the semi-conductor chips used in modern electronic technology). The law provides the creator of topography or a successor in title, a 10-year exclusive right to reproduce the topography, manufacture the integrated circuit incorporating the topography and import or commercially exploit the topography or integrated circuit incorporating it.

To be valid, an application must be filed in Canada within two years of the first commercial exploitation of the topography anywhere in the world. Reverse engineering of a registered topography is lawful if used for analysis, evaluation, research or teaching, but not for commercial purposes.

Plant Breeders' Rights Act

The *Plant Breeders' Rights Act* gives you exclusive rights to new varieties of some plant species.

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Osler's Intellectual Property Department assists companies representing virtually every business sector in the acquisition, commercial exploitation and protection of intellectual property. Kelly Moffatt is a partner in our department.

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Environmental Law in Canada

By Shawn Denstedt, Q.C. & Richard J. King

Increased environmental awareness, heightened concerns about health and wellness, and increased activism from Aboriginal communities and environmental groups have contributed to the development of new environmental laws in Canada. The regulatory regime governing environmental protection in Canada is complex. Despite attempts to harmonize environmental standards throughout the country, companies carrying on business in Canada must consider the potential impact of environmental regulation undertaken by all levels of government in multiple jurisdictions – federal, provincial/territorial and municipal.

The federal and provincial governments in Canada both have jurisdiction over environmental matters and environmental laws often overlap. In addition, municipal governments, traditionally responsible for water and sewage systems and noise issues, in some cases now restrict or prohibit the use of pesticides and herbicides (even after their use has been approved by the federal or applicable provincial government), require public disclosure regarding the use of toxic substances and often try to control the impact of development on the environment through their role as the primary authority for land-use planning. Adding to the complexity, there are sometimes multiple levels of municipal government.

Federal Environmental Regulation

The following is an introduction to some of the key federal environmental legislation.

CANADIAN ENVIRONMENTAL PROTECTION ACT

The *Canadian Environmental Protection Act, 1999* (CEPA) regulates toxic substances from the research and development stages through to production, marketing, use and disposal. CEPA provides broad enforcement powers (with substantial maximum fines and other penalties) and mandatory mechanisms to enforce compliance with CEPA and its regulations (i.e., environmental protection orders). Regulations under CEPA govern (among other things) the import and manufacture of substances new to Canada; the import, export, manufacture or use of toxic substances; and the import, export and movement of hazardous wastes between provinces within Canada.

FISHERIES ACT

The *Fisheries Act* prohibits the deposit of “deleterious substances” in water where fish may be present at any time, or in any place or under any conditions where such substances may enter into water where fish may be present. It also prohibits serious harm to fish (defined as the "death of fish or any permanent alteration to, or destruction of, fish habitat") that are part of a commercial, recreational or Aboriginal fishery unless permission is received from the government and actions are taken to compensate for the loss of habitat. Regulations under the *Fisheries Act* establish standards for effluent discharged by companies in various industrial sectors including mining, petroleum refining and pulp and paper. Penalties under the *Fisheries Act* involve minimum fines of $1 million per offence and maximum fines of $12 million per offence.

TRANSPORTATION OF DANGEROUS GOODS ACT

The transportation of substances that qualify as "dangerous goods" by air, road, rail or ship within Canada, regardless of the destination or point of origin of the goods and whether or not the activity is for profit, is governed by both provincial and federal regulatory schemes. Provincial laws generally incorporate (by reference) the requirements of the federal scheme which is set out in the *Transportation of Dangerous Goods Act, 1992* and the *Transportation of Dangerous Goods Regulations*. This scheme incorporates accepted international requirements and is generally complementary to U.S. provisions governing the movement of such materials.

CANADIAN ENVIRONMENTAL ASSESSMENT ACT, 2012

The *Canadian Environmental Assessment Act, 2012* (CEAA) applies to major projects that may impact areas of federal jurisdiction: fish, aquatic species under the *Species at Risk Act*, migratory birds, federal lands, Aboriginals, and changes to the environment that are "directly linked or necessarily incidental" to a federal approval. The regulations set out a list of projects that require an environmental assessment. In certain cases, a review panel may be appointed and public hearings held. All assessments under CEAA will be subject to fixed timelines: 365 days for standard assessments, 18 months for reviews by the National Energy Board and 24 months for assessments by a review panel.

The objectives of an environmental assessment are to ensure that potential adverse environmental effects are considered before proceeding with a project; projects that cause unjustifiable, significant adverse environmental effects are not permitted by the federal government; and appropriate mitigation measures are implemented, where necessary.

SPECIES AT RISK ACT

The *Species at Risk Act* identifies vulnerable species and places them into one of four categories: (i) extirpated (no longer exists in the wild in Canada), (ii) endangered (facing imminent extirpation or extinction), (iii) threatened (likely to become endangered if no steps are taken), or (iv) special concern (at risk of becoming threatened or endangered). The purpose of the *Species at Risk Act* is to prevent wildlife species from becoming extirpated or extinct, to provide for the recovery of extirpated, endangered and threatened species, and to manage species of special concern. The *Species at Risk Act* provides for the protection from hunting, trapping, and the destruction of wildlife residences and critical habitat via Protection Orders. It also requires that "Recovery Strategies" and "Action Plan(s)" be developed for extirpated, endangered, and threatened species.

Unless dealing with an aquatic species or migratory birds, the *Species at Risk Act* generally only applies on federal lands (e.g., an Indian reserve or a national park). However, there are measures in the *Species at Risk Act* which make it possible for the prohibitions to apply to provincial lands. In addition, the *Species at Risk Act* stipulates that an assessment under the *Canadian Environmental Assessment Act, 2012*, must ensure that measures are taken to avoid or lessen adverse effects of a project on species at risk and that effects are monitored. The measures must be taken in a way that is consistent with any applicable Recovery Strategies and Action Plans. In this way, the *Species at Risk Act* can have a large impact on projects located on provincial lands, despite the fact that the prohibitions in the *Species at Risk Act* may not directly apply.

NAVIGATION PROTECTION ACT

In Canada, the public has a right to use navigable waters as a highway for transportation. One of the oldest regulatory statutes in Canada, the *Navigation Protection Act* protects this public right to navigation. Navigable waters that are listed in the schedule to the Act require regulatory approval before any works that risk a substantial interference with navigation can be undertaken. The list of scheduled waters includes Canada's busiest waterways that support commercial or recreation-related navigation. Typically, these waters are accessible by ports and marinas and are often close to heavily populated areas.

One of the oldest regulatory statutes in Canada, the *Navigation Protection Act* protects this public right to navigation.

CANADIAN *CRIMINAL CODE*

Under the Canadian *Criminal Code*, the government may criminally prosecute "organizations" for egregious environmental violations (i.e., those causing bodily injury or death). Persons who direct, or who have the authority to direct, how another person does work or performs a task must take reasonable steps to prevent bodily harm to that person or any other person. This duty could arise, for example, where environmental discharges cause injury.

ENVIRONMENTAL ENFORCEMENT ACT

The federal government has recently implemented the *Environmental Enforcement Act* that increases the powers of the federal government to enforce the provisions of various environmental statutes. The *Environmental Enforcement Act* has increased maximum fines, provided more order making powers and authorized the issuance of administrative monetary penalties for violations under nine different existing federal statutes dealing with environmental matters. The *Environmental Enforcement Act* also requires a corporation convicted of an offence under the specified environmental statutes to notify its shareholders of the conviction.

Provincial and Territorial Environmental Regulation

Canada's ten provincial and three territorial governments are very active in the area of environmental regulation. Generally speaking, these regulatory regimes employ both a standards-based system (i.e., specified emission criteria) and an objects-based system (i.e., prevention of adverse effects). Below is an outline of some aspects of the scheme for the province of Ontario. Other provinces and territories have similar robust environmental and regulatory approval regimes in place.

CONTROL OF EMISSIONS, DISCHARGES AND ENVIRONMENTALLY SENSITIVE UNDERTAKINGS

The *Environmental Protection Act* (EPA) and the *Ontario Water Resources Act* impose prohibitions and penalties for the "discharge" of contaminants in amounts or concentrations in excess of that prescribed by regulation, that would otherwise cause or likely cause an "adverse effect," or that may impair water quality. An adverse effect includes virtually any damage or harm that could occur to the natural environment, people, plants or animal life. The EPA also deals specifically with spills.

Both statutes require approvals for certain environmental undertakings that have the potential to discharge or emit contaminants or pollutants, and for most waste handling and disposal activities, water works, sewage works and water takings in excess of 50,000 litres per day. The statutes also authorize the Ontario Ministry of the Environment to issue orders requiring that an ongoing discharge (or a process resulting in a discharge) be controlled or stopped, or that contamination be cleaned up. The *Technical Standards and Safety Authority Act, 2000* and subsidiary regulations govern the installation, use and removal of tanks and related equipment used to store petroleum products. The *Fire Code of Ontario* similarly governs larger petroleum storage tanks and tanks for the storage of other substances that may pose fire hazards.

In Québec, the *Environment Quality Act* ensures the protection of the environment by way of a verification procedure that requires the issuance of a certificate of authorization for a wide range of commercial and industrial activities. The enabling legislation is widely construed so as to include anyone erecting or altering a structure, undertaking to operate an industry, carrying on an activity, using an industrial process, or increasing the production of any goods or services "if it seems likely" that this will result in an emission of contaminants, or change the quality of the environment, with some exceptions. The Minister may require any alteration to the plan submitted to ensure that the emission of contaminants into the environment will be in accordance with the law. The Minister may suspend or revoke an authorization certificate in case of non compliance with its terms or with the law. The Minister also has the power to order, without prior notice, whoever is responsible for a source of contamination to cease or limit its activities, whether permanently or temporarily, when an immediate danger to any person's health or serious or irreparable damage to property exists. These ministerial orders are usually reviewable by the Tribunal administratif du Québec.

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Brownfields Legislation

Former industrial (or mined) sites that may be contaminated with pollutants from earlier uses must, in some cases, be cleaned up before they can be redeveloped (referred to as brownfields). There is relatively little coordination among the ten provinces and the three territories in their respective approaches to environmental regulation in this area. All provinces permit either a risk-based or a standards-based approach to remediating contaminated lands. Changes to Ontario's brownfields legislation that became effective in July 2011 made compliance with the regime considerably more onerous and expensive. For example, the generic standards that can be used to determine site clean-up have, in some cases, become more stringent.

In most jurisdictions in Canada, a due diligence defence is available for most environmental charges.

Environmental Liabilities

There are four general types of environmental liabilities that a corporation doing business in Canada should understand:

> *Quasi-criminal Enforcement:* Individuals and companies that do not comply with environmental legislation may be subject to quasi-criminal charges. Both the number of prosecutions and the size of the penalties for these offences have increased significantly in recent years. Although rare, individuals involved in environmental offences can also be imprisoned. Convictions are being publicized to stigmatize and embarrass offenders and to deter potential offenders.
>
> In most jurisdictions in Canada, a due diligence defence is available for most environmental charges. To establish the defence, the accused must show that they took "all reasonable care" to prevent the offence from occurring (e.g., that an effective environmental management system had been implemented).

> *Environmental Penalties:* The stated purpose of environmental penalties (EPs) is to encourage compliance with the appropriate regulatory regime, rather than to penalize those who do not comply, but their practical effect is very similar to that of a fine. In Ontario, EPs can be imposed for violations of environmental statutes by regulatory order. Appeals of such orders are to an administrative board rather than the courts. In addition to having to pay an EP, an offender can be charged and fined with respect to the same violation.

> *Administrative Orders:* Government authorities can order individuals and businesses to take remedial action to investigate, clean up or otherwise address an environmental concern or issue. Those who fail to comply with an order can be prosecuted. Certain environmental statutes may permit the government authority to undertake necessary action to address a violation and seek recovery of its costs from the party responsible for the violation.

Civil Actions: A person may bring a civil action for breach of contract or based in tort (i.e., for negligence, nuisance, strict liability or trespass) to recover damages suffered from a party that caused the damage. Any individual or corporation that causes environmental damage to another's property, or harm to a person, may be held responsible for the damage. Some environmental statutes also give injured parties the right to recover damages suffered as a result of, for example, spills. The use of civil actions to recover environmental damages is growing. The Supreme Court of Canada has determined that, in certain circumstances, civil claims can be advanced by the government for damages similar to the statutory right to claim damages to natural resources in the United States.

Directors' and Officers' Environmental Duties and Potential Liability

Directors and officers of corporations can be personally liable to fines and, in extreme cases, imprisonment, for causing or permitting damage to the environment or for failing to take all reasonable care to prevent the corporation from committing an offence, regardless of whether the corporation has been prosecuted or convicted. Also, if the directors and officers are sufficiently involved in the activity leading to a discharge or, in at least one province, the corporation fails to comply with an order issued to it, they may be personally named in regulatory orders for the protection or clean-up of the environment.

Under CEPA, directors, officers and agents may be subject to charges if they directed, authorized, assented to, acquiesced in or participated in the commission of an offence by the corporation. They also have a duty to take all reasonable care to ensure that the corporation complies with CEPA, its regulations and orders or directions issued under it or its regulations. Failure to do so is an offence.

In Ontario, directors and officers of corporations have a statutory duty to take all reasonable care to prevent the corporation from illegally discharging contaminants; obstructing environmental officials; failing to notify the regulator where the corporation is legally required to do so; failing to install and maintain emission or discharge control equipment required under environmental permits or licences; contravening an order issued under environmental legislation; and contravening certain provisions related to hauled liquid industrial or hazardous waste. A breach of any of those duties can result in charges, fines and, in egregious situations, imprisonment. Where so charged, the director or officer has the (reverse) onus of proving that he or she has discharged the duty.

Climate Change and Greenhouse Gas Control

The province of Alberta was the first North American jurisdiction to legislate the regulation of greenhouse gas (GHG) emissions from large industrial emitters. The Alberta regime regulates the intensity of emissions (i.e., the GHG emissions per unit of product produced). Québec has implemented the *Regulation respecting a cap-and-trade system for greenhouse gas emission allowances* which provides for an absolute emissions cap. Under the Regulations, emitters over a certain amount may be subject to penalties for non-compliance, including in some cases penal (criminal) offences. Québec has also entered into an agreement with the State of California to harmonize a cap-and-trade system allowing trading between them. Along with Québec, British Columbia, Manitoba, and Ontario originally committed to participating in the Western Climate Initiative. The province of Saskatchewan registered as an observer, but only Québec proceeded with the original implementation schedule. British Columbia currently places a carbon tax on the purchase or use of fuels within the province which provides industry with an incentive for sustainable choices that produce fewer emissions. In addition, British Columbia has passed the *Greenhouse Gas Reduction (Cap and Trade) Act* which provides for absolute emissions caps and a market for trading emission credits. However, regulations have not been created to implement the *Greenhouse Gas Reduction (Cap and Trade) Act*.

The federal government has contemplated various climate change strategies in recent years ranging from a cap-and-trade regime to intensity based reduction targets. On January 31, 2010, the government committed under the Copenhagen Accord to reducing GHG emissions by 17 per cent from 2005 levels, which is linked to the same target adopted by the United States. The Copenhagen Accord does not contain any binding commitments for reducing GHG emissions, nor does it include any discussion of compliance mechanisms. To date, the federal government has pursued a sector-by-sector regulatory approach beginning with the electricity and transportation sectors. It is currently looking at how to regulate GHG emissions from oil sands operations and conventional crude oil and natural gas extraction. Climate change regulation is an emerging issue that companies carrying on business in Canada will have to monitor closely.

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Osler's Regulatory, Environmental and Aboriginal Law Group (REAL Group) understands that businesses today are faced with escalating and arduous environmental requirements. We help leading organizations adopt forward-looking approaches to manage these issues and challenges. Shawn Denstedt, Q.C. (Calgary) is national Co-chair of the firm and leader of the REAL Group. His practice is comprised of energy, mining, environmental, regulatory and aboriginal law matters. Richard J. King (Toronto) is a partner with the REAL Group. His environmental practice focuses on the environmental aspects of major infrastructure projects, as well as toxic substance regulation and product stewardship matters. We would like to acknowledge Thomas McNerney, Associate (REAL Group), for his assistance with this chapter review.

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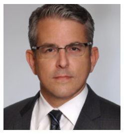

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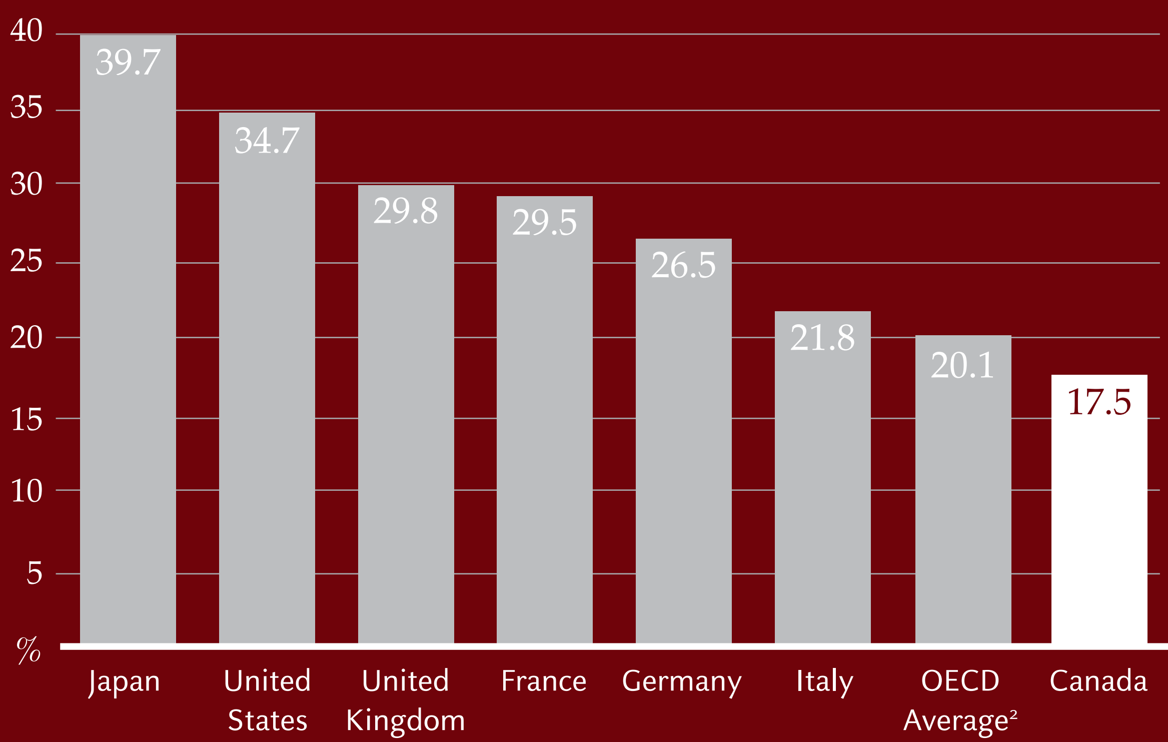
Why Invest in Canada?

Canada offers a favourable environment for business investment. It leads the G-7 with the lowest marginal effective tax rate on new business investment.

Marginal Effective Tax Rate[1] on New Business Investment, 2014



[1] The marginal effective tax rate (METR) on new business investment takes into account federal, provincial and territorial statutory corporate income tax rates, deductions and credits available in the corporate tax system and other taxes paid by corporations, including capital taxes and retail sales taxes on business inputs. The methodology for calculating METRs is described in the 2005 edition of Tax Expenditures and Evaluations (Department of Finance). The METR includes measures announced as of January 1, 2014. It excludes the resource and financial sectors and tax provisions related to research and development.

[2] OECD (Organisation for Economic Co-operation and Development) average excludes Canada.

Regulatory Approvals for Energy Projects

By Shawn Denstedt, Q.C., Martin Ignasiak & Richard J. King

Depending on the scope and location of the project, proposed energy projects in Canada may require a range of regulatory and environmental approvals from the federal and/or provincial/territorial governments. Consultation with Aboriginal peoples often plays a significant role in the approvals process.

This chapter is an introduction to the primary federal energy regulatory agency (National Energy Board), federal environmental legislation that may apply to energy projects that have inter-provincial or international characteristics and Alberta, British Columbia, Ontario, Québec, and the Northwest Territories' regulatory regimes and governing legislation.

National Energy Board

The National Energy Board (NEB) is Canada's federal energy regulatory agency. The NEB has two functions. Firstly, the NEB regulates inter-provincial and international pipelines, international power lines and designated inter-provincial power lines, and the importation and exportation of energy to and from Canada. Secondly, the NEB also regulates onshore and offshore development in the Yukon and Nunavut, offshore development in the Northwest Territories, as well as offshore areas not within provincial jurisdiction, under the *Canada Oil and Gas Operations Act*. The NEB also shares jurisdiction through a Memorandum of Understanding with the Canada-Nova Scotia Offshore Petroleum Board in the Nova Scotia offshore area in order to reduce regulatory overlap.

The purpose of the NEB is to promote safety and security, environmental protection, and efficient energy infrastructure and markets in the Canadian "public interest" (a balance of economic, environmental and social interests that change as society's values and preferences evolve over time). In deciding whether to approve an energy facility application, the NEB must consider the overall public good that a project may create as well as its potential negative impacts.

Federal Environmental Legislation

In Canada, jurisdiction over environmental matters is shared by the federal and provincial governments. A number of key federal laws typically apply to energy projects. For example, the *Fisheries Act* applies where a proposed project would seriously harm fish and fish habitat that are part of a commercial, Aboriginal or recreational fishery. Energy project proposals must also comply with provisions of the federal *Migratory Birds Convention Act* and the *Species at Risk Act*. Additionally, where equipment is to be erected or placed in navigable waters, approval under the *Navigation Protection Act* may be required.

The federal government has also released regulations for coal-fired electricity plants aimed at reducing greenhouse gas emissions. The *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations* set a stringent performance standard, based on an emission-intensity limit of 420 tonnes of carbon dioxide per gigawatt hour, for new coal-fired electricity generation units and those that have reached the end of their useful life. The federal government has announced plans for similar regulations for the oil and gas industry in the future.

Canadian Environmental Assessment Act, 2012

Certain types of major projects may also trigger a federal environmental assessment under the *Canadian Environmental Assessment Act, 2012* (CEAA). The regulations made under CEAA set out a list of projects that require an environmental assessment. In certain cases, a review panel may be appointed and public hearings held. All assessments under CEAA are subject to fixed timelines: 365 days for standard assessments, 18 months for reviews by the NEB and 24 months for assessments by a review panel. However, the time limits do not apply to all steps in the process and, therefore, the actual timeline to obtain approval for a project may be longer.

Major Projects Management Office

The Major Projects Management Office (MPMO) is an organization which serves as a single point of entry into the federal regulatory system for proposed major resource projects. The MPMO provides overarching coordination and management for major resource projects as they progress through the federal regulatory review process. A “major resource project” is a large resource project which is subject to an environmental assessment as defined under the CEAA. Major resource projects may include federally-regulated pipelines, electrical transmission lines, oil sands mines, and water management facilities handling large quantities of water.

Provincial/Territorial Regulatory Regimes

Each province and territory maintains its own regulatory regime for approving energy-related projects. The majority of oil and gas-related activities under provincial jurisdiction are located in the provinces of Alberta and British Columbia, although there are also significant oil and gas activities in Saskatchewan, Newfoundland and Labrador, Nova Scotia, and in Canada’s three northern territories.

ALBERTA

The Alberta Energy Regulator (AER) and Alberta Utilities Commission (AUC) are Alberta's primary energy regulators. These tribunals regulate upstream energy projects, intra-Alberta electricity transmission and pipeline projects, and local distribution utility matters. The AER and AUC's mandates are to ensure the safe, responsible and efficient development of Alberta's energy resources, and to regulate the pipelines and transmission lines required to move these resources to market.

All significant steps in proposed energy projects require AER and/or AUC approval. Where a project is approved, a licence, order or permit is issued. Energy development applications are processed as either routine (applications may be processed in as little as one to two days) or non-routine (applications may take months to process and may involve public hearings). In a routine application, there are no landowner obligations and all technical, safety, public consultation and environmental requirements have been met. Landowner objections, community or environmental concerns, or objections from competing companies give rise to a non-routine process.

Larger energy projects require an environmental assessment process and review under the *Alberta Environmental Protection and Enhancement Act* (the EPEA). The AER and AUC consider the results of the assessment process in assessing the public interest.

ALBERTA LAND STEWARDSHIP ACT

The *Alberta Land Stewardship Act* (ALSA) provides the Lieutenant Governor in Council (Cabinet) with the authority to make and implement land-use plans for seven regions within Alberta. The seven regions are identified in Alberta's Land Use Framework and are based on major watersheds with boundaries aligned to best fit municipal boundaries and natural regions. As of 2014, two land use plans had been established. The Lower Athabasca Regional Plan (LARP), covering the Athabasca oil sands region, was the first regional plan released by Cabinet pursuant to the ALSA. The LARP identifies several specific outcomes for the Lower Athabasca region, including improved integration of industrial activities on the landscape, designation of new conservation, recreation and tourism areas, and inclusion of Aboriginal peoples in land-use planning. The LARP includes both regulatory and non-regulatory strategies to implement the identified outcomes for the Lower Athabasca region. The LARP introduced an additional layer of environmental scrutiny and compliance into the Athabasca area of Alberta. The Government of Alberta has also recently approved the South Saskatchewan Regional Plan and is commencing consultation of the North Saskatchewan Regional Plan soon.

The AER and AUC's mandates are to ensure the safe, responsible and efficient development of Alberta's energy resources, and to regulate the pipelines and transmission lines required to move these resources to market.

BRITISH COLUMBIA

British Columbia's *Oil and Gas Activities Act* (OGAA) regulates the majority of oil and gas activities in British Columbia. The Oil and Gas Commission (OGC), a Crown corporation, is primarily responsible for the regulation of oil and gas activities and pipelines in British Columbia. The OGC reviews applications; ensures that approved applications are in the public interest, having regard to environmental, economic and social effects; encourages the participation of First Nations; participates in planning; and educates and communicates with the public.

The British Columbia *Environmental Assessment Act* (EAA) requires an environmental assessment review process for project proposals that exceed thresholds established by the *Reviewable Projects Regulation* (RPR). All such proposals must receive a certificate before they may proceed. The Environmental Assessment Office is responsible for conducting the environmental assessment process and may coordinate with other governmental agencies, including the OGC.

If a project proposal does not exceed the thresholds set out in the RPR, the OGC has jurisdiction over any environmental review, subject to a variety of statutes. The *Environmental Management Act*, for example, guides the OGC in discharging its responsibilities. Other applicable legislation includes the *Forest Act*; the *Forest and Range Practices Act*; the *Forest Practices Code*; the *Water Act*; and the *Heritage Conservation Act*.

QUÉBEC

In Québec, large projects with the potential for environmental impacts, including the construction of power plants and facilities, the opening of mines and the construction of roads and other infrastructure are subject to public assessment. The *Bureau d'audiences publiques sur l'environnement* (BAPE) investigates and advises the Minister on the environmental, social and economic effects of these projects. The BAPE must hold public hearings whenever required to do so by the Minister. During the 45-day public consultation period, the BAPE is charged with making any document relating to the project public, and any person, group, organization or municipality may request a public hearing, in which any member of the population may participate. Following the hearings, the BAPE conveys to the Minister the concerns of citizens as expressed during the public assessment. These large projects are approved by the Government, on the recommendation of the Minister. As occurred in the case of shale gas in 2011, the BAPE may also conduct industry-wide evaluations in certain cases.

ONTARIO

The Ontario Energy Board (OEB) regulates the province's electricity and natural gas sectors. The OEB sets electricity transmission and distribution rates; licenses all market participants including generators, transmitters, distributors, wholesalers and retailers of electricity; and monitors markets in the electricity sector for efficiency, fairness and transparency. The OEB also regulates Ontario's natural gas utilities and licenses all marketers who sell natural gas. In addition, the OEB regulates the construction of natural gas pipelines, electricity transmission lines, and the use of geological formations for natural gas storage.

Major electricity projects will also be subject to the provincial *Environmental Assessment Act's* Electricity Projects Regulation. The Regulation provides for a self-directed "screening" form of assessment for most energy projects, and a full individual assessment for the most environmentally significant projects (which can result in a hearing before the Environmental Review Tribunal). Renewable energy projects in Ontario are subject to a special approvals process administered by the Ontario Ministry of Environment. The Renewable Energy Approval (REA) process is aimed at expediting the approval of renewable generation via aggregating numerous provincial approvals into a single REA.

NORTHWEST TERRITORIES

In 2014, the Government of the Northwest Territories became responsible for managing public land, water, and resources in the Northwest Territories (NWT). The Government of the NWT's department of Industry, Tourism and Investment will be responsible for the regulation of onshore oil and gas development in the NWT. The Government of Canada will retain its responsibility for offshore resources in the NWT through the NEB.

For major energy projects, environmental assessment approvals may be required under the *Mackenzie Valley Resource Management Act* and/or, depending on the location of the project, the Inuvialuit Final Agreement. Other applicable legislation includes the *Environmental Protection Act, Forest Management Act, Forest Protection Act, Species at Risk (NWT) Act, Waters Act, Water Resources Agreements Act*, and *Wildlife Act*.

The Renewable Energy Approval (REA) process is aimed at expediting the approval of renewable generation via aggregating numerous provincial approvals into a single REA.

Federal-Provincial Cooperation

Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Ontario, Québec, Saskatchewan and the Yukon have entered into environmental cooperation agreements with the federal government that provide for a single, cooperative environmental assessment process where an environmental assessment of a proposed project is required under both the CEAA and provincial/territorial environmental assessment statutes. These agreements are intended to minimize the duplication of efforts and ensure that an environmental assessment is conducted as efficiently and effectively as possible. For example, British Columbia and the federal government have agreed to substitute the provincial regulatory process for the federal process for several major projects that trigger both federal and provincial environmental assessment reviews.

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Osler's Regulatory, Environmental and Aboriginal Law Group (REAL Group) helps energy project proponents navigate the increasingly complex and rigorous environmental and regulatory approvals process in Canada. Shawn Denstedt, Q.C. (Calgary) is the leader of the REAL Group and Co-chair of the firm. Martin Ignasiak (Calgary) is a partner with the REAL Group. Martin has extensive experience in developing and executing strategies for obtaining necessary regulatory approvals for large scale industrial projects, including oil sands facilities, coal mines and electric generation facilities. Richard J. King (Toronto) is a partner with the REAL Group. His practice focuses on assisting clients with the regulatory and environmental approvals associated with major infrastructure projects, including power generation and transmission facilities, natural gas pipelines and mining projects. We would like to acknowledge Thomas McNerney, Associate (REAL Group), for his assistance with this chapter review.


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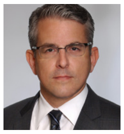
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Aboriginal Law in Canada

By Thomas Isaac
& Richard J. King

Introduction

Aboriginal legal issues can affect all aspects of business across Canada. Before embarking on, or making investments in, natural resource projects and in some cases real estate developments, developers and investors need to familiarize themselves with Canada's evolving and unique treatment of Aboriginal peoples' rights and their potential effects on business, projects and developments.

Aboriginal law in Canada has evolved at a considerable pace since the enactment of the *Constitution Act, 1982* and its inclusion of section 35, which constitutionally recognizes and affirms the existing aboriginal and treaty rights of the Aboriginal peoples of Canada.

First Nations, Inuit and Métis

The Aboriginal peoples of Canada include First Nations (Indian bands), Inuit and Métis peoples of Canada.

There are more than 600 First Nations across Canada, with a combined population of more than 800,000 First Nations peoples as defined by the federal *Indian Act*. There is also a significant number of non-status Indians, or First Nations individuals who for a variety of reasons are not registered as Indians with the federal government. The federal parliament has primary legislative authority over "Indians, and lands reserved for Indians" under section 91(24) of the *Constitution Act, 1867*. Many First Nations people live on reserves which are governed by federal legislation, including the *Indian Act*, *First Nations Land Management Act*, *Indian Oil and Gas Act*, among others. While provincial laws of general application can apply on Indian reserves, a case by case analysis is required. Likewise, while it can be difficult to obtain security for assets situated on reserve, it can be accomplished with appropriate legal advice and structuring. The federal government has primary responsibility for First Nations and Inuit, and some degree of responsibility for the Métis.

More than 50,000 people identify as being Inuit in Canada and they reside primarily in Nunavut, northern Labrador and Northern Québec. They are not governed by the *Indian Act* and do not have a reserve land system, but are considered to be "Indians" for the purposes of federal legislative authority under s. 91(24), *Constitution Act, 1867*.

More than 400,000 people identify as being Métis in Canada, and while they have a distinct culture, they are generally recognized as also having a mixed First Nations/non-First Nations ancestry. Métis claim rights to hunt, fish, trap and gather and Métis rights have been upheld by courts in various parts of Canada. A recent court decision confirmed that Métis fall within the definition of "Indian" under s. 91(24), *Constitution Act 1867*.

Aboriginal and Treaty Rights

Following the *Constitution Act, 1982*, there was increased recognition among Aboriginal groups and Canadian society as a whole regarding Aboriginal rights and the need to respect them. As a result of s. 35 and the Supreme Court's interpretation of the section, Canada now leads the globe in protecting indigenous rights at law in our Constitution.

Aboriginal rights include customs, activities and traditions that have been exercised historically by Aboriginal peoples and can include rights to hunt, fish, trap or gather for ceremonial, food or commercial purposes, depending on the particular group. Aboriginal title is a sub-category of Aboriginal rights and includes the right to the land itself. Although most of the Aboriginal title claims in Canada have been settled by way of historic and modern treaties, Aboriginal title claims still exist primarily in British Columbia, the Maritime provinces, the Northwest Territories and Ontario.

Treaty rights are those rights that an Aboriginal group enjoys as a result of having entered into a treaty with the Crown. Treaties are unique legal instruments entered into between the Aboriginal peoples of Canada and the Crown. There are three general categories of treaties: (1) the Pre-Confederation Treaties; (2) the Post-Confederation Treaties; and (3) Modern-Day Treaties or "Land Claim Settlement Agreements." The specific treaty determines what specific rights are held. For example, many of the historical treaties granted the signatories to the treaty the right to hunt and trap (harvesting rights) on unoccupied Crown land within the geographic boundaries of the treaty. Treaty rights granted by modern-day treaties can be significantly broader than the rights contained in the historical treaties, and often include rights to lands in fee simple (privately owned), mineral rights, wildlife management rights, harvesting rights, and in some cases, self-government.

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Aboriginal Title

Aboriginal title is a form of Aboriginal right and encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes. Courts have held that in order for an Aboriginal group to claim Aboriginal title over lands it must establish that the group exclusively occupied the land prior to Crown sovereignty. The Supreme Court of Canada recently made its first declaration of Aboriginal title for specific lands in interior British Columbia. Aboriginal title gives its holder the right to the exclusive use and occupation of the land for a variety of purposes, and not just traditional or distinctive uses. Aboriginal title holders have the right to determine how land is used and the right to benefit from those uses. Unlike treaties, which are negotiated between the Aboriginal group and the government, assertions of Aboriginal title are proven through the courts.

Crown's Duty to Consult Aboriginal Peoples

Under s. 35, the Crown has a duty to consult, and where appropriate, accommodate Aboriginal peoples when it is making decisions or taking actions that may affect the interests (i.e. proven and asserted Aboriginal or treaty rights) of Aboriginal peoples. For most natural resource-related projects, including those related to the energy, oil, gas, mining, exploration, forestry, fishing and other sectors, the duty to consult will be triggered. While the duty rests with the Crown, the Crown can and commonly does delegate procedural aspects of consultation to project proponents, who in turn must work closely with the Crown as they carry out their respective consultation obligations. Consultation typically involves a clear, transparent, fair and reasonable process or hearing and understanding the issues and concerns of Aboriginal peoples on any given approval or project and, where appropriate and reasonable, addressing such concerns.

Where consultation is deemed to be inadequate by a court, a decision or approval can be delayed or even overturned in some instances. As a result, project proponents and investors have a strong interest in understanding the nature of the duty to consult and whether and to what extent it has been met.

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Treaty Rights

AGREEMENTS WITH ABORIGINAL GROUPS

Increasingly, it is becoming common place for businesses to enter into mutually beneficial agreements with Aboriginal peoples regarding projects. In return for specific financial, employment, business opportunities and other benefits, businesses obtain regulatory and legal certainty regarding a particular Aboriginal group's support for a project, and this can include the Aboriginal groups providing express written support for a project directly to a government decision-maker.

ANTI-BRIBERY LEGISLATION

When making payments to Aboriginal groups in the course of resource development, consideration should be given to anti-bribery legislation from Canada and other jurisdictions that limits payments by foreign public officials. Businesses should determine whether they are subject to any anti-bribery legislation from other jurisdictions when making financial agreements with First Nations, Inuit and Métis peoples so as to ensure that such groups are not deemed to be governments for the purpose of such legislation.

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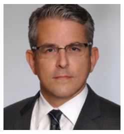

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Foreign Investment in Canadian Real Estate

By Adrian Hartog

Understanding the principal issues involved in acquiring, leasing, financing or developing a property in Canada will assist a foreign investor in properly assessing the risks and rewards associated with any proposed investment.

The provinces have primary responsibility for property law in Canada. With the exception of Québec, property law has developed through the English common-law process. In Québec, property law is governed by the *Civil Code of Québec* (which is derived from the *Napoleonic Code*.) There is no constitutional protection for property rights in Canada. Consequently, property can be expropriated by government and quasi-governmental authorities, but, appropriate compensation must be paid.

Interests in land are generally held directly in fee simple (meaning absolute title to land, free of any other claims against the title, which one can sell or pass to another by will or inheritance) or by leases as leasehold interests. Condominium or strata title ownership is also common throughout Canada. All provinces maintain a system of public land titles registration whereby ownership can be verified and through which interests in land are registered.

Investment Vehicles

There are several legal structures available for investment in Canadian real estate, including a general partnership, a limited partnership, co-ownership (commonly known as a "joint venture"), a corporation, a trust, personal ownership or any combination of the foregoing. The choice of an appropriate investment structure will be governed by factors such as tax planning requirements, liability issues and business considerations and each foreign investor's rules and regulations. (For more information, see Chapter 2, Forms of Business Organization in Canada.)

Acquisitions

The first document in any real estate acquisition is normally the Agreement of Purchase and Sale between the purchaser and the vendor, although this is often preceded by a non-binding letter of intent which sets out the major business terms which have been agreed upon. This agreement should contain all necessary business terms for the transaction, including the description of the land, purchase price, deposit (if any), closing date and any other special terms. This agreement also typically contains conditions for the benefit of the purchaser and/or vendor, as well as representations and warranties by the vendor and, to a lesser extent, the purchaser.

DUE DILIGENCE

Once the Agreement of Purchase and Sale is signed, it is generally the responsibility of the purchaser (usually through counsel) to conduct due diligence concerning the property being acquired. This includes title and zoning searches and a review of any leases and surveys of the property. An independent engineering review of the property with respect to environmental and physical matters (particularly property with older buildings) is commonly conducted.

TITLE INSURANCE

The purchaser's counsel may provide a title opinion to the purchaser (although title insurance, similar to that available in the U.S., is also available throughout Canada and quite commonly obtained in real estate transactions). With title insurance, the purchaser relies on the policy for its confirmation of title, not on a lawyer's title opinion.

Leasing

Property may be leased as well as purchased.

GROUND LEASES

One form of leasing arrangement is a long-term ground lease, in which a tenant leases vacant land and develops it. Once the development is complete, the ground tenant sublets space to retail, office or industrial tenants, depending on the type of development. Ground leasehold interests may be bought and sold in a manner similar to fee simple property interests.

COMMERCIAL LEASING

Most commercial office and retail space, and much of the standard industrial space in Canada, is available only through a commercial lease. Most commercial lease transactions start with an agreement to lease, although this is often preceded by a non-binding letter of intent. An agreement to lease is typically a binding agreement that contains the business terms agreed upon by the parties, including the space, term, rent and any tenant inducements. Commercial leases in Canada are typically on a net/net rental basis, which requires a tenant to pay basic rent plus a proportionate share of the realty taxes, insurance, utility and other maintenance charges for the commercial building. In a retail lease, a tenant may also be required to pay rent based on a percentage of its annual sales.

RESIDENTIAL LEASING

Residential leases are regulated by provincial legislation. In some cases, the applicable legislation will override the terms of the lease agreement, regardless of the intention of the parties. In some provinces, the ability of the landlord to increase residential rents is limited by provincial regulation.

Financing

Most real estate financing is arranged through institutional lenders such as banks, trust companies, pension funds, credit unions and insurance companies. Credit terms will vary from institution to institution and will depend on the nature of the transaction and the risks involved.

INTEREST RATES

Interest rates on real estate financings can be either fixed for a specified period of time or variable, based on a "prime rate" set by the lending institution on a periodic basis. The prime rate is based on a rate announced by the Bank of Canada from time to time. A borrower may consider borrowing in other currencies and has a choice of interest rate pricing, including applicable Government of Canada Bond Rates, the London Interbank Offered Rate (LIBOR) and bankers' acceptances. Certain fees, such as commitment and processing fees, are normally charged by lenders. Typically, it will be the borrower's responsibility to pay for all of the lender's legal and other costs in arranging property financing.

PRIMARY AND COLLATERAL SECURITY

Lending institutions typically take both primary and collateral security in real property and related assets to secure the loan. Typical primary security includes a mortgage or charge, a debenture containing a fixed charge on real property or, in some cases where more than one lender is involved, a trust deed securing mortgage bonds or debentures and including a specific charge over real property. Collateral security often includes assignments of leases and rents, general security agreements and personal guarantees.

FOREIGN LENDERS

Because many foreign lenders in Canada are subsidiaries of the world's major banks, they typically participate by way of syndicated loans which are often arranged by major Canadian lending institutions. Whether through a syndicate or directly, foreign lenders may be subject to certain withholding and other forms of taxes on the interest paid to them.

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Environmental Concerns

Canada has many detailed laws concerning the protection of the environment. These laws attribute liability for environmental damage to the owner of land and to polluters.

A property owner has certain duties in connection with the discharge of contaminants and hazardous materials into the environment from its property. Note that liabilities associated with improper waste management practices can be inherited by subsequent owners of a property. (For more information, see Chapter 16, Environmental Law in Canada.)

ENVIRONMENTAL RISK ASSESSMENT

A purchaser should assess the environmental risks associated with a property being purchased. In Canada, government officials do not "certify" that a property is free from such risks. A property's environmental status can be ascertained by inspecting applicable company and public records. In virtually all cases, a purchaser will want to do an "environmental audit" of the property which may include conducting scientific testing and a technical analysis of the property. Lending institutions often require such an audit before advancing any funds.

DEVELOPMENT CONTROLS

Property development is provincially regulated, primarily at the municipal level. Municipalities typically control land use and the density of development through official plans and zoning by-laws. Many of them impose development charges on new developments within their jurisdiction. Several provinces restrict and regulate the ability of an owner to subdivide property.

Construction of new projects is also subject to provincial and municipal legislation. In addition to regulating the maintenance of existing structures, building codes set specific standards for the construction of buildings. Before construction commences, most municipalities require that building permits and all regulatory approvals be obtained.

REAL ESTATE BROKERS LEGISLATION

Generally, a person who wishes to dispose of or acquire real estate will seek the assistance of a real estate broker. Real estate brokers are subject to special regulation in Canada. Each province has legislation that regulates the trade in real estate. Such regulation is designed to better protect consumers and instill confidence in the buying and selling of real estate.

In Ontario, the Real Estate Council of Ontario (RECO) is responsible for regulating trade in real estate and administering the *Real Estate and Business Brokers Act, 2002* (REBBA). Under REBBA, all brokerages, brokers, salespersons and any person involved in the trade in or of real estate must be registered with RECO. Members of RECO accept a Code of Ethics that forms part of the legislation and defines how members are to conduct themselves. RECO can lay charges under the statute, and its Registrar has the authority to propose, revoke or put conditions on a broker's registration. RECO provides for a complaint, compliance and discipline process to ensure that effective action is taken in instances where a RECO member has acted in an unethical manner.

MORTGAGE BROKERS LEGISLATION

As with real estate brokers, mortgage brokers, lenders and administrators are subject to specific regulations in Canada. These regulations are governed by various pieces of provincial legislation. In Ontario, the *Mortgage Brokerages, Lenders and Administrators Act, 2006* went into full effect in 2008. The Act requires all mortgage brokerages, administrators, brokers and agents to obtain a licence to do business in Ontario. Similar legislation either exists or is under consideration in most of the other provinces.

LAND TRANSFER TAXES

Land transfer taxes are imposed on the transfer of real estate in some provinces and, in Toronto, by the municipality. The amount of tax payable will vary based upon the value of the consideration paid for the real estate. Certain leasehold and other interests in land may be exempt.

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Osler's Real Estate Group understands the many forces that come into play in today's increasingly complex and sophisticated commercial real estate market. Adrian Hartog is a partner in our group.

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Regulatory Environment and Risk Management

By Shawn Irving & Lawrence Ritchie

When launching a business in Canada, business owners, operators and their corporate leaders must be attuned to risk, including an awareness of the complicated and interrelated regulatory environment in Canada.

Recent market developments, such as increased regulatory oversight, expansion of jurisdiction by the courts, the rise of activist shareholders, heightened public scrutiny with instant access Internet-driven media, and a litigious consumer base, have increased exposure to litigation and other risks to businesses, their leaders and stakeholders in Canada and around the world.

Corporate risk is multi-faceted. It is not confined within self-contained silos in any organization or jurisdiction. An issue that arises in relation to one business unit, discipline, product line or department can have far-reaching effects on other parts of the organization. Similarly, events and regulatory responses occurring in one jurisdiction often have an impact in another. Failing to recognize the potential ripple effect can have costly financial, operational and reputational consequences upon the whole organization, its leaders and its stakeholders.

Canadian Capital Markets Regulatory Environment

Canadian securities laws must be considered before launching any capital-raising initiatives, or before undertaking the acquisition or disposition of outstanding shares of a company in Canada. Currently, Canada does not have generally applicable federal securities laws or a federal securities regulator. Securities law is primarily a matter of provincial/territorial jurisdiction whereby each individual province/territory has:

- enacted legislation that governs securities transactions;
- established a securities commission or similar securities regulatory agency; and
- enacted rules, instruments and policies by the respective securities authorities to augment securities legislation.

Although the securities regulatory authorities attempt to harmonize their rules nationally (through an umbrella organization compromising representatives of each securities regulatory authority in Canada known as the Canadian Securities Administrators) there remains important differences and distinctions.

Many attempts have been made throughout the years to consolidate the regulation and oversight of the Canadian capital markets although with limited success. Efforts have been seen as requiring provinces to relinquish jurisdiction over investor protection and the regulation of trades, for example.

Global responses to the recent financial crisis, including widespread recognition of the inter-dependencies of capital and other financial markets, led to a further push by the federal government in the mid-to-late 2000s to establish a single securities regulator and common regulatory regime. Canada's constitutional federal structure, however, has made any unilateral approach virtually impossible, as recently confirmed by Canada's Supreme Court in a 2011 constitutional reference.

On September 19, 2013, the provincial governments of British Columbia and Ontario and the federal government announced that they had reached an agreement-in-principle to jointly establish a single operationally independent cooperative regulator – the Cooperative Capital Markets Regulator (CCMR) – to administer as-yet enacted federal capital markets legislation and a common provincial legislative regime. In July 2014, it was announced that Saskatchewan and New Brunswick had joined the arrangement. Rather than being pursued as a federal initiative, this largely provincially led initiative, supported and contributed to by the federal government, emphasizes cooperation, as suggested by the Supreme Court of Canada in its 2011 decision. A primary goal of the CCMR is to eliminate the inefficiencies that are found in Canada's current system of 13 separate securities agencies. The provinces that had signed on to the CCMR as of July 2014 represent approximately three-quarters of Canadian listed companies, with a market capitalization of almost 53%.

Although certain provinces such as Québec and Alberta have, as of September 2014, remained opposed to this initiative, other jurisdictions have been invited to participate.

Reform and structural transformation in the regulation of the capital markets in Canada is inevitable. Businesses and other market participants are advised to stay current on these evolving developments.

Canada's Place in an Evolving and Interrelated International Environment

Canada's legal and regulatory business environment is continually evolving to reflect and respond to developments both domestically and internationally. The increase in international cooperation and coordination among lawmakers, regulators and law enforcement agencies, particularly in the years following the financial meltdown of 2008-2009, demands that businesses stay on top of the changing requirements and developments.

Canadian developments in areas covered in this guide, including capital markets regulation, competition, trade and investment, privacy, tax and environmental law, are heavily influenced by and often follow parallel developments outside of Canada's borders.

In many instances, some regulations, such as those enforcing economic sanctions against targeted entities, appear to have been drafted with what appears to be a purposive ambiguity so as to have broad and flexible reach in their application. Similarly, laws that require internal codes of conduct or specific treatment of employees or suppliers, by businesses, must be understood and integrated into the business operations to avoid regulatory or even criminal sanction. For example, various provincial and federal statutes contain whistleblower protections. Section 425.1 of Canada's *Criminal Code* makes it a criminal offence for an employer to take disciplinary measures against an employee with the intent to prevent them from providing information to a law enforcement official respecting an offence that the employee believes is or has been committed, or with the intent to retaliate against that employee for providing such information.

The dynamic relationship between business conduct, regulated activity and criminal law consequences must be fully understood by operators when doing business in Canada, and specific legal advice is advised. Whether they relate to rules of general application, or focus on specific circumstances, such as regulations enforcing economic sanctions, "whistle blowing" and complaint handling requirements or other related developments, businesses need to have access to trusted advisors to will enable them to stay "on side" of continually changing regulations and legal requirements.

Risk and Regulation and Benefits of Multidisciplinary Risk Management

In today's legal and regulatory environment, matters not handled appropriately, effectively and swiftly can do significant and unforeseen damage to a business, both financially and from a public relations perspective. This is particularly so when combined with the media storm that often accompanies crisis issues (complex or otherwise). Businesses can save costs, reduce aggravation and executive time, and limit corporate exposure if they act in a responsive and responsible manner, resulting in enhanced value for shareholders and other stakeholders. How quickly and effectively a business responds to a crisis usually results in reduced impact on the reputation of the business, its leaders and the products and services they offer. In some cases, businesses can obtain credit in the form of lesser sanction from regulators for proactively dealing with a crisis and cooperating with a regulatory investigation.

How quickly and effectively a business responds to a crisis usually results in reduced impact on the reputation of the business, its leaders and the products and services they offer.

While most businesses and their leaders should be aware of these potential hazards, what is often overlooked is how they are interrelated and cross over business units and territorial borders. Even with the most elaborate risk management program, companies must be prepared for an unforeseen crisis. Businesses should pursue appropriate risk management strategies which reflect the complex interdependencies of the legal and regulatory environment in which the business is conducted, including outside subject matter expertise in the areas of risk management and regulatory matters. In addition, this team of experts should possess:

- a deep understanding of local regulations and legal climate, and how actions related to one matter can have a profound impact on another matter;
- a cohesive and coordinated response to a crisis situation;
- familiarity and strong working relations with relevant regulatory agencies; and
- well-articulated procedures for crisis containment.

While these strategies may not prevent a crisis situation, with the assistance of a multidisciplinary team of experts and the correct tools to effectively identify, manage and mitigate threats to the reputation of the business, they may minimize disruption to the business and lessen the impact of unexpected expenses and/or sanction down the line.

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Lawrence E. Ritchie is a partner in the firm's Litigation department and chairs Osler's cross-disciplinary Risk Management and Crisis Response national practice. Shawn Irving is a partner in the firm's Litigation department with a focus on capital markets regulatory enforcement. Further information on risk management strategies, recent case law decisions and updates on Canada's regulatory environment can be accessed at our Risk Management and Crisis Response blog, www.riskandcrisismanagement.com.

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Osler is a leading business law firm uniquely positioned to advise Canadian, U.S. and international clients on an array of domestic and cross-border legal issues. Osler is recognized for providing business-critical advice and counsel in key industry sectors, and in transactions and litigation for some of the world's largest enterprises. Its "one firm" approach is based on collaboration, and the team is dedicated to providing clients with innovative, solution-oriented advice in a practical and cost-effective manner. Founded in 1862, Osler has over 400 lawyers working together from offices across Canada in Toronto, Calgary, Montréal and Ottawa and an office in New York. For more information, please visit osler.com.

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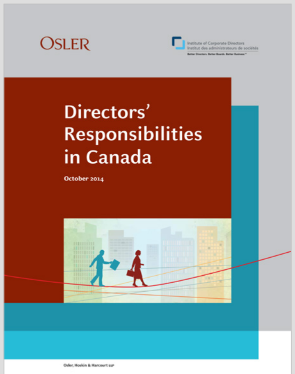
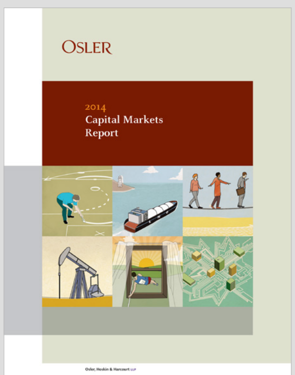
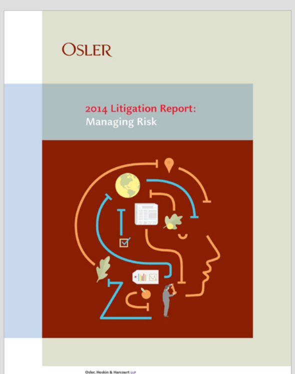


DIRECTORS' RESPONSIBILITIES IN CANADA
Produced in collaboration between Osler and the Institute of Corporate Directors, the guide is the valuable reference all directors need to understand corporate governance best practices and to fulfill their responsibilities among today's constantly evolving business trends and market shifts.



2014 CAPITAL MARKETS REPORT
Osler lawyers share observations gleaned from our experiences representing our clients on some of the most high-profile transactions of 2013 and offer insights into the trends that we believe will shape Canadian and global capital markets over the next year. Topics discussed include: the ongoing evolution of shareholder activism; what's next for SOE investment in the oil and gas sector; the rise of Canadian pension funds as major players in the global economy; new growth in the technology sector; and approaches to risk management in project and resource development.



2014 LITIGATION REPORT – MANAGING RISK
The rise of a highly litigious environment is gaining momentum in Canada, resulting in significant growth in risk for organizations in every aspect of their business and in every sector of the economy. Topics discussed include the risks associated with commercial practices such as procurement and data protection, through to project management and the rise of securities and consumer class actions.

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