



# DOING BUSINESS IN CANADA

An Introduction to the Legal Aspects  
of Investing and Establishing  
a Business in Canada

## About Borden Ladner Gervais LLP

As the largest full-service Canadian law firm, Borden Ladner Gervais LLP delivers the most comprehensive legal solutions and client services for domestic and international clients – across more practice areas and industry sectors – than any other Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves businesses and institutions across all of their legal needs – from M&A and capital markets; to major litigation, financing, and trademark and patent registration.

BLG is the largest of Canada's few AmLaw Global 100 firms, with five full-service offices located in each of Canada's principal business markets, and the nation's capital. As a bilingual English-French firm, BLG excels under both the common and civil law systems in Canada.

BLG has a legacy of "firsts" – from being Canada's oldest law firm, to one of the first in North America to implement client service standards, and receive numerous legal industry recognitions for innovation in client service and value. BLG takes great pride in the communities it serves, and supports a variety of initiatives including pro bono legal services, fundraising and volunteer programs, such as the BLG Reads to Kids Program.



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BLG was ranked **Band 1, the highest level of recognition, for International Trade/WTO and Transportation:** Shipping in the 2016 *Chambers Global*.

BLG was ranked in **15 practice areas, and 40 BLG lawyers recognized**, in the 2016 *Chambers Global*.

BLG was ranked **Band 1, the highest level of recognition, in 11 practice areas** in the 2017 *Chambers Canada*.

BLG was ranked in **38 practice areas, and 86 lawyers recognized**, in the 2017 *Chambers Canada*.

- BLG ranked **first choice among clients** for Bet-the-Company Litigation according to Acritas/Sharplegal.
- BLG was recognized in six practice areas, and **18 lawyers recognized**, in the 2017 *IFLR1000*.
- BLG ranked **highest for equities** in the *Financial Post* Q1 2016 league tables.
- BLG was named the **top Canadian law firm for derivatives for a third year in a row** at the GlobalCapital Americas Derivatives Awards.
- BLG earned the **highest level of recommendation** in each of the provinces we operate in – Alberta, BC, Ontario & Québec – in the 2016 *Benchmark Canada*.
- BLG was the **top ranked firm** in *The Best Lawyers in Canada*® for the **ninth year in a row**, with **236 lawyers recognized**, and **10 lawyers recognized** as "Lawyer of the Year."
- BLG had **217 lawyers recognized** in the 2016 *Canadian Legal Lexpert*® Directory – more than any other law firm.
- BLG won **two Pro Bono Ontario Awards** for participation in PBO's Law Help Program and for providing assistance to patients and families at Children's Hospital of Eastern Ontario.

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## 1

Current as of December 1, 2016

## Introduction

This guide provides a practical overview of Canada's legal landscape to international businesses looking to establish operations in Canada or considering an investment in a Canadian business.

As an independent Canadian firm with a strong national platform, BLG's international clients benefit from our comprehensive industry knowledge and insights into what it takes to do business today in Canada. BLG provides business law, dispute resolution and intellectual property solutions to a wide range of clients internationally in virtually every area of law across all business sectors.

BLG has acted in international banking transactions; international insolvencies, liquidations and restructurings; international joint ventures, reorganizations and acquisitions; commercial contracts; and international and multi-jurisdictional disputes. A business relationship with BLG gives you access to a wealth of cross-border experience and legal expertise.

## 2

Current as of September 30, 2016

## The Canadian Legal System

Canada's legal system owes its origin to two of the world's major legal traditions: English common law, applied in nine provinces and three territories; and French civil law, applied in the Province of Québec. Constitutionally, Canada is a federal state, in which some powers are assigned to the federal government and others to the provincial and territorial governments.

For most businesses, provincial laws have a greater impact than federal laws, since the provincial governments have power over “property and civil rights”, which includes contract law, labour relations, occupational health and safety, consumer protection, real estate transactions, land use, municipal law (municipalities derive their powers from provincial statutes), securities law and regulation of professionals.

So far as businesses are concerned, federal jurisdiction is more narrowly focused, on particular kinds of business (for example, banks and most other financial institutions, airlines, railways, broadcasters, and telecom companies), particular kinds of property (for example, patents, trademarks and other intellectual property), particular kinds of behaviour (such as crime and anti-competitive practices), or matters of national significance (such as immigration, customs and monetary policy).

In some cases, an aspect of a business may be subject to either federal or provincial regulation. An employer's relations with employees are generally governed by provincial labour and employment laws, but if the business is a bank, railway, airline or other “federal” business, those relations are governed by a federal labour code. In other cases, different aspects of the business may be regulated at different levels: for example, all major insurance companies are federally chartered, and their governance and prudential practices are subject to the oversight of the federal Superintendent of Financial Institutions, but their marketing, policies and relations with policyholders are subject to provincial insurance laws. In a few cases, there is duplication: for example, there are both federal and provincial environmental regulations.

This “division of powers” is further complicated by a number of arrangements in which a province may “opt out” of a federal program (for example, Québec administers its own provincial pension plan, separate from the Canada Pension Plan), or the federal government may recognize a provincial regime as being an acceptable substitute for the federal regime in the same area: for example, in Québec, Alberta and British Columbia, businesses only need to comply with provincial privacy law.

Both levels of government impose personal and corporate income taxes and transaction taxes, though in many cases there are administrative arrangements under which the federal government administers both taxes: for example, except in Québec, payroll deductions for employment insurance, government pensions and income tax are paid only to the federal government, but are credited to the employee’s tax obligations at both levels; similarly, in all provinces except Alberta and Québec, the provincial corporate tax is collected by the federal government under a single tax return.

Unlike many other federal states, however, the Canadian judicial system is mostly unitary. There is a specialized Federal Court (including both trial and appellate levels), which has jurisdiction over specific areas such as immigration, citizenship, appeals from federal administrative tribunals, actions against the federal Crown, tax, intellectual property and navigation and shipping (and maritime law generally), but virtually all other litigation is brought in a provincial superior court, from which there is an appeal to a provincial court of appeal. The Supreme Court of Canada hears appeals from both the federal and provincial courts of appeal.

Canada is receptive to foreign ideas and capital. Canadian courts often look to foreign judicial decisions for guidance, and both the federal and provincial legislatures frequently adopt foreign legislative models: for example, the *Personal Property Security Act* in force in the common law provinces is essentially the same as Article 9 of the U.S. *Uniform Commercial Code*. Because of this interest in international legal developments, many of Canada’s laws and governmental policies reflect internationally accepted norms: for example, unlike the U.S., Canada has adopted the International Financial Reporting Standards for public companies and other “publicly accountable entities”.

Nevertheless, there are legal considerations unique to doing business in Canada, for both domestic and foreign companies.





# 3

Current as of September 28, 2016

## Foreign Investment Regulation

Generally, there are few restrictions on foreign investment in Canada, although some screening does take place and some sectors are subject to special limits at the federal or provincial levels. Foreign investment in Canada has been subject to some type of screening or review for almost 40 years. Such review generally occurs pursuant to the *Investment Canada Act*. The *Investment Canada Act* was introduced in 1985 to replace the much more restrictive *Foreign Investment Review Act*, which had initially been introduced in 1973. The purpose of the *Investment Canada Act* was initially to provide a mechanism for the federal government to review only significant investments in Canada. Recent amendments have expanded its scope to also provide for the review of any foreign investment in Canada that may raise national security concerns. The *Investment Canada Act* applies to all “non-Canadians”, which includes any person that is not a Canadian citizen or permanent resident of Canada, along with any entity that is not controlled or beneficially owned by Canadians.

The *Investment Canada Act* contains two separate review processes. These two processes are subject to differing thresholds and different procedures, and consider different factors. The first process provides for the review of only those significant investments over certain specified financial thresholds. This process considers whether such investments will be of “net benefit to Canada”. The second process applies generally to any investment by a non-Canadian in or into Canada, regardless of size, and considers whether the investment might reasonably be expected to injure Canada’s national security.

### 3.1 Notification and “Net Benefit to Canada” Review

In all cases of a proposed investment in Canada by a non-Canadian seeking to establish a new business or acquire control of an existing Canadian business, the non-Canadian must file either: (a) a straight forward “Notification” of the investment; or (b) a much more in depth “Application for Review”. A Notification must be filed each time a non-Canadian commences a new business activity in Canada or acquires control of

an existing “Canadian business”, where the establishment or acquisition of control is not otherwise subject to a “net benefit to Canada” review. A “Canadian business” is defined to be a business carried on in Canada that has: (a) a place of business in Canada; (b) an individual or individuals employed or self-employed in connection with the business; and (c) assets in Canada used in carrying on the business. Current ownership or control of the business is not relevant to this determination, and therefore foreign-owned entities operating in Canada will still be considered “Canadian businesses”. If only a Notification is required, it must be filed by the non-Canadian making the investment at any time prior to the implementation of the investment or within 30 days following implementation. However, if the investment is subject to a “net benefit” review an Application for Review must be filed, the Application for Review, in most cases, must be filed and the review process completed before the investment can be implemented.

### 3.2 Applicable Thresholds for a “Net Benefit to Canada” Review

The acquisition of control of an existing Canadian business by a non-Canadian will be subject to a “net benefit” review (as opposed to being merely notifiable) if the value of the Canadian business being acquired exceeds one of the following applicable thresholds:

- Where the investor is a “WTO Investor”<sup>1</sup> and not a state enterprise, or where the investor is a non-WTO Investor and not a state enterprise and the Canadian business being acquired is controlled by a WTO investor – \$ 600 million<sup>2</sup> in “enterprise value”.<sup>3</sup> (Note: this applies only to direct acquisitions. Indirect acquisitions by WTO investors, including state enterprises, are not reviewable under the *Investment Canada Act*, but are subject to notification. This exception does not apply to non-WTO investors or to acquisitions of cultural businesses.);
- Where the investor is a WTO investor and a state enterprise or where the investor is a non-WTO Investor and a state enterprise, but the Canadian business being acquired is controlled by a WTO investor – \$375 million<sup>4</sup> in assets;

1 In basic terms, a “WTO Investor” is a government of a WTO (World Trade Organization) Member country, a permanent resident of a WTO Member country, or an entity that is controlled by one or more WTO Investors.

2 This value is set to increase to \$800 million as of April 24, 2017 and \$1 billion as of April 24, 2019. As of January 1, 2021, the threshold will then be further adjusted annually, based on growth in the nominal gross domestic product.

3 The calculation of a Canadian business’ “enterprise value” will depend on whether that business is private or publicly traded and whether the transaction involves the acquisition of shares or assets. Generally, if publicly traded, the entity’s enterprise value is calculated based on market capitalization, plus liabilities, minus cash and cash equivalents. If private, the enterprise value is to be calculated based on the total acquisition value, plus liabilities, minus cash and cash equivalents.

4 Based on the book value of the business’ assets, as shown on its last audited annual financial statements. This is the threshold for 2016. The value is adjusted annually, based on inflation and is expected to rise approximately 2 per cent – to \$382 million – for 2017.

- In those rare cases where both the investor is not a WTO investor and the Canadian business is not controlled by a WTO investor – \$5 million in asset value for direct acquisitions and \$50 million in asset value for indirect acquisitions<sup>5</sup>;
  - Any acquisition of a cultural business (including the publishing, distribution or sale of books, magazines, newspapers, films or music) – \$5 million in asset value for direct acquisitions and \$50 million in asset value for indirect acquisitions; and
  - In addition and notwithstanding any of the above, any investment which is usually only notifiable (including the establishment of a new Canadian business) and which relates to Canadian cultural heritage or national identity may be ordered reviewed within 21 days of receiving a notification.

It is important to note that, subject to special provisions for cultural businesses, the “net benefit” review provisions of the *Investment Canada Act* only apply to “acquisitions of control” of a Canadian business or substantially all of its assets. For purposes of the *Investment Canada Act*, a non-Canadian can only “acquire control” of a Canadian business through certain specified methods. If the proposed transaction does not fall within the scope of one of those specified methods, then there can be no acquisition of control for purposes of the *Investment Canada Act* and the transaction cannot be subject to a “net benefit” review. Note, in particular, that the acquisition of effective or *de facto* control over a Canadian business through contractual arrangements only, such as IP licensing agreements, where there is no other acquisition of shares, voting interests or assets, cannot be subject to a “net benefit” review.

### 3.3 The Application Process

The obligation to file a Notification or an Application for Review under the *Investment Canada Act*, as appropriate, falls solely on the non-Canadian undertaking the investment. The Canadian

5 Based on the book value of the business’ assets, as shown on its last audited annual financial statements.



business or vendor involved has no filing obligations, although it will commonly assist the investor by providing information necessary to complete the required filing. There is no filing fee associated with either a Notification or an Application for Review.

The federal Minister of Industry (the “Minister”) has 45 days from the filing of a complete Application for Review to make a determination as to whether the proposed investment will be of net benefit to Canada.<sup>6</sup> The Minister may unilaterally extend this initial review period by a further 30 days, and commonly does, if the Minister considers it necessary to do so to complete the review. Any further extensions are only permitted with the investor’s consent, although such consent is normally given by the investor. In addition, the “net benefit” review period will be extended automatically, if the investment is, or may be, subjected to a national security review (discussed below). Generally, once an Application for Review has been filed, the investor cannot implement the proposed investment until after the Minister has made a positive determination that the investment will be of net benefit to Canada.

### 3.4 The “Net Benefit” Factors

The Minister’s general mandate under the “net benefit” review provisions is to determine if the proposed investment will be of net benefit to Canada. The *Investment Canada Act* sets out the specific factors that the Minister must consider in any such determination. The Minister has also issued special guidelines (*Guidelines – Investment by State-Owned Enterprises – Net Benefit Assessment*), concerning the application of these factors to investors that are state-owned enterprises. In particular, the Minister’s Guidelines provide that the governance structure and the commercial orientation of the state-owned enterprise are factors which will be specifically considered in the Minister’s “net benefit” review. (Note, under a policy relating to foreign investment in Canada’s oil sands, any future proposed investment by a foreign state-owned enterprise to acquire control of a Canadian oil sands business exceeding the review threshold will be found to be of net benefit to Canada *only in exceptional circumstances*. Non-controlling minority interests in Canadian oil sands businesses and joint ventures are not subject to this policy.)

Although it is necessary to comply fully with the notification and informational requirements of the *Investment Canada Act*, it should be noted that, to date, only two significant proposed investments in Canada have ever been blocked following a “net benefit” review. This is not to say, however, that these reviews are mere information gathering exercises. Certain commitments concerning the future operation of the Canadian business concerned, known as “undertakings”, are often required from the investor, as a condition of Ministerial approval. Such undertakings are negotiated between the Minister and the investor and the terms of

such undertakings are normally kept confidential to the investor. The precise scope and term of these undertakings will vary, depending on the specific transaction at issue and the investor’s future plans for the business, as set out in its Application for Review. Once agreed to as part of an approved Application for Review, such undertakings then become enforceable against the investor and, post-implementation, the investor is normally required to report to the Minister regularly concerning the investor’s progress in meeting its undertakings. Although enforcement action relating to accepted undertakings is rare, it does occur.

### 3.5 The “National Security” Review

The second review process under the *Investment Canada Act* is the “national security” review. Any direct or indirect investment in Canada by a non-Canadian, regardless of value, is subject to a security review, if the investment could be injurious to national security. If determined to be potentially injurious, the investment can be blocked completely, or permitted to proceed only on terms and conditions acceptable to the Governor in Council (effectively the federal Cabinet). If the investment has already been undertaken, divesture can be ordered.

### 3.6 The National Security Review Process

The national security review process applies to any investment, implemented or proposed, by a non-Canadian to establish a new Canadian business, acquire control of a Canadian business, or acquire, in whole or in part, or establish, an entity to carry on all or any part of its operations in Canada. In general, it is expected that the Minister will become aware of transactions raising potential national security concerns through the filing of Notifications and Applications for Review, done as part of the existing “net benefit” review process (discussed above). All such transactions are now also potentially subject to a national security review. However, the national security review process has broader potential application, also applying to transactions which are not notifiable or reviewable under the “net benefit” process, including minority investments.

Having become aware of a proposed or implemented investment by a non-Canadian, if the Minister has reasonable grounds to believe that the investment could be injurious to national security, he may then send the investor a notice indicating that an order for a review of the investment may be made. Generally, the Minister may issue such a notice at any time within 45 days of being made aware of the investment. Such a notice is not an order for review and is optional, at the Minister’s discretion. It is an “early warning”, indicating to the investor, at an early stage, that the transaction may raise potential national security concerns. In addition, if the investor has not yet implemented the investment, receipt of an “early warning” notice has the effect of barring the investor from implementing the investment until the investor is formally advised either that there will be no review, or that the investment is permitted following a review.

<sup>6</sup> In situations involving cultural businesses, the net benefit to Canada decision is made by the Minister of Heritage, on the recommendation of the Investment Review Division of Heritage Canada.

If an “early warning” notice is issued, the Minister then has a further 25 days to consider whether a full national security review is warranted in the circumstances. In circumstances where no “early warning” notice has been issued, the time period for consideration of whether a full national security review is warranted is at least 45 days from the date the investment was implemented. The Minister may require the investor and any other person or entity involved in the transaction to provide such information as the Minister considers necessary. The Minister must also consult with the federal Minister of Public Safety and Emergency Preparedness. A full review may then be ordered if the Minister considers that the investment could be injurious to national security, and the federal Cabinet, on the recommendation of the Minister, orders the review. Similar to an “early warning” notice, if the investor has not implemented the investment prior to receiving such a notice of review, receipt of that notice bars it from implementing the investment until it receives authorization to proceed.

Once a full national security review is ordered, the Minister then has 45 days, or such longer period as may be agreed to between the Minister and the investor, to complete the review. The Minister may gather further information during his review, and the investor must be afforded a reasonable opportunity to make representations. The Minister is expected to consult with numerous other federal departments and agencies as part of the review, including the Canadian Security Intelligence Service, the Royal Canadian Mounted Police, the Canada Border Services Agency and the Departments of Justice, National Defence, Transport, Health, Finance and Citizenship and Immigration. Upon completion of the review, the Minister must either allow the investment to proceed, or refer the investment to the federal Cabinet for further consideration. If the matter is referred to Cabinet, within 15 days of the reference, Cabinet must then issue an order in respect of the investment on terms it considers advisable in the circumstances, either: (a) authorizing the investment, with or without conditions; (b) directing that the investment not be implemented; or (c) if already implemented, ordering divestiture.

The time required to complete a national security review depends on a number of factors, including complexity of the transaction, industry and entities at issue and type and nationality of the investor. However, based on the prescribed time periods, and subject to any additional time that may be agreed to between the Minister and the investor, the review process may take up to 130 days to complete.

### 3.7 Corporate Ownership Restrictions

In addition to the provisions of the *Investment Canada Act*, both the federal and provincial governments impose corporate ownership restrictions in certain strategic or sensitive industries. This includes, for example:

- **Financial Institutions:** Generally, without ministerial approval, a foreign bank cannot own more than 10 per cent of any class of shares in any Canadian bank, including a Canadian bank subsidiary. There are various exceptions to this general rule.
- **Broadcasting:** In an effort to promote the ownership or control of broadcasting entities by Canadians, Parliament has enacted a general rule that broadcasting licences may not be issued to non-Canadians or to companies that are effectively controlled, directly or indirectly, by non-Canadians.
- **Telecommunications:** In an effort to promote the ownership and control of telecommunications common carriers by Canadians, Parliament has enacted a general rule that to be eligible to operate a telecommunications common carrier in Canada, the carrier must be a Canadian-owned and controlled corporation, incorporated or continued under the laws of Canada or a province.
- **Air Transportation:** Generally, a licence to operate a domestic airline service will only be issued to a corporation, if the corporation is controlled in fact by Canadians, and if 75 per cent of the voting interests in the corporation are owned and controlled by Canadians. Licences for international airline service may be issued to a non-Canadian, provided that the non-Canadian applicant satisfies certain eligibility requirements.

### 3.8 Directors' Residency Requirements

See Section 4.2(e) (Residency of Directors).



## 4

Current as of October 1, 2016

## Business Formation

One of the threshold issues for a foreign entity wishing to establish a business in Canada is whether that business should be carried on directly, as a branch of the foreign entity, or should be created as a separate Canadian business organization, such as a subsidiary corporation (with either limited liability or, in some provinces, unlimited liability). Other forms of business include a proprietorship, a partnership (which may be a general partnership or limited partnership, or possibly a limited liability partnership) or some form of joint venture. Generally speaking, a foreign entity may carry on business directly in Canada through a branch, but will be subject to the same sort of federal and provincial registration requirements that would apply to a corporation.

### 4.1 Branch or Subsidiary

A number of issues should be considered in choosing whether to operate as a branch or as a subsidiary.

If the Canadian operation is expected to incur significant losses in its early years of operation, the foreign entity may wish to carry on business in Canada directly through a branch, in order to deduct those losses for foreign tax purposes, if possible. A Canadian branch structure might also be relevant to enable a better matching of the Canadian corporate tax paid with the foreign tax credits available in the home jurisdiction.

Many foreign investors prefer to carry on business in Canada through a Canadian subsidiary. The use of a Canadian subsidiary is more convenient for administrative purposes. For example, having a Canadian subsidiary can make the process of executing documents much simpler.

The use of a Canadian subsidiary generally limits the liability of the foreign parent corporation to its capital investment in the Canadian subsidiary. In conducting business through a branch office, however, the foreign parent corporation exposes itself directly to all of the liabilities of the Canadian operation.



For a discussion of the tax issues that should be considered in determining whether to carry on business in Canada through a branch or subsidiary, see Section 19.8 (Branch Tax).

## 4.2 Corporations

The most common form of legal entity for businesses is a corporation. Most foreign businesses operating in Canada adopt a corporate form. A corporation is a legal entity that is separate and distinct from the shareholders who contribute to the corporation's capital. While there are exceptions, generally shareholders are not responsible for the debts, liabilities or obligations of the corporation. In addition, the corporation enjoys perpetual succession, meaning that the existence of the corporation continues despite the death of any or all of its shareholders. As discussed in Section 4.2(c) (Alberta, British Columbia and Nova Scotia Unlimited Liability Companies), those three provinces also provide for the incorporation of unlimited liability companies, where shareholder liability is not limited.

Corporate income is taxed at combined federal and provincial flat corporate rates rather than at the marginal individual rates. For more on the taxation of corporations, see Chapter 19 (Taxation).

### a) Federal or Provincial Incorporation

Corporations may be created in Canada under either federal or provincial legislation. Accordingly, assuming a decision has been made to incorporate in Canada, a choice must then be made regarding the jurisdiction under which the entity should be incorporated. In most cases, the jurisdiction of incorporation does not affect the question of whether federal or provincial laws will apply in areas of dual jurisdiction, as in the case of Canada's labour laws. Corporations established under federal or provincial legislation may carry on business anywhere in Canada as of right, but are required to comply with provincial requirements such as extra-provincial registrations.

In most Canadian jurisdictions, governing legislation permits corporations to adopt a unanimous shareholders agreement. Such agreements have the effect of transferring certain of the directors' powers to the shareholders. To the extent that these powers are transferred to the shareholders, the directors are generally relieved of liability and the shareholders are then subject to those duties and liabilities. This can be useful in the case of a foreign corporation that wishes to limit the powers of the Canadian subsidiary's directors over the operation of the subsidiary, especially where the subsidiary and the foreign parent have different directors.

### b) Public and Closely-Held or Private Corporations

Canadian law distinguishes between public corporations, which distribute their securities to the public, and closely-held or private corporations, which have a limited number of shareholders and restrict the transferability of their securities in some manner. Public corporations are subject to more stringent requirements concerning public disclosure and to potentially differing income tax rules. These differences do not, however, affect most fundamental principles of corporate law, including limited liability of shareholders, which apply to all limited liability corporations.

### c) Alberta, British Columbia and Nova Scotia Unlimited Liability Companies

An unlimited liability company (or a "ULC") is a form of corporation where the shareholders of the ULC can be liable for the obligations of the ULC. In this respect, a ULC can be similar to a general partnership and is different from the common form of corporation where the corporation's shareholders are not, in general, liable for the liabilities, acts or omissions of the corporation.

A ULC can be formed under the laws of Alberta, British Columbia or Nova Scotia. The corporate legislation in each provincial jurisdiction is different, so creating a ULC will therefore require that an assessment of the advantages and disadvantages of each jurisdiction be completed before the ULC is formed. The unique nature of the shareholder liability under a ULC also requires that the liability be assessed and mitigated.

The oddity of a ULC with respect to shareholder liability is what also makes it unique from a tax perspective. For U.S. tax purposes, a ULC is generally regarded as a flow-through entity. The U.S. Internal Revenue Service generally treats a ULC as a branch, if there is only one shareholder, or as a partnership, if there is more than one shareholder; but, in either case, the ULC will generally be "looked through" for U.S. tax purposes. This is different from the position in Canada, where a ULC is taxed like any other corporation. The end result is that a ULC is generally a hybrid entity – a corporation for Canadian tax purposes and a flow-through entity for U.S. tax purposes.



This hybrid tax treatment has resulted in a ULC being used in a variety of situations, including by U.S. businesses operating in Canada. The Canada – U.S. Tax Treaty can adversely affect the treaty benefits applicable to ULCs, but the Canada Revenue Agency has issued interpretations which suggest that certain transactions involving interest payments and deemed dividends paid by a ULC to a U.S. resident would still be eligible for a reduced rate of withholding tax. Professional advice should be obtained to fully consider the tax implications of establishing a ULC.

#### d) Capital Structure

Considerable flexibility is permitted in the design of a corporation's share structure under Canadian federal or provincial corporate statutes. For example, shares can be voting or nonvoting, they can have limited or unlimited participation in equity and they can be redeemable for a fixed price at the option of the corporation or the holder. Shares can also be given special voting rights with respect to certain matters, such as the appointment of directors and the acquisition or disposal of significant assets.

By careful selection of share characteristics, it is possible to separate capital contributions and control from participation in future profits. This possibility is particularly useful in designing share structures for joint ventures and in addressing taxation issues.

On occasion, foreign parents may wish to capitalize their Canadian subsidiaries through debt rather than share capital. In general, Canadian corporate legislation does not require any minimum investment by way of share capital. However, the financing of a corporation largely by debt may lead financial institutions to require a guarantee from the foreign parent. It may also have income tax implications, as discussed below.

In most provinces, the authorized capital of a corporation does not affect either the incorporation or the registration fee. Accordingly, a company's authorized capital should not be a major factor in determining its share structure.

Interest is generally deductible in computing the income of a corporation for tax purposes, while dividends are not. However, there are income tax rules which limit the deductibility of interest paid to non-resident shareholders. These "thin capitalization" rules provide in general that where the debt owing to certain non-resident shareholders exceeds 1.5 times the equity investment of those shareholders, interest on the excess debt will not be deductible for tax purposes. Such denied interest expense will also be deemed to be a dividend paid to the non-resident and subject to Canadian withholding tax.

The tax rules governing the capitalization of non-resident controlled corporations are complex and accordingly, professional advice should be obtained before an enterprise is established and capitalized.

#### e) Residency of Directors

The federal *Canada Business Corporations Act* (the "CBCA") requires that at least one quarter of the directors of most federal corporations be resident Canadians. For CBCA corporations doing business in certain industries, such as book publishing and uranium mining, the residency requirement for directors is higher. Some provinces also have residency requirements for directors.

To be a resident Canadian for federal purposes, a person must generally be either a Canadian citizen, or a permanent resident under the federal *Immigration and Refugee Protection Act*. In addition, subject to some limited exceptions, a person must already be ordinarily resident in Canada in order to be considered to have resident status.

In many cases, it is possible to avoid these residency requirements by incorporating in a province or territory with less onerous or no residency requirements, such as British Columbia, New Brunswick, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Québec and the Yukon, followed by extra-provincial registration in each of the other provinces and territories in which the corporation intends to conduct business.

#### f) Corporate and Trade Names

Corporations are registered in Canadian jurisdictions under their corporate names. That registration does not, in and of itself, give the corporation any proprietary interest in the corporate name. It does, however, provide the corporation with some practical protection for its name, since the corporate registrars in certain jurisdictions will typically refuse to register a corporation under a name which is the same as, or substantially similar to, that of another existing corporation within that jurisdiction.

In order to better protect a corporation's name that is used in association with its goods or services, the name can also be registered as a trademark under the federal *Trademarks Act*. Registration gives the owner of the trademark the exclusive right to use the trademark in association with its goods and services throughout Canada. Trademarks are discussed in Section 14.1 (Trademarks).

If a corporation operates in Québec, it must comply with specific requirements with respect to its name. These requirements are discussed in Chapter 22 (Language Considerations).

If a corporation wishes to conduct business using a name other than its corporate name, some provinces require the corporation to register this so-called “trade name”. In most provinces, the name cannot be the same as, or similar to, that of another corporation (except in certain specified circumstances). Registration of a trade name does not, in and of itself, give the corporation a proprietary interest in the trade name. However, once a corporation establishes a reputation in association with the trade name, it may, in certain circumstances, preclude other businesses from using the same trade name. It is also possible to trademark trade names.

Some provinces are more flexible than others in granting registration to foreign corporations whose corporate name is confusing with that of a previously registered corporation. In some jurisdictions the foreign corporation cannot be registered unless it changes its corporate name. In other jurisdictions, the registrar will approve the registration on receiving the foreign corporation’s undertaking that it will operate under a pseudonym within that jurisdiction.

### 4.3 Proprietorships

The simplest form of business organization, a proprietorship, exists when an individual carries on business as the sole owner without incorporating. At law there is no distinction between the proprietorship and the owner; the proprietorship’s income is the owner’s income and the proprietorship’s liabilities are the owner’s personal liabilities. For tax purposes, the proprietorship is not treated as a separate taxpayer. Rather, the income of the proprietorship is included in the calculation of the owner’s taxable income. While the requisite formalities for creating a proprietorship are minimal, in some cases there may be licensing and registration requirements. Also, if the owner wishes to carry on business using a name that is different from his or her own individual name, that name may first need to be registered with the applicable provincial government.

### 4.4 Partnerships

#### a) Generally

A partnership generally exists when two or more individuals or entities carry on business together with a view to making profit without incorporating. In an ordinary partnership, the partnership is not a separate legal entity and all the liabilities of the partnership are the personal liabilities of the partners. An exception is found in Québec, where (although not recognized as a legal person distinct from that of its partners), a partnership possesses

some of the characteristics of a legal person, such as a partnership name, a partnership head office, and legal standing in court. The assets and liabilities of a Québec partnership are also considered to be distinct from those of its partners, and creditors must first take recourse against partnership assets before calling on the personal liability of the partners for any excess. A number of provinces and territories recognize a second type of partnership: the limited partnership, where the liability of at least one partner (the “general partner”) is unlimited and the liability of any other partner (a “limited partner”) is limited to the amount of the limited partner’s contribution to the business.

Generally, partnership income is not taxed at the partnership level, but rather in the hands of the individual partners. Each partner will be taxed on his or her proportionate share of the partnership income and on any capital gain realized when the partner disposes of his or her interest in the partnership. See Chapter 19 (Taxation).

In partnerships, it is usual to have a comprehensive agreement to avoid certain onerous provisions in partnership legislation which would apply in the absence of a specific agreement to the contrary.

#### b) Limited Partnerships

A limited partnership is something of a legal hybrid, providing some of the benefits of a limited liability company along with many of the tax benefits of a partnership. Generally, there must be one or more general partners who are liable for all the partnership’s debts. There may also be any number of limited partners whose liability is limited to the amount they agree to contribute. Generally, a limited partner is not permitted to take any part in the management or control of the partnership’s business. A breach of this requirement makes the limited partner liable as a general partner. However, a limited partner may participate in certain fundamental decisions, such as the admission of new general partners, the winding-up of the partnership or its expansion into new businesses. A comprehensive partnership agreement is required to address these issues.

#### c) Limited Liability Partnerships

Some provinces allow professional firms such as law firms and accounting firms to carry on business as limited liability partnerships, and in British Columbia, a limited liability partnership may be used for any type of business venture. The benefit of a limited liability partnership is that a partner is generally only liable for the partner’s own negligent or wrongful acts or omissions or for the negligent or wrongful acts or omissions of another partner or an employee of the partnership, if the partner knew of such acts or omissions and did not take the actions that a reasonable person would take to prevent them. However, there can be

differences in the specific liability regime in each province. In British Columbia, for example, partners in a limited liability partnership are subject to the same obligations as corporate directors, and if a corporation is a partner in a limited liability partnership, the directors of that corporation are jointly and severally liable for any liability imposed on the corporation as a partner, unless they dissented from, or took the actions a reasonable person would take to prevent, the act or omission that resulted in their liability. Professional advice should be obtained before forming a limited liability partnership.

#### 4.5 Joint Ventures

The term “joint venture” lacks a precise legal definition in Canada. It generally refers to any means whereby two or more economic entities share in a common venture. It can refer to joint venture corporations, to partnerships of corporations or, most commonly, to a structure (usually referred to as a contractual joint venture) under which separate corporations own certain assets in common, in the expectation that the venture does not constitute a partnership, at least for tax purposes.

Typically, in any joint venture, profits or losses are not calculated at the joint venture level, except in the case of a partnership or a joint venture corporation. Instead, each co-venturer contributes assets or cash to cover expenses and shares in any revenue generated from those assets in the agreed proportion. Depreciation and the calculation of profit and loss are determined by each co-venturer separately from the others.

A potential disadvantage of a contractual joint venture is that a court may conclude, after examining the situation and the conduct of the parties, that a type of partnership was created, notwithstanding that the contract may expressly stipulate that the parties did not intend to create a partnership, with the consequence that the parties may find themselves subject to laws which they may have intentionally sought to avoid via contract.



## 5

Current as of September 21, 2016

## Financing Canadian Operations

Assuming that the foreign investor will conduct operations through a Canadian corporation, financing for the Canadian business will either be sourced internally, for example by way of shareholder loans or equity, or from external sources, such as via bank lines of credit and loans or publicly-issued securities.

Internally-sourced funds can be advanced or contributed in a combination of debt and equity, usually dictated by the “thin capitalization rules” contained in the federal *Income Tax Act*, as discussed in Section 4.2(d) (Capital Structure).

In some cases, shareholder loans may be preferred over equity, because in a bankruptcy or liquidation of the corporation, debt is paid in priority to return of equity. Furthermore, to obtain priority over the general unsecured trade creditors, shareholder loans can be secured by the assets of the corporation. The form of security will usually be a debenture, a general security agreement or (in Québec) a hypothec, each of which would normally be subordinated by agreement to any security for senior indebtedness, such as bank debt. However, even though subordinated, *bona fide* shareholder loans which are secured in this fashion will still have priority over the claims of unsecured creditors of the corporation.

### 5.1 External Financing

#### a) Debt Financing

Canada has a well-developed banking system. There are three types of banks operating in Canada under the federal *Bank Act*. The first two are domestically-chartered banks, which can carry on branch banking operations throughout the country. They are known as “Schedule I banks” (banks that are not subsidiaries of foreign banks) and “Schedule II banks” (banks that are subsidiaries of foreign banks). Banks of either type provide the widest range and most easily accessible set of services to all types of customers. The third type of bank is a Canadian branch opened by a foreign bank. This type of bank, commonly called an authorized foreign bank or a “Schedule III bank”, has similar powers to banks of the other two types, except that it cannot accept deposits payable in Canada that are less than C\$150,000,

subject to certain limited exceptions (and some authorized foreign banks are not permitted to accept deposits at all). This restricts the ability of Schedule III banks to carry on “retail banking” business in Canada.

Banks typically provide two kinds of loans: operating loans and term loans. Revolving operating loans are often payable on demand. Banks do not normally demand payment, unless they are concerned about a borrower’s continuing creditworthiness, but having the loan payable on demand can allow the terms of the loan to be simpler. Operating loans are generally used to finance working capital requirements. Operating loans sometimes permit the borrower to obtain letters of credit, in addition to cash advances, and may permit U.S. dollars to be borrowed in addition to Canadian dollars. The borrower may also be provided with a choice of interest rate options, such as a floating prime-based rate, a bankers’ acceptance rate and, in the case of larger U.S. dollar borrowings, a rate based on short-term rates in the London inter-bank market. Operating loans from Canadian banks are normally based on a floating rate of interest, although banks will sometimes offer a borrower an opportunity to fix rates for large borrowings through an interest rate swap.

Typically, banks will secure operating loans by taking a security interest in all of the borrower’s personal property or specifically in the borrower’s inventory and accounts receivable. Operating loans will often provide for a maximum amount of credit available to the borrower, but will also be limited by a “borrowing base”, calculated on a percentage of the value of each of the inventory assets and receivables of the borrowing company, after deducting assets against which the bank does not wish to lend, such as receivables that are over 90 days due or otherwise doubtful, and obsolete inventory.

In addition to security on assets of the borrower, banks may also require personal guarantees from the shareholders, although this is becoming less common, particularly for well-established borrowers. Shareholder loans made to the borrower and any security for them will also have to be subordinated, postponed and assigned to the bank, although ordinary course payments may be permitted if no default under the bank loan has occurred or would result. The bank will also require that it be named as an additional insured and as loss payee in any insurance policy respecting the assets of the borrower over which the bank holds security. “Key person” life insurance may be required on the principals of the borrower. If the shareholder is sufficiently creditworthy, the bank may make a loan solely on the strength of a guarantee from the shareholder, or the shareholder may be able to obtain a letter of credit from its bank in favour of the Canadian bank, which would be held in place of security over the borrower’s assets.

The second kind of loans made by banks are term loans. Term loans are generally repayable over a fixed period of time pursuant to an agreed schedule. Term loans are most often made to finance the acquisition of fixed assets by the borrower. Usually, term loans can only be

accelerated by the bank when a specified event of default occurs, although some banks make term loans payable on demand in some circumstances.

The principal security taken for a term loan is often a security interest in the fixed assets of the borrower. However, as discussed above, banks frequently demand security over all of the borrower’s assets. Similarly, the discussion above with respect to the methods of availability, choice of interest rates, additional security and guarantees applies equally to term loans, although letters of credit are not commonly issued in connection with term loans and fixed rates of interest are more often available for such loans.

Although banks are the dominant providers of debt financing in Canada, debt financing is also available from other sources, such as insurance companies, trust companies, credit unions, finance companies and vendors of assets. These sources often operate within narrower market niches than banks and, in particular, some may be better sources of longer-term, fixed rate financing than banks.

Capital assets can often be acquired from the manufacturer on a conditional sale basis or using a lease. Such accommodation from the manufacturer eliminates the need for a substantial sum of upfront cash and allows the company to pay for the assets over their useful life from the company’s cash flow. Lease finance companies can also help a company to acquire assets by buying the assets chosen by the company and then leasing those assets to the company.

In some situations, a company may also use a factoring company to improve its cash flow. A factoring company will purchase or lend against a company’s accounts receivable at a discount (normally smaller than the discount used in a borrowing base calculation described above) and will then attempt to collect the receivables directly from the account debtor. Depending on the arrangement, the collection may be either with or without recourse to the company if the account debtor fails to pay because of creditworthiness. The company will normally be liable to the factoring company, if non-payment is because of product quality issues.



### b) Equity Financing

Raising funds by means of a public offering through a prospectus is done through investment dealers. Since the costs incurred in pursuing this type of financing are substantial, this route is only suitable if large sums of money are to be raised. For a new company starting out, a public offering is generally not appropriate. Securities regulation is discussed further in Chapter 6 (Securities Regulation).

Funds may also be raised by way of a private placement (i.e., under an exemption from the prospectus requirements), whether directly by the issuer or through investment dealers. Some exemptions are designed for institutional investors or high net worth individuals (e.g., the accredited investor exemption) but there are also exemptions designed for others (e.g., the family and friends, employees and the offering memorandum exemptions).

For smaller or start-up companies, another source of external equity financing is venture capital. Typically, venture capitalists are interested in acquiring a substantial minority equity position and, in combination with such an investment, will often also make available some debt financing. For their support, venture capitalists usually require significant control over the management and direction of the company. This is a major factor to consider before seeking venture capital financing.

Private equity investors frequently seek control by investing in or acquiring equity and arranging debt financing for mid-cap and larger companies.

## 5.2 Government Assistance Programs

The availability of government assistance programs in Canada varies, depending on the size and location of the proposed business, the nature of the market in which the business sells its product and the inclination of the government concerned to make such assistance available.

Federal and provincial governments in Canada have established a number of government assistance programs. The programs discussed below are designed to assist persons engaged in the establishment or expansion of a business in Canada.

### c) Federal Assistance – The Business Development Bank of Canada

Wholly-owned by the federal government, the Business Development Bank of Canada (“BDC”) exists to assist small and medium-sized businesses in Canada. The BDC offers financing, consulting services and venture capital. The BDC has offices located in major centres across the country.

### d) Federal Assistance – Regional Development Programs

Two of the more significant regional development initiatives of the federal government are the Western Economic Diversification Canada (“WD”) and the Atlantic Canada Opportunities Agency (“ACOA”).

The focus of WD is on innovation, business development and community economic development in Western Canada. The focus of ACOA is similar to WD, but its region of responsibility is limited to Atlantic Canada, an area comprising of the provinces of New Brunswick, Nova Scotia, Newfoundland and Labrador, and Prince Edward Island.

### e) Federal Assistance – Canada Small Business Financing Program

The Canada Small Business Financing Program (the “CSBF Program”) is a program devoted to the credit needs of small businesses. Under the CSBF Program, the federal government guarantees loans made by conventional lenders to small business enterprises in a broad spectrum of industrial sectors, including manufacturing, transportation, wholesaling and retailing. Farming businesses, charitable or religious organizations and businesses not operating for gain or profit are ineligible under the program, however. A small business is defined as a business carried on in Canada for profit or gain, with estimated gross annual revenues (in the case of an existing business) not exceeding C\$5 million for the fiscal year in which the CSBF Program loan is approved or (in the case of a new business) whose estimated gross annual revenues are not expected to exceed C\$5 million during the first 52 weeks of operation, at the time the CSBF Program loan is approved.

The rate of interest on CSBF Program loans is set at a maximum of 3 per cent above the prime lending rates of the chartered banks for variable rate loans. This rate fluctuates as the prime lending rate fluctuates. Fixed rate loans are also available. The rate of interest on fixed rate loans is a maximum of 3 per cent above the lender’s single family residential mortgage rate for the period of the loan. The CSBF Program loan may be used to finance up to 90 per cent of the cost of the purchase or improvement of land or of new or used equipment, or the purchase of leasehold improvements. The maximum loan amount a small business can access under the CSBF Program is C\$500,000, of which C\$350,000 can be used to finance the purchase or improvement of equipment and leasehold improvements.

The loan must be secured. All participants are required to pay a 2 per cent registration fee to the lender.

### f) Provincial Assistance

Individual provinces administer many of their own government assistance programs. Even where a Canadian corporation’s operations are based in one particular province, if it is intended that marketing be done nationally through branch operations, assistance may be obtainable from more than one province.

## 6

Current as of September 30, 2016

## Securities Regulation

### 6.1 General

Each province and territory has enacted its own securities legislation and has established a regulatory authority to administer it. As a result, national securities transactions require compliance with several regulatory regimes administered by different authorities. However, the laws are generally very similar (and in many cases uniform) and the regulatory authorities have implemented procedures to reduce the difficulties of dealing with multiple regulators. The federal government, five provinces and one territory are pushing ahead with the establishment of a single securities regulation system (to be operated jointly by the federal and provincial governments), notwithstanding the historical opposition by a number of provinces to the establishment of a single regulator. On July 22, 2016, it was announced that the single securities regulation system would be operational in 2018.

Canadian securities regulation is relevant to a wide variety of interested parties, including in particular: those who trade securities in Canada; those who provide investment advice or portfolio management services in Canada; those who manage investment funds that have investors in Canada or that have actively solicited investors; those who issue securities in Canada; those issuers who list their securities on a Canadian stock exchange; those who acquire or offer to acquire more than 20 per cent of the voting or equity securities of a class of an issuer from securityholders, including securityholders in Canada; those issuers who offer to acquire their own securities from securityholders in Canada; and certain investors, directors and senior officers of Canadian public issuers.

### 6.2 Registration of Dealers

Generally, persons or companies that engage in the business of trading in securities are required to be registered as dealers in the provinces or territories in which the dealers do business. Depending on their activities, they may also be required to join the Investment Industry Regulatory Organization of Canada. The dealer will have to satisfy certain financial, insurance and other requirements. As part of the registration process, for most categories

of registration, individuals acting as officers or representatives will have to demonstrate that they have the required knowledge, experience and integrity. There are exemptions from these requirements in certain circumstances. In particular, foreign dealers can engage in certain specified limited activities if they file a form submitting to the local jurisdiction and appointing an agent for service and process.

### 6.3 Registration of Advisers

Generally, persons or companies that engage in the business of providing investment advice (including providing portfolio management services) are required to be registered as advisers in the provinces or territories in which the advisers do business. An investment adviser will have to satisfy certain financial, insurance and other requirements. As part of the registration process, those individuals who will be providing advice or acting as officers or representatives will have to demonstrate that they have the required knowledge, experience and integrity. There are exemptions from these requirements in certain circumstances. In particular foreign advisers can engage in certain specified limited activities if they file a form submitting to the local jurisdiction and appointing an agent for service and process.

### 6.4 Registration of Investment Fund Managers

Generally, persons or companies that act as investment fund managers are required to register as such in the provinces or territories in which the investment fund managers do business. A registered investment fund manager will have to satisfy certain financial insurance and other requirements. If an investment fund manager does not have a place of business in Canada, it may be exempt from these requirements in certain circumstances. Ontario, Québec and Newfoundland and Labrador have a different approach to exemptions from the other provinces and territories.

### 6.5 Issuing Securities in Canada

Generally, issuers of securities in Canada are required to file and clear a prospectus with the applicable securities regulatory authorities. A prospectus must contain specified information about the issuer and the offering including full, true and plain disclosure of all material facts relating to the issuer and the offered securities.

An issuer that offers securities by way of prospectus (or, in some jurisdictions, one who merges with a reporting issuer, who offers securities in a securities exchange take-over bid for a reporting issuer or who lists its securities on a recognized Canadian stock exchange) becomes a “reporting issuer”. Reporting issuers are subject to certain continuous and timely reporting obligations. For example, they must file and send to securityholders unaudited quarterly financial reports, audited annual financial statements, management’s discussion

and analysis and information circulars in connection with meetings of securityholders. They must also make prompt announcements and filings in connection with material changes in their business, operations or capital.

Issuers can also offer or issue their securities in a manner that is exempt from the prospectus requirements. For example, an exemption would be available for sales to those defined as “accredited investors” or those who spend at least C\$150,000 to purchase the securities. In these cases, there are filing requirements and there may also be specific disclosure obligations. Exemptions are also available for certain sales to family and friends, sales to employees, and sales made under a prescribed form of offering memorandum. In 2015 and 2016, Canada’s exempt market regulatory system was significantly revised through a series of initiatives related to prospectus exemptions, including revisions to the foregoing exemptions and the crowdfunding exemptions discussed in Section 5.1 (b) (Equity Financing). These revisions were the result of recent economic developments and the perceived need to further protect retail investors in Canada.

### 6.6 Listing Requirements

Issuers who wish to list their securities on stock exchanges, such as the Toronto Stock Exchange or the TSX Venture Exchange, must satisfy minimum listing requirements relating to their management, issued capital, distribution of securities and financial resources. They must also sign a listing agreement with the stock exchange and agree to comply with its rules.

Listed issuers must notify, and in some cases obtain the consent of, the stock exchange before making corporate changes or entering into certain transactions, such as changes in capital structure, material transactions and issues of shares or options. Listed issuers must also make regular filings with the exchanges, pay annual fees and satisfy timely disclosure requirements. By listing its securities, an issuer becomes a reporting issuer in one or more provinces and, therefore, becomes subject to the continuous and timely reporting obligations referred to in Section 6.5 (Issuing Securities in Canada).



## 6.7 Take-Over Bids

A person that offers to acquire voting or equity securities which, if acquired, would cause the offeror's holdings of the securities to exceed 20 per cent of the outstanding securities of that class is considered to be making a "take-over bid". Unless it can avail itself of one of the exemptions, a take-over bidder must comply with certain rules, including that it send a take-over bid circular with specified disclosure to all holders in Canada of securities of the class concerned, offering to buy their securities.

Significant changes to Canada's take-over rules came into effect on May 9, 2016. Generally, under the new rules, a formal take-over bid must be outstanding for at least 105 days, subject to abridgement by the target company to 35 days. Where a mandatory 50 per cent minimum tender condition has been achieved, and all other terms and conditions of the bid have been complied with or waived, the bid must be extended for an additional 10 days to permit other shareholders a further opportunity to tender to the bid. Among these and other changes, the new rules are expected to broadly impact the way boards of target companies may respond to unsolicited take-over bids in Canada.

## 6.8 Issuer Bids

Similarly, an issuer that offers to acquire its own securities (other than non-convertible debt securities) from holders in Canada is considered to be making an "issuer bid" in Canada. Unless an exemption from those requirements is available, an issuer bidder must comply with certain rules, including the requirement to send an issuer bid circular with specified disclosure to all holders of securities of the class concerned, in Canada, offering to buy their securities.

## 6.9 Investors, Directors and Senior Officers

Certain securityholders of Canadian reporting issuers have obligations under Canadian securities laws. For example "reporting insiders" (which include directors, senior officers and 10 per cent shareholders) are required to report their trades. Those who acquire at least 10 per cent of the outstanding voting or equity securities of a particular class (5 per cent if a formal take-over bid has been made) are required to report and, in some cases, to make an announcement concerning such trades and to wait before making further purchases.

Those "persons in a special relationship" with an issuer are prohibited from trading in securities of the issuer while in possession of material undisclosed information relating to the issuer and from "tipping" others as to that information.





# 7

Current as of September 30, 2016

## Canadian Immigration Procedures for Business People

### 7.1 Non-Immigrant or Temporary Entry

As a general rule, all persons who are not Canadian citizens or permanent residents require a work permit to work in Canada. A work permit is normally granted only if there is no qualified Canadian available to fill the position in question. However, there are many exceptions to this general rule that either make a work permit unnecessary, or that make a work permit much easier to obtain. The following are some of the more widely utilized exceptions to this general rule.

#### a) Business Visitors

A person may enter Canada as a business visitor without the need for a work permit, if the person seeks to engage in international business activities in Canada without directly entering the Canadian labour market. A person will not be considered to be directly entering the Canadian labour market if the primary source of remuneration for his or her business activities is outside Canada and the principal place of business and accrual of profits of the employer remains predominantly outside Canada and/or if the services rendered do not compete directly with those rendered by Canadian citizens or permanent residents. In addition, a representative of a business outside Canada may work in Canada without a work permit, if the purpose of his or her visit is to attend business meetings, to purchase Canadian goods or services or to give or receive training within a Canadian parent or subsidiary company of his or her employer. This is not an exhaustive list of permissible activities. However, it does represent some of the most often used exemptions to the requirement for a work permit.

## b) Work Permits

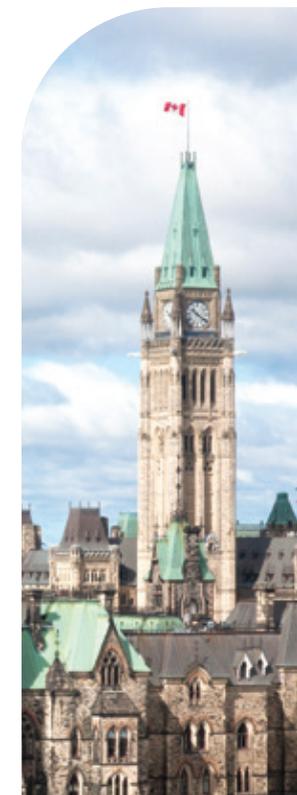
Where a foreign national is entering Canada for business purposes outside the scope of the business visitor provisions, a work permit is required. There are many categories under which a work permit can be obtained:

- **Intra-Company Transferee:** The intra-company transferee category offers one of the quickest and most convenient methods for certain categories of foreign business persons to work in Canada. Intra-company transferees are only persons in senior executive or managerial positions or positions requiring specialized knowledge regarding the employer's products, services or processes and procedures, who have been employees of a branch, subsidiary or parent of the company located outside of Canada for at least one year, and who seek to enter Canada to work at senior executive or managerial levels or in a position requiring specialized knowledge for a temporary period in a related Canadian company.
- **Creating Significant Employment or Other Benefits in Canada:** The "significant benefit" category is available if a person's employment will create or maintain significant employment or other benefits in Canada. This category may be used, for example, where an individual does not meet the requirements of the intra-company transferee category, but has knowledge concerning the financial, administrative or procedural affairs of a company that has an operation in Canada, and it can be shown that significant benefits will be generated from his or her employment. However, as immigration officers are generally unwilling to exercise their discretion to grant a work permit under this category except in unusual circumstances, work permits are granted under this category only in extraordinary circumstances.
- **Entry Under Trade Agreements:** Certain international trade agreements to which Canada is a party, such as the North American Free Trade Agreement ("NAFTA"), the General Agreement on Trade in Services ("GATS") and the Canada-Chile Free Trade Agreement ("CCFTA"), facilitate the temporary entry of certain categories of workers who are nationals of one of the other member states. Three categories of work permits are generally granted under these agreements: (a) traders and investors; (b) professionals; and (c) intra-company transferees. For these persons no Service Canada "Labour Market Impact Assessment" (see below) is required and entry procedures are generally streamlined.
- **Confirmed Job Offer:** Where the above or other exempt categories are not accessible to the foreign worker, a "Labour Market Impact Assessment" must be obtained from Service Canada. The criteria for assessing an offer of employment to a foreign worker varies from region to region in Canada, depending on employment levels, labour market conditions

and the nature of the position at issue. The critical factor is that Service Canada must be satisfied that qualified Canadians or permanent residents are not available in Canada to perform the work at issue (because the requisite specific recruiting/advertising in Canada has been done) or, put another way, that the hiring of a foreign worker will not have a negative impact on the Canadian labour market.

## 7.2 Dependants of Foreign Worker

A work permit generally permits a spouse (legal or common law, in each case including same-sex) and children to accompany the person authorized to work to Canada. It also permits dependant children to attend elementary and secondary school in Canada. However, it does not authorize the spouse or the children to take up employment in Canada. In many cases, however, it will be possible for the spouse to obtain a work permit under Canada's Spousal Work Permit Program.



## 8

Current as of September 28, 2016

## Employment Law

The importance of the employment relationship and employment law for any business cannot be over-emphasized. Employment law involves the legal rights and obligations that regulate all aspects of the relationship between employers and employees. While the principles of law governing employment in Canada are derived from the common law of contracts, certain aspects of labour and employment law, such as collective bargaining and employment standards, are regulated by statutes. Every province and the federal government have enacted labour and employment legislation and each business will either be federally or provincially regulated.

### 8.1 Constitutional Jurisdiction

The nature of the business carried on by the employer determines whether its relations with its employees (including the recognition of unions and the regulation of collective bargaining, as well as employment standards such as overtime and hours of work) are regulated by federal or provincial law. There is a relatively small number of businesses which fall within the category of a “federal work, undertaking or business” (for example, navigation and shipping, railways, inter-provincial transport, air transportation, communications, broadcasting and banking), and whose employment relations are therefore governed by federal law. Most employers in Canada fall within provincial jurisdiction and are, therefore, regulated by provincial statutes.

### 8.2 Individual Contracts of Employment

There is extensive regulation of individual contracts of employment by both provincial and federal laws which govern such matters as human rights, occupational health and safety, workers' compensation, employment insurance, pensions, minimum wages and other standards of employment. Some provinces have as many as 25 different statutes that touch, to some degree, on employment conditions.

Individual contracts of employment are commonly not in writing. The courts have therefore developed a series of terms which are regarded as implied in every employment contract, unless the parties have expressly provided otherwise. In Canada, employees are considered to be hired for an indefinite period, unless there is a written or oral agreement which specifies the duration of the employment.

Generally, it is implied that the employee has a duty of honesty and avoidance of a conflict of interest with the employer. Employees are also obliged to comply with lawful directions of their employer within the scope of their employment, and to perform their contract of service with diligence and to an appropriate standard of skill and competency. Employers in turn have a duty to act in good faith with regard to the manner of termination of an employee.

Canadian courts have held that employees owe a duty not to injure their employer during or after the employment, for example by disclosing confidential information or trade secrets.

Employers can also protect their interests by having a written contract of employment that includes terms restricting or limiting certain employee conduct both during the term of the employment and particularly after termination of employment. These terms are called “restrictive covenants”. There are three general types of restrictive covenants used in an employment contract: (a) non-solicitation covenants, which restrict departing employees from soliciting clients, customers or other employees; (b) non-competition covenants, which restrict departing employees from commencing employment with competitors or setting up competing businesses; and (c) non-disclosure covenants, which restrict departing employees from disclosing confidential information. In the absence of a non-disclosure covenant, employees still have a common law duty not to disclose confidential information or trade secrets. Restrictive covenants are viewed as a restraint of trade and will be approached by the courts with great scrutiny. The enforceability of restrictive covenants depends largely on their duration and geographic scope, the wording of the contract, the nature of the business and the legitimacy of the interests that the employer is seeking to protect. The law is clear in maintaining that a restrictive covenant must go no further than is reasonably necessary to protect the employer’s legitimate proprietary interests.

In the absence of an express agreement regarding the consequences of termination, the law holds that employees who are dismissed without just cause are entitled to reasonable notice of termination of employment, and may recover damages if such notice is not given. In providing reasonable notice, the employer generally has two options. The employer may require the employee to continue to work through the notice period (otherwise known as “working notice”) or may provide the employee with pay in lieu of working notice. All employment standards statutes contain minimum periods for notices of termination, and severance pay, if applicable. However, absent express agreement to the contrary, employers will be required to provide employees with both statutory notice of termination and common

law notice of termination. The duration of common law notice that is reasonable is determined by the circumstances of each case. The courts have identified four major factors in determining common law reasonable notice, giving varying degrees of weight to each, depending on the circumstances: the character of the employment; the length of service; the age of the employee; and the availability of similar employment, taking into consideration the employee’s experience, training and qualifications. This common law reasonable notice entitlement will encompass any statutory notice entitlement provided for by the applicable employment standards legislation. The requirement for reasonable notice directly contrasts with the widely held view in the U.S. that workers are employed at the will of the employer and that their employment may be terminated at any time, without cause and without notice.

Only where just cause for termination exists can an employee be summarily dismissed without common law reasonable notice or statutory notice. The Supreme Court of Canada has recently confirmed that federally regulated employers are not permitted to terminate employment of non-managerial employees under the *Canada Labour*, unless there is just cause, even where notice or pay in lieu of notice is provided, or unless the termination is due to lack of work, with limited exceptions.

What constitutes just cause varies. Assertions of just cause for termination which the employer knows are not well-founded may lead to a larger award of damages to the employee on the basis that the employer acted in bad faith. It is advisable for the employment contract to provide a non-exhaustive list of examples of what would constitute “just cause”. This may be a defence to any argument that a specific type of conduct did not amount to just cause for termination.

Written employment contracts may also contain an express provision that specifies the amount of notice to which the employee is entitled on termination without just cause. Such a provision will not be enforceable where the notice period is less than that which the employee would have been entitled to under the applicable employment standards legislation or where the clause otherwise fails to provide an employee with minimum statutory entitlements. An employer and employee may agree on providing a greater benefit than what is provided for in the applicable employment standards legislation but cannot contract out of the minimum standards set out in such legislation. If a termination provision in an employment contract is unenforceable, the common law will apply and the employee will be entitled to reasonable notice based on the factors described above.

There are many advantages to having a contract of employment stipulating the terms and conditions of employment.

### 8.3 Employment Conditions Imposed by Statute

Provincial and federal statutory employment standards exist for all jurisdictions. Statutes govern such matters as minimum wage rates, method and frequency of payment, hours of work and overtime pay, vacation pay, statutory holidays, emergency leave, maternity and other leaves and minimum requirements for notice of termination of employment or pay in lieu thereof. There are also minimum standards imposed by both provincial and federal legislation governing health and safety in the workplace, including workplace harassment and violence. In most jurisdictions, there are penalties for failing to comply with these standards.

Where employers have a duty under health and safety legislation to protect the safety of a worker, Canada's *Criminal Code* expands this duty to include members of the public. Anyone who undertakes, or has authority to direct how another person does work is under a legal duty to prevent bodily harm to that person and any other person, arising from that work.

In some jurisdictions, there is legislation governing the layoffs or termination of large groups of employees. Such legislation may make it necessary for the employer to give substantial advance notice to the responsible government ministry and the affected employees prior to implementing such initiatives. A specific government ministry in each jurisdiction has the power and duty to enforce the legislation through the imposition of payment orders enforceable by the courts.

The federal jurisdiction and most provincial jurisdictions have enacted legislation protecting workers from workplace violence and harassment. The legislation requires employers to prepare policies and maintain programs with respect to workplace violence and harassment. The programs must include measures and procedures for reporting by workers and investigation by the employer of incidents of violence and harassment. The employer is also required to train employees and proactively identify and assess the risks of violence particular to their workplace. In addition the employer is required to notify workers who will be coming in contact with other workers known to have a history of violent behaviour.

### 8.4 Workers' Compensation

Employers have a general duty to provide a safe working environment. Workers' compensation insurance protects employers from claims resulting from injuries to employees and is mandatory for most Canadian employers that employ a stipulated minimum number of people. Under provincial legislation that provide for workers' compensation schemes, employees covered by such legislation are generally denied their common law right to sue their employer but may claim benefits under the compensation scheme. Where employees are injured "in the course of their employment", compensation is payable to the employee. In most jurisdictions, injured employees receive between 75 per cent and 90 per cent of their pre-injury income while disabled.

Such compensation payments are largely funded through employer contributions.

### 8.5 Canada Pension Plan

The Canada Pension Plan is a contributory, earnings-related social insurance scheme established by the federal government. It insures against the loss of income due to retirement, disability and death. It applies to anyone working in Canada outside of Québec. An employee must contribute to the plan 4.95 per cent of all employment earnings in excess of C\$3,500 up to a specified maximum of C\$2,544.30 per year (in 2016). Employers are required to deduct this amount from an employee's remuneration and remit it to the federal government, and are required to match this contribution. Self-employed persons must pay both portions. The Province of Québec has its own similar program, the Québec Pension Plan, for those working in Québec.

### 8.6 Employment Insurance

The federal *Employment Insurance Act* regulates an insurance scheme to which both employers and employees must contribute. Workers who qualify for assistance receive benefits while they are unemployed, or without pay because of parental leave, temporary sickness or quarantine, or compassionate family care leave. The level of benefits an employee will receive depends on several factors, including past contributions, length of employment and previous salary. Employers are required to deduct the contribution amount from an employee's remuneration and remit it to the federal government and are required to match the contribution, at a rate of 1.4 times the employee's contribution amount.

### 8.7 Human Rights Legislation

Every provincial and federal jurisdiction has legislation designed to protect human rights. Among other things, this legislation is aimed at preventing and redressing discrimination in the work place. For each jurisdiction, the relevant legislation should be referred to, as the prohibited grounds of discrimination are not uniform. Most jurisdictions prohibit discrimination on the basis of race, ancestry, nationality, ethnic or place of origin, political belief, colour, gender



expression and/or identity, religion or creed, sex, sexual orientation, marital status, family status, age, physical or mental disability, or criminal conviction for which a pardon has been granted. Sexual harassment is considered discrimination on the basis of sex. Some jurisdictions allow for mandatory retirement at age 65, while in other jurisdictions mandatory retirement constitutes age discrimination. With respect to disability, employers have a duty to accommodate employees with a disability to the extent possible, to the point of undue hardship.

Some jurisdictions have also enacted pay equity legislation. Pay equity legislation requires that employers provide comparable salary and benefits to employees in comparable positions, regardless of gender.

## 8.8 Employment Governed by Collective Agreements

Trade unions represent a significant portion of the Canadian work force. All Canadian jurisdictions recognize by statute the right of trade unions to organize and represent employees, and to engage in collective bargaining. Collective bargaining consists of negotiations between an employer and group of employees over the terms and conditions of employment. The result of collective bargaining is a collective agreement.

Provincial and federal labour legislation provides for the following: exclusive bargaining rights to certified trade unions; a postponement of the right to strike or lock-out until after the expiry of a collective agreement and after a conciliation or mediation process; prohibition of unfair labour practices by both employers and trade unions; the legal recognition and enforceability of collective agreements; the resolution of disputes under collective agreements through a grievance procedure or arbitration, without resorting to strike; and the establishment of administrative tribunals or regulatory bodies with investigative and remedial powers over the collective bargaining and organization process; and other aspects of labour relations. While the precise nature of these rights varies from jurisdiction to jurisdiction, these features are common to all Canadian jurisdictions.

Employees have the right to belong to a trade union of their choice, free of any coercion or interference by the employer. Employers have a duty to recognize and bargain in good faith with the trade union chosen by their employees. Labour relations tribunals supervise the organization of employees and, to some extent, the collective bargaining process.

This institutional arrangement largely displaces the administration of labour law by the courts, although the jurisdiction of the courts in certain labour matters, such as the issuance of injunctions and limited review of labour board decisions, remains intact.

Employers and employees have different rights and obligations under a collective agreement than under individual contracts of employment where there is no trade union. The collective agreement governs the terms and conditions of employment of unionized workers. Generally, employers cannot enter into individual contracts with unionized employees. Collective agreements must provide for a private system of dispute resolution, typically in the form of arbitration. Employees who are dismissed or disciplined by their employer have the right to seek redress through arbitration. Arbitrators are given the power under the collective agreement (or by statute) to reinstate employees if they find that the employer acted with insufficient cause. They have the right to substitute a penalty of less severity than that imposed by the employer. The common law right to notice does not exist for unionized employees. Employment may generally only be terminated for just cause or because of a lack of work.

Arbitrators also have the authority to settle disputes over the interpretation of the collective agreement. Their decisions are binding on the employer, the employees and the trade union. There is a limited right of appeal to the courts from arbitration decisions.

## 8.9 Whistleblower Protection

In Canada, it is a criminal offence for an employer to take disciplinary measures, or threaten or adversely affect the employment of an employee, with the intent to stop such employee from providing information to law enforcement officials regarding wrongful activity. Anti-reprisal provisions that protect employees who report wrongful activity of their employers are also found in various provincial employment standards legislation, as well as in human rights and workers' health and safety statutes.

## 9

Current as of October 21, 2016

## Directors and Officers Liability

A director or officer of a corporation is subject to certain duties. These duties arise from the common law as well as from legislation. In a number of instances, a director or officer can be held personally liable for failing to fulfill these duties.

Duties and liabilities of directors and officers of a corporation may arise under the statute governing the corporation or under various federal or provincial statutes which apply generally to carrying on business, as well as under common law.

The following is a general description of some of the duties of directors and officers and the liabilities that can arise from failing to fulfill these duties.

### 9.1 Duties and Liabilities of Directors

#### a) Fiduciary Duty

Directors owe a “fiduciary duty” to the corporation. This means that they must act honestly and in good faith with a view to the best interests of the corporation. This also means acting loyally to the corporation and avoiding situations where a director’s duty to the corporation conflicts with his or her self-interest. Accordingly, as part of fulfilling this fiduciary duty, a director must disclose his or her personal interest in a material contract with the corporation, refrain from voting on any resolution which places the director in a conflict of interest and refrain from using corporate information or corporate property for personal benefit. In addition, a director must not take personal advantage of a business opportunity that the corporation either had or was pursuing if the director became aware of the business opportunity in the course of serving as a director. If a director fails to comply with any of these requirements, the director may have breached his or her fiduciary duty. In such circumstances, the director may be required to account to the corporation for any gain earned as a result of the breach. A court may also award damages to the corporation, in order to restore the corporation to the position it was in before the breach occurred.

### b) Duty of Care

Directors also owe a duty of care to the corporation. For corporations incorporated under the federal *Canada Business Corporations Act* and most provincially-incorporated corporations, this duty of care is articulated in the relevant corporate statute as a duty to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. This means that a director must apply his or her knowledge, experience, skills and best judgment when exercising powers, performing functions and making decisions as a director. In jurisdictions where the relevant corporate statute does not define the duty of care, the duty of care is based on common law, which provides that the director's duty of care is to exercise the care, diligence and skill of a person possessing the knowledge and experience of that director.

Those who possess greater knowledge or skill may be expected to meet a higher standard of care. For example, directors who hold other management positions within the corporation may be subject to a higher standard, because they are generally better informed about the corporation's affairs.

To determine whether a director has breached his or her duty of care, a court will examine the process by which the director came to the decision in question. A director will not be relieved from liability simply because the director was absent from the directors' meeting where the decision was made, unless the director properly registered his or her dissent to the decision.

### c) Other Duties

In addition to the fiduciary duty and the duty of care, directors owe additional duties arising from federal and provincial legislation. These duties include:

- **Duties relating to wages and pensions:** Under the various federal and provincial statutes governing employment standards, directors can be held liable to the corporation's employees for unpaid wages and vacation pay earned by the employees during the individual's directorship. Moreover, where a corporation commits an offence under provincial pension benefits legislation, a director may be held personally liable if the director participated in the offence.
- **Tax-related duties:** A director may be liable for employee source deductions, nonresident withholding taxes, excise taxes, and certain other provincial taxes that the corporation has failed to withhold, deduct or remit as required. In addition, directors can be personally liable where a corporation commits an offence under federal or provincial tax legislation.

- **Duties arising from environmental legislation:** Directors can be held liable where the corporation commits certain environmental offences. This liability can arise even where the director was not actively involved in committing the offence, since directors are deemed to have control of the corporation and its employees. Directors may be fined, imprisoned or found liable in damages for the corporation's offences.
- **Duties relating to publicly-traded corporations:** Directors of publicly-traded corporations are subject to additional duties and potential liabilities. A director of a publicly-traded corporation must ensure that the corporation has complied with the various filing, disclosure and reporting requirements and restrictions arising from relevant provincial securities statutes. Failing to do so can give rise to serious penalties, including fines or imprisonment.
- **Other duties:** Depending on the nature of the activities of the corporation, directors can be subject to a number of other duties and liabilities, including those arising from bankruptcy and insolvency legislation, pension benefits legislation and legislation governing financial institutions. The penalties for breaching these duties may consist of fines, imprisonment or the payment of damages.

## 9.2 Duties and Liabilities of Officers

Like directors, a corporation's officers owe a fiduciary duty to the corporation and, generally, are subject to the same duty of care that is imposed on directors. Therefore officers face many of the same potential liabilities as directors. Whether an employee is an officer will depend not on the employee's stated position or title, but rather on the degree of actual power and control that the employee has over the corporation.

## 9.3 Protections and Defences for Directors and Officers

Directors and officers can minimize the risk of liability by performing their functions as directors and officers diligently and faithfully. Among other things, directors and officers should be vigilant in:

- holding the interests of the corporation paramount;
- disclosing personal interests that are in conflict with the corporation's interests;
- abstaining from voting on decisions in which they have conflicting interests;
- obtaining shareholder approval of transactions in which they are personally interested;
- diligently asking questions and obtaining full answers from management about the affairs of the corporation;

- participating in a meaningful way at all board meetings;
- before relying on the advice of an independent adviser or expert, verifying that the person giving the advice is qualified to give such advice, giving the person access to all relevant information in the corporation's possession and exercising common sense when reviewing the report;
- ensuring compliance with applicable legislation and policies;
- becoming familiar with applicable statutory and common law duties, as well as those arising from the corporation's constating documents; and
- keeping the affairs of the corporation confidential.

Directors and officers can also limit their personal liability in the following ways:

- **Corporate Indemnity:** In certain circumstances, corporations may indemnify their directors and officers for actions taken on the corporation's behalf. However, this indemnity is unavailable where the director has breached his or her fiduciary duty, where the corporation is insolvent or where a court finds an indemnity otherwise inappropriate.
- **Shareholders Agreement:** In some cases, a director's liability can be limited by a unanimous shareholders agreement that transfers liability from the directors to the shareholders of the corporation.
- **Insurance:** As a further protection, directors and officers can obtain director and officer liability insurance to protect against certain types of losses and claims. However, insurance typically does not cover cases such as fraud, conspiracy, criminal behaviour and human rights violations.
- **Resignation:** As a last resort, a director or officer could resign to avoid liability arising from future events. However, this does not exonerate the director or officer from liability arising from events that occurred during his or her term as director or officer.
- **Due Diligence:** Generally, directors and officers are entitled to a due diligence defence that may protect a director from liability if it can be proven that the director took all reasonable steps to avoid the event giving rise to liability, or that the director had a reasonable belief in a mistaken set of facts that, if true, would have made the director's conduct reasonable in the circumstances. The due diligence defence is available to officers in a more limited set of circumstances.

Depending on the nature of the offence, there may be other statutory and common law defences and protections available to a director or officer.



## 10

Current as of September 14, 2016

## Canadian International Trade Regulation

The Canadian federal government is generally responsible for Canada's trade policies and laws.

### 10.1 Canadian Import Laws

Canada's *Customs Act* imposes a general duty to report the importation of all goods into Canada. It also regulates the valuation of goods for duty purposes on importation to Canada, the basis for any exemptions from the payment of duty, and procedures for contesting the federal customs authorities' classification of goods for customs purposes. The *Customs Tariff* sets out the various rates of duty that apply to the importation of goods into Canada.

### 10.2 The Classification of Goods

The classification of imported goods for customs purposes is undertaken pursuant to the Harmonized Commodity Description and Coding System (or "HS") which Canada has implemented into domestic law through the *Customs Tariff*.

Upon entry of the goods into Canada, the importer classifies and values the goods to determine the applicable custom duty. A Canada Border Services Agency ("CBSA") officer has, however, the authority to review the importer's determination of the classification and valuation of the goods for up to four years after importation, and may issue a requirement for adjustment with a possibility that a monetary penalty may be imposed for incorrect accounting of goods. If the importer disagrees with the officer's decision, it may request a redetermination or re-appraisal within 90 days after the date a decision notice is given. Further rights of appeal, to the Canadian International Trade Tribunal ("CITT") and judicial review by the Federal Court of Appeal, are also available.

The CITT, established by the *Canadian International Trade Tribunal Act*, has the jurisdiction to decide appeals from CBSA decisions regarding tariff classification.



### 10.3 The Valuation of Goods

Canada is a party to the WTO's Customs Valuation Agreement. Consistent with its obligations under this Agreement, Canada generally uses the "transaction value" method for valuing goods for customs purposes.

Except for special rules which apply when the importer and the exporter are related parties, the transaction value is determined by ascertaining the price paid, or payable, for the goods when they are sold for export to Canada. This price is adjusted for certain fees, charges, royalties, transportation and other additional costs.

### 10.4 Duty Remission and Other Programs

Canada has numerous programs that provide for abatements, refunds, drawbacks and remissions of customs duties in certain circumstances. These duty programs are complex. The availability of a reduced tariff rate is often dependent on the importer's status or how it intends to use the imported goods. The Government of Canada also has authority to reduce or eliminate duties that may have been paid or are payable in certain circumstances.

### 10.5 Export and Import Controls

The *Export and Import Permits Act* gives general statutory authority for controlling imports and exports of certain goods and types of technology. This Act allows the Government of Canada to place goods on the Import Control List which may prohibit the import, or limit the volume of imports, of identified goods. The Government of Canada also has the authority to control the export of goods listed on the Export Control List, particularly those whose purpose is either military- or national security-related.

Canada is also a party to international agreements of relevance to the export and import of goods and the imposition of economic sanctions. These agreements are implemented into domestic law by, among others, the *Special Economic Measures Act* and the *United Nations Act*, and are used by Canada to impose economic and trade sanctions on other countries pursuant to Canadian multilateral obligations.

### 10.6 Canadian Trade Remedy Laws

Canada has legislation and regulations in place to control the import of dumped and subsidized goods if such imports cause injury to domestic production. To investigate alleged dumping or subsidization, the federal *Special Import Measures Act* provides for two types of investigations conducted by two separate agencies.

The CBSA investigates whether dumping or subsidization has taken place. The CITT deals with the injury aspects of investigations arising under Canada's anti-dumping, safeguards and countervailing duty laws. The CITT determines whether the complaining domestic industry has been materially injured by dumped or subsidized imports. As required by Canada's WTO obligations, dumping (or subsidization) and injury to domestic producers must both be found before definitive duties can be imposed.

### 10.7 North American Free Trade Agreement

The North American Free Trade Agreement ("NAFTA") has eliminated most customs duties and other barriers to trade among Canada, the United States and Mexico on goods originating from member states. Goods that meet NAFTA's "rules of origin" qualify for this preferential treatment. Certain restrictions continue to apply in order to protect human, animal or plant life or health and safety. The NAFTA parties have also agreed to work to remove unnecessary obstacles to trade created by certain technical standards.

### 10.8 Other Trade Agreements

In addition to being a member of the World Trade Organization, Canada is party to a number of other bilateral trade agreements, under which preferential benefits may be extended to goods from covered countries. These agreements include trade agreements with Panama, Jordan, Colombia, Honduras, Peru, European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland), Costa Rica, Chile, South Korea and Israel. Canada also concluded a trade agreement with the European Union, referred to as the Comprehensive Economic and Trade Agreement (CETA), and with Pacific-coast countries, referred to as the Trans-Pacific Partnership (TPP), but these agreements are not yet in force.

In addition, Canada is participating in a number of on-going negotiations, including those with the Caribbean Community (CARICOM), the Central American Four (Honduras, Guatemala, El Salvador and Nicaragua), India, Japan, Morocco, Ukraine, Dominican Republic, and Singapore.



## 11

Current as of September 28, 2016

## Competition Law

Canadian law relating to anti-competitive acts and unfair competition is found primarily in the federal *Competition Act*. The *Competition Act* applies, with few exceptions, to all industries and all levels of trade across Canada.

The *Competition Act* contains both criminal and non-criminal provisions. Criminal offences include bid-rigging, conspiracy, deceptive telemarketing, misleading advertising and deceptive marketing practices. Non-criminal, or “reviewable”, matters include mergers, abuse of dominant position and certain types of competitor collaborations.

Allegations of competition offences are investigated by the Commissioner of Competition. The Commissioner brings non-criminal offences before the Competition Tribunal, a specialized judicial body, independent of government, which is composed of judges of the Federal Court of Canada and non-lawyer experts. The *Competition Act* also provides a limited scope for private parties to bring complaints before the Competition Tribunal for specific non-criminal anti-competitive behaviour involving any of five reviewable matters: refusal to deal, price maintenance, exclusive dealing, tied selling and market restriction. The Competition Tribunal can issue both interim and final orders remedying non-criminal anti-competitive practices. Suspected criminal offences are referred by the Commissioner to the Attorney General for Canada for prosecution before the courts. Criminal offenders are subject to fines, prohibition orders, interim injunctions and/or imprisonment.

### 11.1 Merger Review

The *Competition Act* defines a merger in broad terms to include the direct or indirect acquisition or establishment of control over, or significant interest in, the business of another person. In general, mergers are subject to review where they are likely to substantially prevent or lessen competition. In considering whether a merger will substantially lessen competition, the Competition Tribunal will consider a variety of factors, including: the extent of foreign competition faced by the parties to the merger;

the likelihood of the business of one of the parties to the merger failing in the absence of the merger; the availability of substitute products for those supplied by the merging parties; the extent of barriers to entry into the market; and the extent of remaining post-merger competition. In addition, the Competition Tribunal will consider whether the merger is likely to bring about gains in efficiency that will be greater than, and will offset, any anti-competitive effects of the merger. If the Competition Tribunal determines that a merger is likely to substantially lessen competition, the Competition Tribunal may prohibit or dissolve the merger in whole or in part, or may allow it to proceed under imposed conditions.

Significant merger transactions may also be subject to pre-merger notification, depending on the size of the parties involved and the size of the transaction. For example, asset purchases require notification where: (a) the parties to the transaction, together with their respective affiliates, have assets in Canada or gross revenues from sales in, from or into Canada in excess of C\$400 million; and (b) the gross value of the assets being purchased or gross revenues from sales in or from Canada generated by those assets exceeds C\$87 million<sup>1</sup>. The same thresholds apply in the case of share acquisitions, amalgamations and combinations. If the applicable notification thresholds are met, the parties to the transaction must provide prescribed information to the Commissioner and pay the prescribed filing fee (currently C\$50,000). Notifiable transactions are subject to a mandatory initial waiting period of 30 days and cannot be completed until either this waiting period has expired or the Commissioner has otherwise indicated that the transaction can proceed. This initial waiting period can be further extended in the event the Commissioner makes a supplementary information request of the parties.

## 11.2 Criminal Offences

The Attorney General of Canada has exclusive jurisdiction over all criminal prosecutions under the *Competition Act*. Both companies and individuals can be charged with criminal offences, including conspiracy and bid-rigging, as well as some misleading advertising and deceptive marketing practices. Such offences are sanctioned by fines and/or prison sentences.

The key criminal offence under the *Competition Act* is conspiracy, which involves any agreement or arrangement (formal or informal) between competitors or potential competitors: to fix, maintain, increase or control prices; to allocate sales, territories, customers or markets; or to fix, maintain, control, prevent, lessen or eliminate production or supply of a product. Such agreements are *per se* illegal and subject to significant fines and/or prison sentences, regardless of any actual anti-competitive effect.

## 11.3 Misleading Advertising and Deceptive Marketing Practices

The *Competition Act* also contains provisions aimed at curtailing misleading advertising and deceptive marketing practices. These provisions generally prohibit representations to the public that are false or materially misleading, that are not based on adequate and proper tests, or that contain false testimonials or misstatements as to price. Where such representations are made deliberately or recklessly, they can be pursued criminally and criminal sanctions can be sought. If the disputed representations are not made deliberately or recklessly, the *Competition Act* provides for civil sanctions, including orders prohibiting a continuation of the anti-competitive practice and significant administrative monetary penalties.

Criminal deceptive marketing practices include double ticketing of prices, pyramid selling, bait-and-switch selling and deceptive prize notices. These provisions prohibit promotional contests, where there is a representation made suggesting that the recipient has won, or will win, a prize or benefit, and that seeks payment from, or requires the recipient to incur, any cost, unless the recipient actually wins the contest and prescribed disclosure requirements are met. Criminal responsibility for this deceptive practice can also be imposed on the directors and officers of the corporation who were in a position to control or influence the behaviour of the corporation.

Reviewable, non-criminal deceptive marketing practices include misleading or false representations to the public that fall short of the criminal standard, performance claims based on inadequate testing, and bait-and-switch advertising.

<sup>1</sup> This is the threshold value for 2016. This value is adjusted annually, based on changes in gross domestic product. The value for 2017 is expected to be approximately 2 per cent higher, or approximately C\$89 million.



## 12

Current as of September 30, 2016

## Sale of Goods and Consumer Protection

As discussed above in Chapter 11 (Competition Law), in addition to addressing competition issues, such as price-fixing, bid-rigging, and other anti-competitive practices, the federal *Competition Act* addresses a variety of consumer issues, including misleading advertising, deceptive telemarketing, and pyramid schemes.

Under the Canadian Constitution, the federal and provincial governments share responsibility for consumer protection. The federal government is responsible for ensuring a fair, efficient and competitive marketplace for producers and consumers. Federal consumer protection laws govern the sale, advertising and labelling of consumer goods sold in Canada. Provincial governments are responsible for contractual matters related to the sale of goods, such as conditions of sale, warranties and licensing. The standard of protection given to consumers is broadly similar in all provinces across the country. The provinces also require that a variety of businesses providing goods or services to the public be registered, licensed, or granted a permit before selling their goods or providing their services (such as real estate agents, automobile dealers, collection agencies and direct sellers).

### 12.1 Regulation of Advertising

As discussed above in Chapter 11 (Competition Law), in addition to addressing competition issues, such as price-fixing, bid-rigging, and other anti-competitive practices, the federal *Competition Act* addresses a variety of consumer issues, including misleading advertising, deceptive telemarketing, and pyramid schemes. The misleading advertising and deceptive marketing practices provisions of the *Competition Act* apply to any person promoting, either directly or indirectly, the supply or use of a product or service or any business interest, by any means (including print, broadcast and internet advertisements, written and oral representations, and illustrations). Any materially misleading representations that affect the purchaser's decision to buy the product fall under the *Competition Act* and can attract penalties. Misleading advertising is also the subject of various provincial regulations.



## 12.2 Regulation of Labelling of Goods in Canada

In general, federal consumer protection laws govern the information that must be disclosed on product labels, and prohibit the use of false or misleading information.

The federal *Consumer Packaging and Labelling Act*, which is principally administered by Canada's Competition Bureau, regulates the packaging and labelling of consumer goods. The goal of this legislation is to protect consumers from misrepresentations and to help consumers differentiate between products. Products regulated under the *Consumer Packaging and Labelling Act* include any article that is the subject of trade or commerce, including both food and non-food products. The *Consumer Packaging and Labelling Act* applies to "dealers" (who are defined broadly as retailers, manufacturers, processors or producers of products, or any person who is engaged in the business of importing, packing, or selling any product) and prohibits dealers from selling, advertising or importing into Canada any prepackaged product unless a label in the prescribed form is affixed. Certain information displayed on labels must be written in both English and French (including the common name and the net quantity of the product) and such information must be shown in the prescribed format (i.e., meet size and placement requirements).

In addition to the requirements of the *Consumer Packaging and Labelling Act*, the federal *Food and Drugs Act* regulates the advertising, sale and importation of foods, drugs, cosmetics and medical devices, by prescribing standards of purity and quality, as well as labelling and advertising standards.

The *Hazardous Products Act* regulates the advertising, sale and importation of hazardous or controlled products and substances, which include compressed gas, flammable and combustible material, oxidizing material, poisonous and infectious material, corrosive material, and dangerously reactive material. The statute generally prohibits suppliers from selling or importing hazardous products intended for use in a workplace, unless the importer provides a material safety data sheet disclosing certain information, and the packaging of such hazardous products complies with certain labelling requirements.

The *Canada Consumer Product Safety Act* generally regulates manufacturers, importers and retailers of "consumer products" (which are defined broadly to include products, their parts, accessories or components, which may be reasonably expected to be obtained by an individual to be used for noncommercial purposes, and their packaging), as well as those persons who advertise, test, package or label consumer products and those who distribute promotional products for free. The purpose of the statute is to prevent the manufacturing,

importation, advertising and selling of consumer products that pose a danger to human health or safety, such as the advertising or labelling of consumer products in a manner that is false, misleading or deceptive in respect of their safety. Pursuant to the *Canada Consumer Product Safety Act*, the federal government can recall products. There are also obligations under the statute to report consumer product safety incidents and product defects, and to maintain records pertaining to the supply chain.

Other consumer protection legislation regulates the marketing and sale of certain specific products. For example: (a) the *Textile Labelling Act* requires labels to be affixed to garments and upholstered household furnishings; (b) the *Precious Metals Marking Act* sets out rules for the sale of goods made from precious metals; (c) the *Agricultural Products Marketing Act* sets standards and grades for agricultural products and regulates the import, export and inter-provincial trade of agricultural products; (d) the *Tobacco Act* requires the packaging of tobacco products to display, amongst other information, the health hazards and health effects arising from the use of or emissions from such products; and (e) the *Motor Vehicle Safety Act* regulates the safety standards of motor vehicles imported and exported to and from Canada.

In addition, both the federal and provincial governments have set mandatory standards for the performance and safety of numerous other potentially dangerous products, such as electrical wiring, equipment, appliances and automobiles.

## 12.3 Product Liability Law

Product liability law in Canada is based on both the law of contract and the law of negligence. Statutory law also applies in some cases, providing, among other things, statutory and/or implied warranties.



Contract law provides a remedy for parties who are injured when enforceable contractual promises are breached. Contracts for the sale of personal property are subject to provincial jurisdiction and are regulated by provincial sale of goods legislation which generally implies into contracts certain conditions and warranties of fitness and quality of goods. Where goods are found to be defective or in breach of either express or implied warranties, sellers, distributors and manufacturers may be held liable for breach of contract. The purchaser of the defective goods may choose either to reject the goods and rescind the contract, or to treat the breach as a breach of warranty and sue for damages. Proof of fault is not required for a breach of warranty action; contract law requires only that a warranty was breached and that the breach has resulted in damage. An injured party can generally sue for breach of warranty only where the injured party has a contractual relationship with the party being sued.

The law of negligence provides a remedy for parties who are injured when the conduct of a responsible party (usually the party responsible for manufacturing or bringing a product to market) falls below an accepted standard. To support a claim in negligence, an injured party must generally show that the responsible party owed the claimant a duty of care, that the responsible party's actions with respect to the product breached the applicable standard of care, and that the breach caused the claimant's injury. Negligence does not require a contractual relationship between the injured party and the responsible party, such that liability in negligence can be extended to anyone that came into contact with the defective goods, including manufacturers, designers and distributors.



## 13

Current as of September 14, 2016

## Franchising

Franchising is a method of doing business and facilitating business expansion. It normally involves the grant of a licence to the franchisee permitting the franchisee to use the franchisor's intellectual property and system of carrying on business in exchange for a fee.

The extent of a franchisor's involvement in the ongoing operation of the franchise will vary considerably depending on the nature of the franchise agreement. In a "turnkey" franchise, the franchisor is entirely responsible for construction and set-up of the franchise premises, and exercises continuing supervision over its operation. At the other extreme, in a "distributorship" relationship, the franchisor's role is simply to supply the franchisee with products for resale in return for which it receives royalties.

Franchise agreements must be distinguished from agency and distribution contracts. In an agency relationship, the agent simply effects the sale of a product on behalf of the principal in return for a commission, but does not buy the product. Distributorships are businesses that purchase inventory for resale to other businesses. The line between franchise and distributorship is not always clear and will usually depend on the degree of control exercised over the distributor or franchisee. The distinction between the two becomes particularly important in determining whether a particular relationship falls within the scope of franchise legislation in effect in some provinces.

### 13.1 Structure of the Franchise

A franchise system may be structured by way of unit franchise, area development franchise or master franchise. A unit franchise involves the granting of individual franchise rights directly to a franchisee. Alternatively, it is possible to devolve on an area developer responsibility for marketing the franchise system and identifying potential franchise locations within a specified territory. In a master franchise system, the master franchisee sublicenses franchise rights to unit franchisees. The master franchise agreement will normally preserve for the franchisor a measure of control over the expansion and set an appropriate apportionment of fees between the master franchisee and the franchisor.



### 13.2 Foreign Franchisors

There are several business structures available to a foreign-based franchisor wishing to expand into the Canadian market using the franchise method. The first is to operate the franchise directly from the franchisor's existing foreign-based corporate structure. While such direct franchising has the advantage of minimal startup costs, it exposes the franchisor to liabilities incurred by Canadian operations, and the lack of a local presence may detract from the effectiveness of the franchisor's marketing in Canada. An alternative method is the establishment of a branch office to administer the granting of franchise rights in Canada. However, this approach may attract Canadian income tax liability and does nothing to insulate the franchisor from the operating losses and liabilities of its Canadian branch. Third, a foreignbased franchisor may opt to incorporate a Canadian subsidiary. Such incorporation will serve to immunize the foreign franchisor from Canadian liabilities and operating losses, but the other implications of such a structure, such as tax consequences, should be carefully considered.

### 13.3 Compliance with Federal and Provincial Legislation

Although Canada has no comprehensive federal franchise legislation equivalent to the United States' Federal Trade Commission Franchise Rule (known more formally as "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures"), there are several federal statutes of general application that can affect franchise relationships. Of particular significance are the *Competition Act*, the *Trademarks Act*, the *Investment Canada Act*, and the *Income Tax Act*, which govern, respectively, competition and trade practice matters, the registration and protection of trademarks, and investment and taxation rules to which foreignbased franchisors are subject.

Certain types of provincial legislation of general application, such as liquor licensing, employment standards, commercial tenancy and personal property security acts, may also be applicable.

In addition to these generally applicable laws, the provinces of Alberta, Manitoba, Ontario, Prince Edward Island and New Brunswick have enacted specific legislation regulating franchise relationships, as discussed below. The *Civil Code of Québec* and *Charter of the French Language* also merit the attention of any franchisor considering expansion into the Province of Québec.

#### a) Alberta

The stated purpose of the Alberta *Franchises Act* is to assist prospective franchisees in making informed investment decisions, to promote fair dealing in franchise relationships, and to provide civil remedies for breaches of the legislation. Important features of this statute include: the requirement that franchisors give prospective franchisees a disclosure document

at least 14 days before any payment is made or any agreement is signed relating to the franchise; the imposition of a duty of fair dealing on each party to a franchise agreement; a right of action in the franchisee for any losses arising from misrepresentations contained in the disclosure document; and the right of a franchisee to rescind the franchise agreement in the event that the franchisor has failed to provide the requisite disclosure document.

The term "franchise" is broadly defined in the Alberta *Franchises Act*. Payment of a franchise fee is not an essential component of the definition, provided there is a continuing financial obligation to the franchisor by the franchisee and significant continuing control by the franchisor on the operation of the franchised business. As a result, distribution-type relationships must be carefully examined to determine whether they fall within the scope of the Alberta *Franchises Act*.

It is also noteworthy that the Alberta *Franchises Act* applies to the sale of a franchise only if the franchisee is an Alberta resident or has a permanent establishment in Alberta for the purposes of the Alberta *Corporate Tax Act*. The Alberta *Franchises Act* also mandates Alberta law as the governing law of any franchise agreement.

#### b) Ontario

The Ontario *Arthur Wishart Act (Franchise Disclosure), 2000* is similar to its Alberta counterpart, but differs in several important respects. First, its application is not limited to prospective franchisees that reside in or have a permanent establishment in Ontario, but extends to any franchise to be operated partly or wholly in Ontario. Second, more detail is required in the content of the mandatory disclosure document. That document must include: warnings that prospective franchisees should obtain independent advice and contact current or previous franchisees before entering into the agreement; extensive information on the directors, general partners and officers of the franchisor corporation; and a description of every licence, registration, authorization or other permission that the franchisee will be required to obtain in order to operate the franchise.



### c) Prince Edward Island, New Brunswick and Manitoba

Prince Edward Island's *Franchises Act* came into force on January 1, 2007, New Brunswick's *Franchises Act* came into force on February 1, 2011 and Manitoba's *The Franchises Act* came into force on October 1, 2012. In most respects, the franchise legislation in Prince Edward Island, New Brunswick and Manitoba is similar to Ontario's *Arthur Wishart Act (Franchise Disclosure), 2000*, in that those three statutes impose requirements on a franchisor to provide a disclosure document to a prospective franchisee, provide a right of rescission if a disclosure document is not provided, obligate good faith and fair dealing between a franchisor and a franchisee and protect franchisees' rights to associate. The information that a franchisor must include in a disclosure document with respect to a franchise in Prince Edward Island, New Brunswick or Manitoba is detailed in the Regulations to each province's *Franchises Act* and is very similar, but not identical, to that which must be included in a disclosure document in Ontario.

### d) British Columbia

On October 5, 2015, the Government of British Columbia introduced Bill 38, the *Franchises Act*, for first reading in the legislature. The Bill followed an extensive investigation into the regulation of franchising by the British Columbia Law Institute and months of consultation with various stakeholder groups. The Bill largely adopted the recommendations in the *Uniform Franchises Act*, proposed by the Uniform Law Conference of Canada. The Bill moved very quickly through the legislature, receiving its second reading on October 7, 2015 and its third and final reading on October 20, 2015. It received Royal Assent on November 17, 2015, and will come into force by regulation of the lieutenant governor in council.

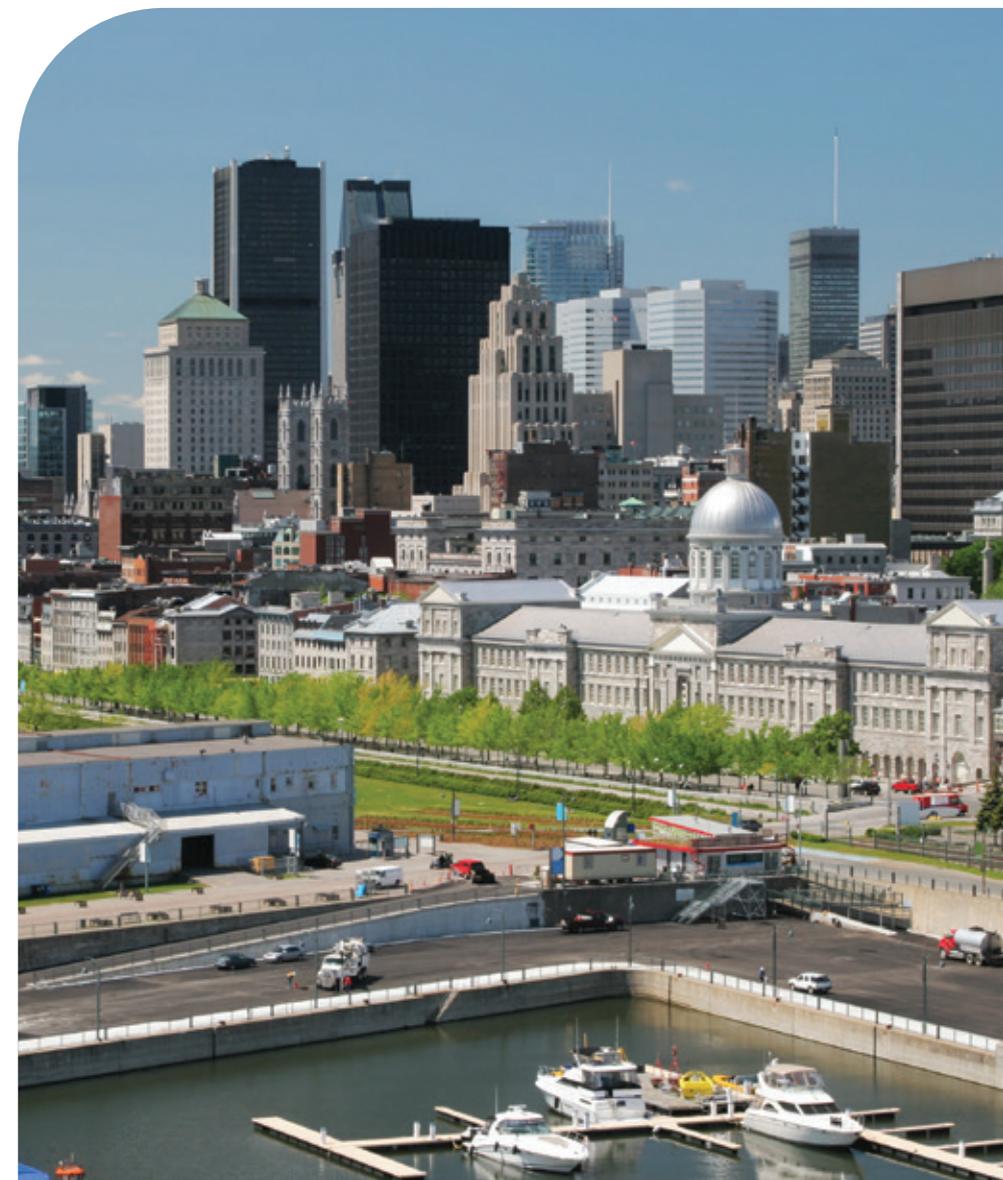
In most respects, British Columbia's *Franchises Act* will be similar to franchise legislation currently in force in Prince Edward Island, New Brunswick, Ontario, Manitoba and Alberta, in that franchisors who grant franchises in British Columbia will have new mandatory disclosure obligations to prospective franchisees, franchisees will have statutory rights of rescission and rights of action against a franchisor if the franchisor fails to provide proper disclosure or makes a material misrepresentation to a prospective franchisee, and both parties will have statutory duties of fair dealing which will govern the performance and enforcement of the franchise agreement.

### e) Québec

Most franchise agreements will qualify as "contracts of adhesion" under the *Civil Code of Québec*, as they are drawn up by or on behalf of one party (the franchisor) and their terms are not negotiable by the other party (the franchisee). Under the *Civil Code of Québec*, a contract of adhesion must be couched in clear and understandable language. It may not refer to provisions in other contracts, unless those provisions are expressly brought to the

franchisee's attention. Any abusive or excessively onerous provisions may be found null and void or may otherwise be reduced in their effect. The contract as a whole will be interpreted in favour of the franchisee.

The *Charter of the French Language* also has application to franchising, as it mandates French as the language of commerce and business in the Province of Québec. The *Charter of the French Language* is discussed further in Chapter 22 (Language Considerations).



## 14

Current as of November 16, 2016

## Strategic Value and Importance of Intellectual Property

The European Patent Office and the EU IP Office recently published a study estimating that over 42 per cent of the EU's total economic activity is generated by intellectual property rights (IPR)-intensive industries and that 38 per cent of all EU employment is from businesses with greater use of intellectual property. The study also found that wages are higher in IPR-intensive industries. In the same year, the U.S. Commerce Department released a report, titled "Intellectual Property and the U.S. Economy: 2016 Update". It found that in the U.S., IPR-intensive industries support at least 45 million jobs and contribute more than 38.2 per cent of the GDP. Intellectual property also features prominently in Canada, a country committed to being a global innovation leader.

As discussed in this chapter, firms in IPR-intensive and other industries create value by securing exclusive rights in the form of patents, trademarks, copyrights, industrial designs, and trade secrets, among other forms of intellectual property, and then commercializing these rights to extract value.

### 14.1 Patents

Technology innovation and inventions are the lifeblood of many companies, and patents help protect the value of these innovations and inventions.

If an inventor or other owner of the invention obtains patent protection, they are granted the statutory right to exclusively make, sell and use the invention.

In exchange for this exclusivity, the inventor must disclose sufficient information about the invention to allow others to make and use the invention after the patent expires. The maximum term of a Canadian patent is 20 years from the date of filing of an application.



An invention is defined as “any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement thereof”. To be patentable in Canada, an invention must be new to satisfy the requirement of “novelty”, useful to satisfy the requirement of “utility” and non-obvious to satisfy the requirement of “inventiveness”.

Like most countries, Canada has adopted a first-to-file rule, so the person entitled to obtain a patent for an invention is the first person to file a patent application for the invention. Canada is also a member country of the Patent Cooperation Treaty (“PCT”). This provides a patent applicant with a cost-effective method to file internationally, including in Canada.

Canada does not require absolute novelty or inventiveness. Accordingly, it is possible to file a Canadian patent application within one year of the first public disclosure of the subject matter of the invention, if that disclosure was made by the applicant (or by someone who obtained knowledge from the applicant).

Subject matter that is patentable in Canada is generally similar to what is patentable in most other patent systems. While there are clear restrictions in Canada on patenting methods of medical treatment and higher life forms, recent jurisprudence has allowed at least some business method patents. For most subject matter, it is usually possible to obtain patent protection with suitable attention to drafting a description and claims that comply with Canadian practice.

## 14.2 Pharmaceutical Patents

Canada has a unique system linking generic drug approval to preliminary clearance of patent hurdles. Certain types of patents can be listed on the Patent Register for a new drug. Any generic company seeking to enter the market must allege that these patents either are not infringed or are invalid. If the innovator chooses to challenge that allegation in Court, the generic company cannot enter the market until the challenge is lost. If the challenge is won, the generic company cannot enter the market until the expiry of the patent. Such challenges are not in rem determinations of patent infringement or validity; and full patent infringement cases can follow. However, these proceedings are often the only way a pharmaceutical company can obtain what amounts to an interlocutory injunction to preserve its market while the patent is pending.

In addition, pharmaceutical companies in Canada are required to report patents pertaining to a medicine to the Patented Medicines Prices Review Board (PMPRB). These patents need only relate to the medicine by the ‘merest slender thread’ to require reporting. Any drug that has patents pertaining to it is subject to price controls set out by the PMPRB.

For more information on this topic, we invite you to download the latest edition of our book, titled “Life Sciences and Chemical Patent Practice in Canada”, available at [blgbooks.com](http://blgbooks.com).

## 14.3 Trademarks

A company’s brand helps set it apart from its competitors. A trademark is a critical part of a company’s brand that helps its customers easily identify its products and services from its competitor’s offerings.

In Canada, a trademark can be a word, a design, a combination of words and designs or other distinctive identifiers (such as shape, colour and sound).

Canada’s trademark legislation is undergoing significant changes to harmonize Canada’s trademark law and process with international treaties, including the Singapore Treaty on the Law of Trademarks and the Nice Agreement, and to prepare for the use of the Madrid Protocol in Canada.

This harmonization will eliminate the requirement in Canada for applicants to declare whether a trademark application is based on use, proposed use or use and registration abroad.

Registration of a trademark provides substantial benefits. Most significantly, registration grants the owner the exclusive right to use the registered trademark for specific goods and services and to enforce the trademark throughout Canada. Registration also provides certain remedies for infringement that are not available to or for unregistered trademarks.

Canada’s *Combating Counterfeit Products Act* is designed to provide ways for trademark owners to address the importation, detention and destruction of counterfeit products. This Act allows for trademarks to be registered with the Canada Border Services Agency and adds significant criminal sanctions against any person who knowingly manufactures, imports, exports, sells or distributes ‘on a commercial scale’ goods, labels and packaging, and advertisements for services, that bear a trademark that is identical to, or that cannot be distinguished in its essential elements from, a registered mark.

All goods and services included in a Canadian trademark application, however, must be set out in ordinary commercial terms. The requirement for further specification of goods and services remains unchanged by the amendments to the *Trademarks Act* mentioned above.

A registered trademark, if renewed, can be kept in force indefinitely.

The entire registration process takes approximately 14 to 18 months, if no objections or oppositions are encountered. Use of a trademark may generally commence prior to completion of the registration process – thorough searches are recommended before such use to be sure the trademark is not already being used by someone else.

In Canada, a trademark owner must control the character or quality of its licensees' goods or services. This legislative requirement applies even when the owner permits one of its subsidiaries to use the owner's trademark. Failure to do so may prejudice the trademark owner's interest in its trademark.

Subject to certain conditions, foreign governments, armed forces, universities and international intergovernmental organizations may request that their national, territorial or civic flags, arms, crests or emblems be recognized as official marks. Official marks can prevent the registration of identical marks or trademarks so nearly resembling an official mark as to be likely to be mistaken for it. Official marks are not open to opposition by third parties during application and continue until voluntarily withdrawn or inactivated pursuant to a court order. Additionally, official marks are not limited to specific goods and services, and do not require periodic renewal.

For more information on trademarks, we invite you to download the latest editions of our books, titled "Trademark Practice in Canada" and "Trademark Opposition and Litigation in BRIC And NAFTA Countries", both available at [blgbooks.com](http://blgbooks.com).

#### 14.4 Copyright

Copyright helps protect original creations. Literary, musical, dramatic and artistic works can all be protected by copyright.

Copyright is "the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof", and includes certain other specific rights.

Copyright applies to qualifying authors of certain types of works. To qualify, the author must be a Canadian, or a citizen or resident of the British Commonwealth or a foreign country that is, like Canada, a member of the Berne Convention. If the author meets these qualifications, the original literary, musical, dramatic or artistic work will be protected by copyright in Canada, if the work is fixed in a physical embodiment such as text, recordings, works of art, and the like. The length of protection for copyright in Canada is generally the life of the author plus 50 years. A shorter term applies for some works.

The categories of literary, musical, dramatic and artistic works are widely defined. For example, artistic works include not only paintings and sculptures, but also maps, charts, plans and architectural works of art. Similarly, literary works include computer programs. To qualify for copyright protection, a work must be original, in the sense that it originated with its author and was not copied from another source.

Copyright does not need to be registered in Canada. If the author qualifies and the work meets the necessary requirements, then that work will be protected by copyright in Canada. Registration provides certain benefits, such as establishing the existence of the copyright, and creating a presumption of ownership that helps an owner enforce the copyright. There are no time limits to register a copyright.



Authors' moral rights are also protected. These rights ensure that the author of the work is properly attributed (or that anonymity is respected) and that the work is not modified in a way that prejudices the author's reputation.

Copyright infringement occurs when a person does anything that only the copyright owner has the right to do (unless the owner consents). Remedies are available if there is copyright infringement. There are also exceptions to infringement, such as fair dealing.

The Copyright Board of Canada oversees the collective administration of copyrights. The Board supervises and manages the administration of copyrights by collective societies. Collective societies are responsible for large collections of works, depending on the rights that they supervise. The Board's primary function is to certify tariffs of royalties that are proposed by collectives.

When a collective society and user cannot agree on royalties or terms of use of certain works, the Board may be asked to fix such royalties and terms of use.

The circumvention of digital locks that copyright holders use to prevent unauthorized dissemination of their protected works is prohibited. There are exceptions to this prohibition, including reverse engineering for the purposes of security testing and related research. There are further exceptions for temporary, technical and incidental copies that are made of copyrighted materials. These exceptions may provide greater certainty to innovation companies in the software and computer industry.

Internet service providers and search engine companies will not be held liable for the infringing activities engaged in by users of their services. Further, a "notice-notice" approach allows a copyright holder to provide notice of an alleged copyright infringement to the service provider, and the service provider will then forward that notice to the alleged infringer.

The provisions of the *Copyright Act* are technology neutral, to ensure that the Act is adaptable to the rapidly evolving world of digital technology. This may provide greater comfort to businesses that deal in cutting-edge technologies.

The *Copyright Act* includes criminal offences, civil remedies and border enforcement mechanisms intended to combat infringement and the import and export of counterfeit goods.

## 14.5 Industrial Designs

Industrial designs protect the original features of shape, configuration, pattern or ornament, and any combination of those features that, in a finished article, appeal to, and are judged solely by, the eye.

Examples include designs for furniture, shoes, smartphones, bottles, vehicles, household utensils, toys and fabrics. Design features that are solely functional, or methods or principles of manufacture or construction generally, do not qualify as industrial designs (but these may be patentable).

To be registered, designs must be original – the author has through the exercise of intellectual activity created a design which had not occurred to anyone before. At a minimum, the design must not be similar to a previously registered design or be describable as common or within general knowledge.

In Canada, an industrial design application cannot be registered if it is filed more than one year after the publication of the design anywhere else in the world.

Once registered, articles using the design must be marked, to put others on notice that a design registration exists. Failure to mark articles properly may prevent recovery from an infringer, and such failure could also invalidate the design registration.

The term of protection can last for 10 years from registration if a maintenance fee is paid.

Once registered, articles embodying the design may be marked, so as to put others on notice of the registration. Failure to properly mark articles may preclude recovery of damages from an infringer.

## 14.6 Trade Secrets

A trade secret is confidential business information that has value. Examples include inventions (unless they are published in a patent application), chemical formulas, compilations of data, research, business processes and techniques and marketing information.

Trade secrets are not registered but must be kept confidential. They can be protected for an unlimited period of time if they can be kept secret. Companies must implement safeguards and processes to ensure that trade secrets are not disclosed or misappropriated.

For trade secrets that are inventions, companies can decide whether they wish to seek patent protection or maintain the secrecy of the trade secret. The decision depends on a number of factors, including the likelihood the invention can be kept secret, the chances that a competitor will independently develop the trade secret and the likelihood of obtaining a patent.

## 14.7 Other Forms of Intellectual Property

Protection is also available in Canada for integrated circuit topographies and plant breeders' rights.

## 14.8 Commercialization

The value of intellectual property can be unlocked through commercialization – using the intellectual property, licensing it to others, selling articles using the intellectual property (or selling the intellectual property itself) – or by enforcing intellectual property rights.

Generally, all types of intellectual property can be licensed in Canada, and no one statute will govern such licensing. Rather, the general common law governing contracts normally applies. Licences for trademarks must comply with the control requirement described in Section 14.4 (Trademarks).

The licensing party can grant a license to one or many licensees, and has many options available to determine the limitations of the license.

There are three primary types of licences: an exclusive licence, a sole licence, and a non-exclusive licence. An exclusive licence means the licensee is the only one that can use the licensed intellectual property (even the licensing party cannot use the intellectual property). A sole licence means only the licensee and the licensing party can use the intellectual property. A non-exclusive licence allows the licensing party to grant as many licences as it wants. Most commercial software licences are granted as non-exclusive licenses.

Although licences can be unlimited, they are often restricted in certain ways by the Licensor, such as with respect to time, geography or use. A licence can be geographically limited, so that the Licensee is permitted to use or market the licensed IP Rights only within a particular territory. A licence can be limited as to time, so that the licence will be in effect only for a specified term (for example, one year, ten years, etc.). A licence can be limited with respect to use, in that licences can restrict the Licensee's use of the licensed IP Rights to only certain specified activities or fields.

The remedies available in the event of a breach of an intellectual property licence are the same remedies available for any breach of contract.

For more information on this topic, we invite you to download the latest edition of our book, titled “Innovation to Commercialization”, from **blgbooks.com**. Additionally, for thorough coverage on the topic, we recommend the book, titled “The Business of Innovation – Intellectual Property Transactions and Strategies in the New Economy”, co-edited by BLG.

## 14.9 Intellectual Property Enforcement

Companies have a variety of methods available to them to enforce their intellectual property rights. These include injunctions.

For more information on this topic, we invite you to download the latest editions of our books, titled “Intellectual Property and Related Commercial Litigation in Canada” (which includes a chapter on the significant differences between Canadian and U.S. litigation) and “Trademark Opposition and Litigation in BRIC And NAFTA Countries”, both available at **blgbooks.com**.

## 14.10 Intellectual Property Strategy

While individual intellectual property assets can have value, this value can be increased by using a comprehensive and integrated program to secure innovation, a company's branding and its creations, as well as to exploit intellectual property that has been protected and to take enforcement steps against infringers, to maintain the value of the intellectual property concerned.

For more information on this topic, we invite you to download the latest edition of our book, *Innovation to Commercialization*, from **blgbooks.com**. Additionally, for thorough coverage on the topic, we recommend the book, “The Business of Innovation – Intellectual Property Transactions *and* Strategies in the New Economy”, co-edited by BLG.



## 15

Current as of October 19, 2016

## E-Commerce

Electronic commerce has created significant opportunities for foreign investors in Canada. However, it also presents a host of legal issues. Included among these issues are:

- the validity of electronic documents;
- the formation and enforceability of electronic contracts;
- the protection of copyrighted works and trademarks;
- the security and cross-border export of information;
- consumer protection, privacy and the sending of commercial electronic messages;
- the admissibility of electronic evidence in court;
- compliance with advertising and competition laws; and
- the application and enforcement of both domestic and foreign tax legislation.

Canada has enacted laws to specifically address some of these issues, while other issues may be dealt with through other generally applicable legislation, private contract and insurance. The following are some general highlights concerning the law relating to formation of electronic contracts and the validity of electronic documents in Canada.

### 15.1 E-Commerce Legislation in Canada

The federal government and most provinces (except Québec) have modelled their e-commerce legislation after the *Model Law on Electronic Commerce* developed by the United Nations Commission on International Trade Law, and the *Uniform Electronic Commerce Act* developed by the Uniform Law Conference of Canada. The legislation defines “electronic” to mean created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any similar means. While the legislation covers a broad range of electronic contracts and documents, it does not apply to certain other documents, such as wills, powers of attorney and documents creating or transferring interests in land. Québec has taken a different approach in its legislation, although it is broadly similar to the legislation adopted in other provinces.

## 15.2 The Validity of Electronic Documents

Existing e-commerce legislation generally provides for the following:

- an electronic record will not be denied legal effect solely because it is in electronic form;
- a record that is in electronic form and is accessible for future reference will satisfy a legal requirement that a record be in writing;
- a legal requirement for an original record is satisfied by providing an electronic record, as long as the record is organized in substantially the same manner and can be accessed and retained by the addressee for future reference;
- an electronic signature satisfies a legal requirement for a person's signature (although some provinces, such as Québec, have stipulated that electronic signatures must satisfy particular standards); and
- the use of electronic records is not mandatory, although consent to use electronic documents may be inferred from past conduct.

Certain legal documents and contracts, such as wills and contracts that transfer interests in land, are generally excluded from e-commerce legislation permitting electronic contracts and accordingly cannot be made electronically.

## 15.3 Contract Formation and Contract Enforceability

E-commerce legislation also regulates the formation and enforceability of contracts made electronically. For example, absent a contrary agreement between the parties, an offer or acceptance, or any other matter that is material to the formation or operation of a contract, may be expressed by means of information or a record in electronic form, or by an activity in electronic form, such as touching or clicking on a web site icon. A contract will not be invalid or unenforceable solely because an electronic record was used to form the contract.

Also, a contract may be formed by electronic agents, provided that certain rules are observed. The legislation defines "electronic agent" to mean a computer program or some other electronic means used to initiate an activity or to respond to electronic information, records or activities, in whole or in part, without review by an individual at the time of the response or activity.

## 15.4 Sending and Receiving Electronic Records

Applicable legislation generally deems an electronic record to be sent when it enters an information system that is outside the sender's control. If the sender and the addressee are in the same information system, the electronic record is deemed to be sent when the addressee can retrieve and process the record.

An electronic record is deemed to be received by an addressee when the record enters the addressee's information system. If the addressee has not designated or does not use an information system for the purpose of receiving electronic records, the legislation deems the addressee to have received the record on becoming aware of the record in the addressee's information system.

Electronic records are deemed to be sent from the originator's place of business and to be received at the recipient's place of business. If there are multiple places of business, the relevant "place of business" is generally the place of business with the closest relationship to the underlying transaction.



## 16

Current as of September 24, 2016

## Privacy

### 16.1 Personal Information Protection Legislation

Depending on the province(s) in which they operate, private sector entities in Canada are subject to either federal or provincial legislation governing the collection, use and disclosure of “personal information”. The purpose of such legislation is to balance individuals’ privacy rights with the entity’s need to obtain and use personal information for reasonable purposes.

The federal *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) applies to an entity if:

1. it is a “federal work, undertaking or business” (i.e., it carries on business in a sector such as navigation and shipping, railways, inter-provincial transport, air transportation, communications, broadcasting and banking), in which case PIPEDA applies to all personal information it collects, uses or discloses, including information about its own employees; or
2. it collects, uses or discloses personal information “in the course of commercial activities” AND the province in which it is operating has not enacted a comprehensive personal information law which has been recognized by the federal government as “substantially similar” (i.e., the province has not “opted out” of the federal legislation); or
3. it transfers personal information, for consideration, out of the province in which it was collected.

To date, Québec, Alberta and British Columbia have enacted personal information legislation which has been recognized as “substantially similar” to PIPEDA. Accordingly PIPEDA does not apply to the collection, use or disclosure of personal information within those provinces, although it continues to apply to inter-provincial or international transactions involving personal information, and to federal works, undertakings and businesses within those provinces. In 2013, Manitoba passed private sector privacy legislation that is not yet in force. It has not yet been determined if the Manitoba legislation will be recognized as “substantially similar” to PIPEDA.

Under all these statutes, “personal information” is broadly defined, generally as “information about an identifiable individual”, with some exclusions (for example, under PIPEDA, it does not include information used to communicate with an individual relating to his or her employment or business, including the individual’s name, title, work, work address, telephone number, work fax address or work electronic address). Importantly, an entity falling within category (2) above is not subject to personal information laws with respect to information about its own employees (because under the Constitution, the federal government lacks jurisdiction to legislate on employment relationships that are governed by provincial law). However the province’s personal information legislation in Québec, Alberta, and British Columbia does apply to employee information.

All provinces other than Prince Edward Island<sup>1</sup> have also enacted legislation specifically governing the collection and disclosure of “personal health information”. Some, but not all, of that legislation has been recognized as “substantially similar” to PIPEDA for limited purposes. While such legislation applies primarily to practitioners and organizations in the health care sector (such as doctors and hospitals), it can also apply to an employer that has personal information about an employee (for example, in connection with a disability or the employee’s return to work after an accident or illness).

PIPEDA and its provincial counterparts generally require compliance with the following principles:

- **Accountability:** An organization is responsible for personal information under its control and must designate an individual or individuals who are accountable for its compliance with the legislation.
- **Identifying Purposes:** The purposes for which personal information is collected must be identified by the organization at or before the time the information is collected.
- **Consent:** The knowledge and consent of the individual are required for the collection, use or disclosure of personal information, except where inappropriate.
- **Limiting Collection:** The collection of personal information must be limited to what is necessary for the purposes identified by the organization.
- **Limiting Use, Disclosure and Retention:** Personal information must not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual, or as required by law. Personal information must be retained only as long as necessary for the fulfillment of those purposes.
- **Accuracy:** Personal information must be as accurate, complete and up-to-date as is necessary for the purposes for which it is to be used.

<sup>1</sup> The *Health Information Act* (P.E.I.) received Royal Assent on May 14, 2014 but has not yet been proclaimed.



- **Safeguards:** Personal information must be protected by security safeguards appropriate to the sensitivity of the information.
- **Openness:** An organization must make readily available to individuals specific information about its policies and practices relating to the management of personal information.
- **Individual Access:** On request, an individual must be informed of the existence, use, and disclosure of his or her personal information and must be given access to that information. An individual must be able to challenge the accuracy and completeness of the information and have it amended as appropriate.
- **Challenging Compliance:** Individuals must be able to address a challenge concerning compliance with the above principles to the designated individual or individuals accountable for the organization's compliance.

Of particular note to those with international parent companies or service providers outside Canada to whom they transfer personal information is the expectation that such facts be disclosed in the Canadian organization's privacy policy, to meet obligations under the openness and safeguarding principles. Further, the individuals whose information is collected must be informed of the transfer to the foreign entities and provided with appropriate contact information for obtaining details on the privacy obligations of those entities. While this has been held to exist as an implicit requirement in privacy legislation across Canada, it is made explicit in Alberta's *Personal Information Protection Act*. Alberta's *Personal Information Protection Act* also differs from the privacy legislation in the rest of Canada, in that it imposes specific breach notification obligations on organizations. While PIPEDA has also been amended to impose mandatory breach notification requirements, those amendments are not yet in force.

## 16.2 Other Privacy Obligations

In addition to PIPEDA and provincial legislation dealing specifically with the collection, use and disclosure of personal information in the private sector, businesses may have additional statutory privacy obligations. For example, several provinces have enacted legislation, such as the British Columbia *Privacy Act*, which makes it an actionable wrong for one person, wilfully and without claim of right, to violate another's privacy. Under the *Privacy Act*, the nature and degree of privacy to which a person is entitled in any situation will depend on what is reasonable in the circumstances, giving due regard to: the lawful interests of others; the nature, incidence, and occasion of the act or conduct; and any relationship between the parties. Recent common law developments in Ontario also give rise to the new tort of intrusion upon seclusion<sup>2</sup>.

Businesses dealing with Canadian governmental bodies should also be aware of the privacy aspects of federal and provincial access to information legislation, such as the provincial *Freedom of Information and Protection of Privacy Acts*, the federal *Access to Information Act* and the federal *Privacy Act*. Subject to certain exceptions, these statutes generally restrict the ability of governmental bodies to disclose personal information to third parties, and in British Columbia, impose obligations on private sector businesses that act as "service providers" to governmental bodies. These statutes also impose significant obligations on governmental bodies that do not exist for private enterprises, which should be considered when disclosing information to them.

Recently, new federal anti-spam legislation came into force that affects the sending of electronic messages in Canada or to recipients in Canada. The legislation, commonly known as CASL, prohibits sending commercial electronic messages (which includes emails and text messages) unless consent has been obtained from the recipient. CASL also requires certain prescribed content and an "unsubscribe" mechanism to be included in the message. There are also provisions dealing with altering transmission data in an electronic message and preventing the installation of computer programs on another person's computer in the course of a commercial activity, without the person's knowledge and consent.

<sup>2</sup> *Jones v. Tsige*, 2012 ONCA 32

## 17

Current as of October 3, 2016

## Real Property Acquisitions in Canada

In Canada, different types of interests in land may be privately held and transferred, including, for all provinces governed by a common law system (i.e., all provinces other than Québec), freehold, leasehold, legal or beneficial interests and for the Province of Québec, ownership, emphyteusis, superficies, etc. To facilitate the transfer of title to privately held land, there are public land registration systems in place.

Since the provinces have jurisdiction over “property and civil rights”, each province and territory has developed its own rules and procedures regarding privately held land registration. For historical reasons, Québec has maintained a civil law system (based on a civil code) that is quite different from the common law system maintained by all other provinces. The provincial governments provide or facilitate electronic and/or physical facilities for the registration, storage and retrieval of documents affecting title to land, but do not play an active role in transfers of land. To effect certain transfers of land, specific documents, some of which are quite technical, must be filed.

In Canada, there are different land registration systems. In Western Canada the “Torrens” system governs (see below). In the Atlantic provinces, historically the deed registration system governed. However, some of the Atlantic provinces have implemented a form of land titles registration system. In Ontario, while there is both a land titles registration system (or land titles system) and deed registration system (or registry system), substantially all of the lands not previously subject to the land titles system have been or are being converted from the registry system to the land titles system. In Québec, the deed registration system governs. So, the dominant Canadian land system is the land titles system.

In the registry system, the system acts as a “depository” for documents affecting title. When land is acquired, one examines all of the documents in the registry system for a certain period (e.g., 40 years in Ontario; 40 years or more in Québec) to determine if others hold an interest in the land being purchased and to confirm “good title” (that is, ownership). In the registry system, the provincial government does not guarantee the validity of any registered document or “good title”. An increasing percentage of purchasers are turning to



title insurance as a means of protecting against certain defects and issues, including fraud and forgery, whether the property is governed by the registry system or land titles system.

The “Torrens” system of land registration, being a form of land titles system, simplifies and expedites land conveyances and provides greater certainty of title. This system provides a generally reliable record of the registrable interests currently affecting the land. Generally, no enforceable interests as against third parties are created in the land until they are registered. However, there are some exceptions, such as statutory liens. Statutory liens are charges usually in favour of governmental entities which arise from the failure of present or past owners to pay amounts owing pursuant to various provincial or federal statutes and may attach to the land and be effective without registration against the title of the land in the applicable land title office. If one suffers a loss due to inaccuracies created by a breakdown of the “Torrens” system, one may be compensated through an assurance fund maintained by the particular province.

Failure to register an interest in land may result in serious consequences under each land registration system. For example, if an interest is not registered, the estate or interest claimed in the land may not be enforced against a third party who, for valuable consideration and without notice of that unregistered estate or interest, obtains an interest in the land. Also, in the registry system, if an interest is not registered, that interest may lose priority when subsequent interests are registered for value without notice before the subject interest is registered. So, it is important to become familiar with the laws of each jurisdiction, to ensure that good title is given and received.

When purchasing land in Canada it is important to consider not only what is being acquired, but also how it is being acquired. A purchaser should consider the various encumbrances that may affect the title to the land because some encumbrances may severely restrict the use that may be made of the land. Searches may be required to ascertain all of the encumbrances on the land and a review of the documents that create the encumbrances may be quite complex. If there is more than one purchaser, they should consider if they want to take title as joint tenants or tenants in common (in the common law system). How purchasers take title will affect each of their subsequent rights to deal with the land.

There are few restrictions on the ownership of land in Canada by non-residents. At the federal level, foreign investment in Canadian real estate, such as in apartment buildings, office complexes and shopping centres, is regulated by the *Investment Canada Act*. For a discussion on that Act, see Chapter 3 (Foreign Investment Regulation). At the provincial level, provinces such as Alberta, Saskatchewan, Manitoba, Prince Edward Island and Québec impose limitations on the ownership by non-residents of certain types and/or amount of land. In addition, all provinces require corporations that have been incorporated in other jurisdictions to be licensed or registered in the province if they carry on business in that

province. The concept of “carrying on business” is a broad one, and in most cases includes holding an interest in real property. Many provinces impose substantive restrictions on foreign corporations.

Taxation issues also arise. A transfer of an interest in land may attract provincial and/or municipal transfer or registration taxes, as well as the federal goods and services tax (“GST”) or, in the case of Québec, a separate tax which is equivalent to the federal GST. In addition, certain provinces levy sales taxes that may apply to the transfer of the interest in land and/or any associated chattels.

Each province (and some municipalities) has the authority to impose transfer or registration taxes, and accordingly the amount of such taxes vary from province to province and sometimes from municipality to municipality. In addition, each province may establish guidelines for specific tax exemptions, which may be available to purchasers. Additional transfer taxes are imposed in some circumstances where the purchaser is a non-resident of Canada. British Columbia has enacted an additional property transfer tax of 15 per cent, applicable to residential properties in the Greater Vancouver Regional District, that is only payable by non-residents.

Every transfer of an interest in land is subject to GST, unless a specific exemption is available. The most common exemptions are those available to purchasers of previously occupied residential property and non-commercial vacant land sold by an individual. GST is currently payable at a rate of 5 per cent. Certain provinces have harmonized their provincial retail sales taxes with the federal GST, which has the effect of raising the rate of the overall tax rate in those provinces. As of October 1, 2016, there are 5 harmonized provinces: New Brunswick, Newfoundland and Labrador, Nova Scotia and Prince Edward Island (all at 15 per cent), and Ontario (13 per cent). The Province of Québec imposes a separate tax at a rate of 9.975 per cent which is similar to the federal GST and applies to transfers of land to which the GST applies.

Manitoba, Saskatchewan and British Columbia impose retail sales taxes which generally do not apply to real property but do apply to most chattels which form part of the acquisition.



18

Current as of October 21, 2016

## Environmental Law

Canadians have a well-developed regulatory regime for environmental protection. The environment is a field where the federal and provincial governments have shared jurisdiction. While the provinces have been most active in this area, the federal and local governments have also enacted environmental legislation. The federal, provincial, territorial and local laws use a regulatory system to control (and in some cases eliminate) the adverse environmental effects resulting from industrial and commercial activities. The environmental laws apply to both new and existing businesses.

### 18.1 Permits

The federal and provincial (and to a lesser degree, territorial) laws require environmental permits to be obtained for many industrial and commercial activities. The permits are designed to restrict and control the discharge of pollutants into the environment. It is an offence under most of these laws to operate contrary to the terms of, or without having first obtained, an environmental permit. The monetary penalties for environmental offences are designed for deterrence and are therefore potentially severe. Several jurisdictions are moving towards “codes of practice”, or other similar regulatory mechanisms, whereby the requirement to obtain a waste discharge permit is replaced by registration and compliance with an industry-specific code of practice or regulation.

### 18.2 Contaminated Sites

Several provinces have enacted contaminated sites legislation and regulations that impose liability on parties connected to a contaminated site, even if those parties did not cause the contamination. Accordingly, anyone proposing to invest in an existing business should investigate whether the business and its assets, such as any real property holdings, are in compliance with the applicable environmental legislation. It is also advisable to have a reputable consultant conduct appropriate studies, in order to determine whether any real estate holdings contain contamination.

### 18.3 Environmental Impact Assessments

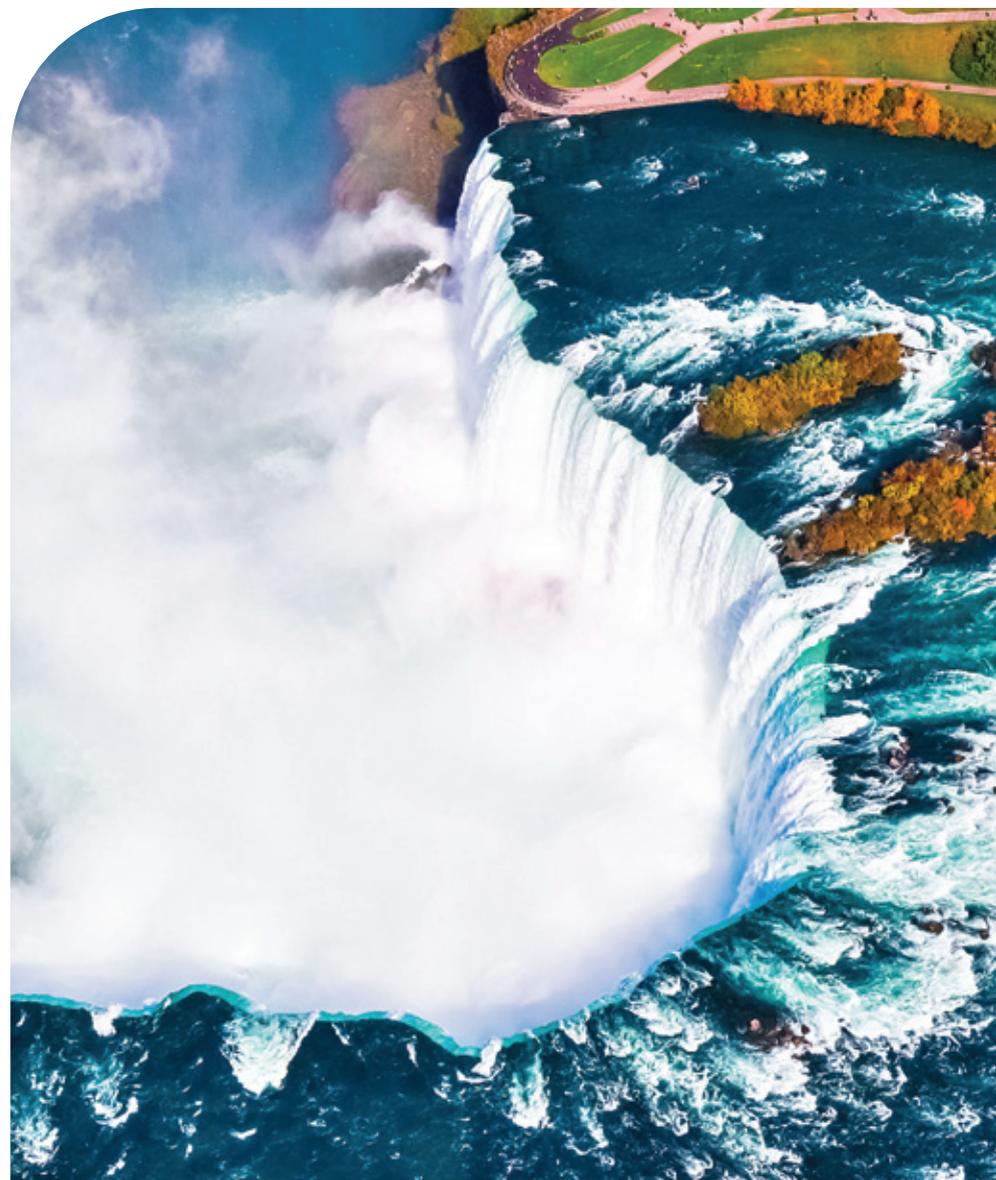
The federal, provincial and territorial laws require environmental assessments of certain types of industrial and commercial projects and activities before they are undertaken. These environmental assessments generally require a study and consideration of the effect of the project or activity on air and water quality, fisheries, wildlife, recreational land use and nearby communities. The impact of the project or activity on First Nations is also a factor taken into consideration, and Aboriginal communities need to be consulted by the project's proponents and the Crown. The outcome of the environmental assessment may result in the regulators imposing conditions to moderate or eliminate the effect of the project or activity on the environment before work on the project or activity may proceed. The project or activity may also be prohibited from proceeding altogether. Investors contemplating a new venture, particularly in the manufacturing, processing or natural resource sectors, should consider carefully the applicable environmental legislation.

### 18.4 Species Protection

Legislation at both the federal and provincial levels has been enacted with the intention of protecting animal and plant species from adverse effects caused by human intervention. The federal *Species At Risk Act* aims to prevent wildlife species from becoming extinct and to secure the necessary actions for their recovery. It applies to all federal lands in Canada, all wildlife species listed as being at risk, and their critical habitat. Another example is the federal *Fisheries Act*, which protects fish and fish habitat that are part of a commercial, recreational or Aboriginal fishery. No person may carry on any work, undertaking or activity that results in serious harm to fish that are a part of these types of fisheries. Provincial legislation may also address species protection in matters within provincial jurisdiction, such as the designation of sensitive streams and riparian setback regulations. Legislation designed to protect species is used both to prohibit certain activities and to provide certain exceptions in the form of permits. When purchasing property or investing in a business with plans to redevelop, it is important to ensure that due diligence is exercised, to identify any relevant species or habitat (for example, streams) that might impede the project.

### 18.5 Transportation of Dangerous Goods

The movement of dangerous goods domestically and across international borders is another major focus of environmental regulation. Both federal and provincial laws prescribe standards of care, as well as the content, form and substance by which the import and export of hazardous wastes and the local movement of hazardous goods are undertaken. Generally, transportation of dangerous goods laws apply to carriers, shippers and transportation intermediaries (including freight forwarders, warehouses and customs brokers), although other businesses may also be subject to regulatory requirements in certain circumstances.



Movement across international boundaries of hazardous waste, as well as hazardous materials to be recycled, requires mandatory notification to the proposed importing country before shipment. Waste may only be imported into Canada if not prohibited by federal and applicable provincial laws.

## 18.6 Climate Change

Climate change is an area which is receiving ever-increasing attention worldwide, including in Canada, which ratified the Kyoto Protocol. Though Canada withdrew from the Protocol effective December 2012, a federal election in October 2015 brought a new government to power, with a renewed interest in re-engaging in international efforts to combat climate change.

After participating in the latest round of international climate change talks held from November 30 to December 11, 2015, Canada signed the resulting Paris Agreement on April 22, 2016. In June 2016, Canada also announced its commitment to the newly formed North American Climate, Clean Energy, and Environment Partnership with the U.S. and Mexico. The Partnership issued an action plan that includes a target to achieve 50 per cent clean power generation by 2025. Then, in October 2016, the federal government introduced a Pan-Canadian Carbon Plan. The Plan announced that Canada would implement a national price on carbon by 2018, becoming the first major hydrocarbon producer in the world to advance a carbon pricing plan. The Canadian pricing plan would set a floor on carbon pricing, beginning in January 2018, for those provinces that do not implement their own regime. The plan would allow provinces either to implement a carbon tax or use a broad market-based mechanism, such as a cap-and-trade scheme.

With the exception of Saskatchewan, all Canadian jurisdictions have introduced climate change policies. In 2016, many provinces introduced or updated their respective schemes. In the spring, the Ontario government implemented a number of climate-related statutes and regulations, including the *Cap and Trade Program* Regulation, brought into force under the *Climate Change Mitigation and Low-carbon Economy Act*. Ontario has taken steps to link to Québec and California's cap-and-trade systems, starting in 2018. Alberta passed its own *Climate Leadership Implementation Act* in June 2016, imposing a carbon levy in that province. And in August 2016, a number of other Canadian jurisdictions announced new policies targeted at reducing emissions. British Columbia released its Climate Leadership Plan, committing to an emissions reduction across a number of sectors. In addition, though not a carbon pricing plan, the four Atlantic provinces of Nova Scotia, New Brunswick, Newfoundland and Labrador, and Prince Edward Island issued a joint statement committing themselves to a transition to clean electricity. Thus, to date, a cap-and-trade system is used in Ontario and Québec, while a carbon levy has been implemented in British Columbia and Alberta, with Manitoba exploring the possibility of introducing its own levy in the near future.

Finally, requirements to report annual greenhouse gas (GHG) emissions above certain thresholds are now in effect, and GHGs have been added to the list of substances specified for regulation under the federal *Canadian Environmental Protection Act* and under several provincial statutes.

## 18.7 Water

Constitutional division of responsibility for water is complex. The provinces have primary responsibility for managing water, which they do through water laws that generally include a requirement to obtain a licence or other form of authorization for surface water and/or groundwater use, as well as the regulation of discharges into water, and the delegation of such regulatory powers to local governments. Drinking water quality is also of primary importance to legislators, particularly given several recent high-profile health incidents related to drinking water, and all provinces have enacted measures to protect drinking water quality and to regulate those constructing and operating drinking water systems. The federal government has jurisdiction over some matters that bear on water management, including fisheries, navigation, international relations, federal lands and aboriginal people. The *Canada Water Act* provides a framework for joint federal-provincial management of Canada's water resources. The *Canada Water Act* provides for cooperative agreements with the provinces to develop and implement plans for the management of water resources. The *International Boundary Waters Treaty Act* and related regulations prohibit the bulk removal of boundary waters from Canadian basins for any purpose, including export. All provinces also have in place legislation, regulations or policies prohibiting the bulk removal of water (defined as the removal and transfer of water out of its basin of origin by man-made diversions, tanker ships or trucks, and pipelines).



# 19

Current as of October 1, 2016

## Taxation

The two important concepts on which Canada's tax laws are based are residency and source. In Canada, income earned by Canadian residents and income earned by non-residents sourced in Canada are subject to Canadian income tax. Under Part I of the federal *Income Tax Act* ("ITA"), Canadian residents are taxed on their world-wide income, whereas non-residents are taxed on Canadian source income which generally includes income that arises from employment in Canada, a business carried on in Canada, or the disposition of "taxable Canadian property". Under Part XIII of the ITA, non-residents may also be subject to Canadian withholding tax on certain types of passive income, including interest, dividends, rents, and royalties.

### 19.1 Residency

An individual's residency for Canadian income tax purposes generally involves a determination as to whether the individual was "ordinarily resident" in Canada or has otherwise established significant residential ties to Canada. The ITA also deems certain persons to be resident in Canada. An individual who is physically present in Canada for a total of 183 days or more in any year is deemed to be a resident of Canada for the entire year.

A corporation is deemed to be a resident of Canada for tax purposes if it was incorporated in Canada at any time after April 26, 1965. In addition, a corporation incorporated in a foreign jurisdiction will be resident in Canada if the directors meet in Canada or if control over the corporation is exercised in Canada. If the foreign jurisdiction is a country with which Canada maintains a tax treaty, further tie-breaker rules may apply if an individual or corporation is found to be resident in more than one country.

## 19.2 Income Tax Rates

Federal taxes on personal income are marginal, increasing with the amount of income. The federal marginal rates for individuals are: 15 per cent on the first C\$45,282 of taxable income; 20.5 per cent on the next C\$45,281; 26 per cent on the next C\$49,825; 29 per cent on the next \$59,612 of taxable income; and 33 per cent of taxable income in excess of C\$200,000. In addition to federal income tax, provincial or territorial tax is also assessed on income. The highest combined marginal income tax rate varies from 44.5 per cent (Territory of Nunavut) to 54 per cent (Nova Scotia).

The federal corporate tax rate is 15 per cent, after applying all scheduled rate reductions. Provincial corporate tax rates on general corporate income vary by province, ranging from 11 per cent (British Columbia) to 16 per cent (Nova Scotia and Prince Edward Island), for a combined corporate tax rate of between 26 per cent and 31 per cent. Preferential rates are available for all or a portion of the active business income earned in Canada by “Canadian-controlled private corporations” and, in some cases, for Canadian manufacturing and processing profits.

## 19.3 Filing and Reporting Requirements

Canadian residents are required to file an annual Canadian income tax return with the Canada Revenue Agency (“CRA”) and to report their world-wide income. As well, information returns are required to be filed by Canadian residents with respect to certain foreign property interests, as well as certain transactions with non-arm’s length non-residents or foreign trusts. Corporations must file a corporate income tax return within six months after the end of their taxation years.

Non-residents liable to tax under the ITA must also file a tax return with the CRA. Non-residents may also be required to make self-assessed payments of estimated tax (including with respect to business income and employment income) under the rules applicable to resident taxpayers, unless generally a waiver has been obtained from the CRA (and Revenu Québec for income to be earned in the Province of Québec) to exempt the remittance of estimated tax payments.

Passive receipts of income, such as dividends, will not, in and of themselves, subject non-residents to filing a Canadian tax return. However, the payer of such amounts must issue information slips that are submitted to the CRA and which may be required to withhold tax on the payments.

A reporting and enforcement system is also provided for under the ITA for dispositions of certain properties (being “taxable Canadian property”) by non-residents of Canada. This system allows the CRA to enforce the taxation of such non-resident dispositions through the possible imposition of penalties on purchasers for any failure to comply with the reporting requirements.

## 19.4 Business Income

The incidence of Canadian tax on a non-resident’s business income is typically dependent on whether the business activity is sufficient to create a taxable presence in Canada. A non-resident will be taxable on income from a business if the non-resident “carried on a business in Canada”. The question of whether or not a business is being carried on in Canada must be determined by reference to both common law doctrines and certain deeming rules. If, however, a non-resident carries on business in Canada and is resident in a country that has a tax treaty with Canada, income earned from the business is subject to tax in Canada only to the extent that the business is carried on through a “permanent establishment” in Canada. If so, the business profits may be taxed in Canada but only to the extent that the profits are attributable to that permanent establishment.

## 19.5 Employment Income

The ITA provides that non-resident individuals, are taxable in Canada if they are employed in Canada and their taxable income is attributable to the duties of the office or employment performed by them in Canada. Whether an individual is employed in Canada is dependent on the location where employment services are physically performed. If a non-resident renders services to a Canadian resident remotely via telephone, the Internet or other means of communication, the services are generally not considered to be rendered in Canada. The employer’s residence is generally irrelevant to the determination of the source of employment income.

Relief from Canadian taxation of employment income may be available in certain circumstances. Under many of Canada’s tax treaties, employment income earned from services performed in Canada by a non-resident of Canada is not taxable in Canada if:

- the individual who is a resident of the treaty country is present in Canada for a period or periods not exceeding 183 days in a calendar year (or any 12-month period); and
- the remuneration is not deductible in computing the income under the ITA of an employer who is a Canadian resident, or in computing the income attributable to a non-resident employer’s permanent establishment or a fixed base in Canada.

## 19.6 Income from the Disposition of Certain Properties

Non-residents are liable to Canadian tax on capital gains derived from the disposition of “taxable Canadian property”. “Taxable Canadian property” is defined to include, among other items, real property and resource property in Canada, assets used in carrying on a business in Canada, and shares in the capital stock of certain corporations. Any disposition of such property must be reported.

Again, relief from taxation may be available under one of Canada’s tax treaties. The general pattern of Canada’s treaties is to restrict Canada’s jurisdiction to tax only those capital gains realized by the non-resident on the “alienation” of immovable (real) property or property forming part of the business property of a permanent establishment or fixed base. In the case of gains arising from the alienation of other types of property, Canada is generally precluded by virtue of its treaties from levying tax.

## 19.7 Withholding Taxes

Interest, rent, royalty, dividends, management or administration fees, and other specified amounts paid or credited by a Canadian resident to a non-resident person are subject to a 25 per cent non-resident withholding tax. Where the non-resident person receiving the payment is resident in a country with which Canada has a tax treaty, the withholding tax rate is usually reduced under the terms of the applicable treaty. Certain types of payments are specifically exempt from this withholding tax, including certain types of royalty payments and non-participating interest payments on arm’s length debt.

## 19.8 Branch Tax

The ITA also imposes a “branch tax” on any non-resident corporation carrying on business in Canada. This tax is meant to be a proxy for Canadian non-resident withholding tax on dividends paid by a Canadian subsidiary to its non-resident parent corporation. In the absence of the branch tax, a Canadian branch would be a tax-preferred alternative to a Canadian subsidiary, because income earned through the subsidiary would be subject to both tax on business income and tax on dividends distributed to the non-resident shareholder. In contrast, income earned through the branch would be subject only to business income tax. As a result, a 25 per cent branch tax is levied on the non-resident’s Canadian source business profits, subject to certain adjustments.

Where the rate on dividends paid to a non-resident is reduced by treaty, the branch tax rate is typically correspondingly reduced. A treaty may also provide additional relief from branch tax. For example, the Canada-US treaty provides that the first C\$500,000 of after-tax profits is exempt from branch tax.

## 19.9 Canadian Taxation of Non-Resident Trusts

As discussed earlier, a taxpayer’s residency will govern the extent of Canada’s jurisdiction to tax. Accordingly, as with non-resident individuals, a non-resident trust is not taxable in Canada unless it derives Canadian-source income. However, a non-resident trust can become subject to Canadian tax on its world-wide income, if it is deemed to be resident in Canada in certain circumstances.

## 19.10 Capital Tax

The federal government and some provinces levy corporate capital tax on financial institutions at rates that vary.

## 19.11 Commodity and Sales Taxation

The federal government and most provincial governments also impose various taxes on the sale of goods and services and, in some cases, on the transfer of real property. These taxes include excise, sales, fuel and land transfer taxes.

## 19.12 Value-Added Taxes

Canada imposes a multi-staged goods and services tax (“GST”) under the *Excise Tax Act* on the consumption of goods and services in Canada. Some of Canada’s provinces have chosen to harmonize their retail sales taxes with the federal GST. While GST is collected by all registered businesses at each stage in the production or marketing of goods and services, the burden of the tax is borne by the ultimate consumer. Under this system, businesses collect tax on their sales and claim a credit, referred to as an input tax credit, for any tax paid on their purchases. While most sales of goods and services are subject to GST, some goods and services are exempt or zero-rated (taxable but at a rate of zero per cent). GST is currently payable at a rate of 5 per cent. Certain provinces have harmonized their provincial retail sales taxes with the federal GST, which has the effect of raising the rate of the overall tax rate in those provinces. There are 5 harmonized provinces that impose a combined “Harmonized Sales Tax” or “HST”: New Brunswick and



Ontario (all at 13 per cent), Nova Scotia, Newfoundland and Labrador, and Prince Edward Island (all at 15 per cent). The Province of Québec imposes a separate tax, being the “Quebec Sales Tax”, or “QST”, which is similar to the federal GST, at a combined rate of 14.975 per cent.

GST also applies to imports of goods and is usually paid by the importer of record. The GST is payable on the duty-paid value of goods, meaning the value for customs purposes, plus applicable customs duty, additional duty, countervailing duty or anti-dumping duty and excise tax. If the importer of record is registered for GST purposes and will resell the goods or otherwise use them in taxable activities, the importer will be able to recover the GST paid by way of input tax credit. On importation of commercial goods, only the federal portion of the GST will apply, at a rate of 5 per cent.

### 19.13 Provincial Retail Sales Tax

The provinces of Saskatchewan, Manitoba and British Columbia, impose retail sales taxes. These taxes are levied directly on the purchaser, consumer or lessee of taxable goods and services. They are generally levied on the sale or lease price of the goods or services being taxed. The rates of tax vary among the provinces and range from 5 per cent (Saskatchewan), 7 per cent (British Columbia) and 8 per cent (Manitoba). In most cases, where these retail sales taxes are imposed, the GST also applies at a rate of 5 per cent. Both retail sales taxes and GST are calculated on the sale or lease price before consideration of these taxes.

Businesses providing goods or taxable services in a province that levies a separate sales tax must obtain a provincial vendor’s licence. The licensed vendor acts as an agent of the province in collecting the tax imposed on the purchaser or consumer. Generally, an exemption is provided for sales between licensed vendors, as long as the goods are acquired for resale and not for personal consumption or use.

### 19.14 Other Provincial Taxes

Most provinces impose a tax on forestry and mineral operations and a royalty on petroleum and natural gas production. Additional taxes and levies are imposed on other commodities, such as alcoholic beverages, tobacco products, fuel and other specific items at either or both the federal or provincial levels. Certain provinces and municipalities also impose taxes on transfers of real property.



## 20

Current as of September 29, 2016

## Insolvency and Restructuring

Bankruptcy and insolvency are matters of federal jurisdiction and are principally governed by the federal *Bankruptcy and Insolvency Act* (“BIA”) and the *Companies’ Creditors Arrangement Act* (“CCAA”). The BIA, among other things, provides for the liquidation of the assets of an insolvent person and the fair and orderly distribution of the proceeds among the bankrupt’s creditors. It also allows for the reorganization of financial affairs to satisfy creditors without a bankruptcy. The CCAA provides a framework for the reorganization of insolvent corporate debtors with debts exceeding C\$5,000,000 by allowing the insolvent corporation to negotiate arrangements to the satisfaction of its creditors. Provincial receivership laws complement federal bankruptcy legislation, but federal laws retain paramountcy with respect to issues of bankruptcy and insolvency.

The most common forms of insolvency proceedings are: (a) BIA liquidation (bankruptcy); (b) BIA reorganization; (c) CCAA reorganization; and (d) private or court-supervised receivership.

### 20.1 BIA Liquidation (Bankruptcy)

A sole proprietor, a partner or a corporation can become bankrupt either voluntarily or involuntarily in one of three ways:

- An insolvent person, who resides, carries on business, or owns property, in Canada, is indebted to creditors for at least C\$1,000, and is insolvent on a balance sheet test or has ceased to meet liabilities as they fall due, may make a voluntary assignment into bankruptcy.
- An insolvent person may attempt a reorganization by filing a proposal under the BIA. If the proposal is rejected by the person’s creditors, the person is deemed to have assigned itself into bankruptcy, and once bankrupt, all unsecured creditors of the bankrupt are stayed from taking or continuing any proceedings against the bankrupt or its assets.

- A debtor, who resides or carries on a business in Canada and is indebted to creditors for at least C\$1,000 and has committed an act of bankruptcy, may be subject to an involuntary petition into bankruptcy by a creditor, which, if successful, results in bankruptcy.

On bankruptcy by any of these methods, all of the property of the bankrupt vests in a trustee in bankruptcy who is charged with the administration of the bankrupt's estate. (However, secured creditors are not affected by the stay and can realize on their claims against property of the bankrupt, in accordance with their ordinary rights.) After secured creditors have enforced their security, the trustee in bankruptcy liquidates the bankrupt's remaining assets and pays a *pro rata* dividend to the unsecured creditors after payment of priority or preferred claims under the BIA.

## 20.2 BIA Reorganization

Reorganization under the BIA takes place in the form of a proposal. A proposal is a contract between the debtor and the creditors to allow for a restructuring of debts so that the claims of creditors can be satisfied without the debtor proceeding to a liquidation of assets through bankruptcy. Proposals can be made by an insolvent person, a bankrupt, a trustee of a bankrupt's estate, a liquidator of an insolvent person's estate, or a receiver of an insolvent person. Once the debtor files a Notice of Intention to Make a Proposal, or after the proposal is filed, a stay of proceedings prevents both secured and unsecured creditors from commencing or continuing proceedings against the insolvent person. A proposal trustee monitors the reorganization, but the insolvent person remains in possession and control of its business and assets. The BIA does not set out specific criteria for the proposal, but a successful proposal requires approval by a majority in number and by a two-thirds majority in dollar value of claims that are voted for each class of creditors, as well as court approval for fairness. If a class of secured creditors does not vote in favour of the proposal, then it is not binding on that class of secured creditors. However, if a class of unsecured creditors or the court rejects the proposal, then the debtor is deemed to have made an assignment into bankruptcy.

## 20.3 Reorganization under the *Companies' Creditors Arrangement Act*

The CCAA is the preferred statute in Canada for restructuring large corporations. The CCAA allows corporations in financial difficulty to negotiate arrangements with creditors that allow the corporation to avoid bankruptcy and to continue carrying on its business as a going concern. To qualify for relief under the CCAA, the debtor must be an insolvent corporation with aggregate debts of not less than C\$5,000,000. The debtor begins proceedings by making an application to the court for an order granting a stay of proceedings against the debtor. The debtor continues in possession of its assets throughout the restructuring period, subject to any restrictions that the court may impose with respect to use of funds or specific

assets. The plan of compromise or arrangement must be approved by a majority of the creditors in each class of creditors and by a two-thirds majority in dollar value of claims for each class of creditors. The court must also approve the plan of compromise or arrangement. The CCAA has relatively few procedural requirements. Accordingly, the court is given a great deal of discretion in a CCAA proceeding.

## 20.4 Receivership

Receivership is the most common method used by secured creditors for realizing on assets (for example, equipment, inventory, commercial real estate) over which they have been granted a security interest by a debtor. Receivership involves the appointment of a receiver (either a private appointment or a court appointment) to take possession of the debtor's assets and arrange for their sale. On sale of the debtor's assets, the funds are dispersed first to the receiver (for administrative fees), next to secured creditors in accordance with their priorities, and the balance to unsecured creditors.



## 21

Current as of September 15, 2016

## Litigation, Arbitration and Mediation

### 21.1 The Canadian Court System

The Canadian court system consists of three divisions:

- The Federal Court, which has jurisdiction over subject matter that generally has limited relevance in the commercial context. This includes admiralty, air transport, copyright and aboriginal law.
- Provincial Superior Courts, which are administered by the provincial governments but with judges appointed by the federal government. Commercial disputes generally are handled by these courts.
- Provincial Courts, which have jurisdiction over child welfare, small claims, and criminal matters of a minor nature. Provincial Court judges are appointed by the provincial governments.

Each province has a Court of Appeal to which final decisions of the Superior Courts can be appealed as of right. The Supreme Court of Canada is the highest court in Canada and the court of last resort for both federal and provincial court systems. Appeal to the Supreme Court of Canada is generally only permitted with leave of that court.

### 21.2 Civil Procedure

Civil procedure rules governing litigation in Canada allow for the exchange of pleadings, followed by an exchange of documents relevant to the dispute. Examinations for discovery (depositions) are permitted of single representatives of the parties only, except with leave of the court. Many cases in major urban areas are case-managed by judges or court officials who attempt to ensure that cases move forward in an orderly fashion to trial. Juries are used much less often in civil litigation in Canada than in the United States.



The Ontario Superior Court of Justice maintains a “commercial list” with jurisdiction over a range of commercial issues such as bankruptcy, creditors’ rights, shareholder disputes, corporate arrangements etc.. The list is well-regarded for its efficiency and the expertise of its judges.

### 21.3 Class Proceedings

Class actions are permitted, and are growing in popularity, across Canada. Class proceedings follow their own rules of procedure and are case-managed by a judge. The plaintiffs or defendants, as the case may be, must be certified as a “class” before the action can proceed to discovery and trial.

### 21.4 Damages

Generally, damages awarded for tort claims are less than in the United States. Punitive, aggravated and exemplary damages are permitted, and occasionally awarded, in the civil tort area and, rarely, for breach of contract, although typically for much smaller amounts than in the United States.

### 21.5 Mediation

In some parts of Canada, parties are required to mediate cases prior to trial. Parties are, however, free to choose their own mediators. Apart from court mandated mediation, parties routinely take cases to voluntary mediation. Trained and experienced mediators, respected lawyers and retired judges all serve as mediators.

### 21.6 Arbitration

#### a) Domestic

All provinces have domestic arbitration legislation. However, there are significant differences between the provinces, particularly in the availability of an appeal from an arbitral award to the courts, and the extent to which parties can contract out of the legislation. The domestic arbitration regime in Québec is governed by specific provisions in the *Civil Code of Québec*.

Canadian Courts generally defer to arbitral tribunals where arbitration has been selected by the parties. The popularity of arbitrations in the commercial context has been gaining steadily over recent years. Some consumer protection legislation prohibits arbitration in consumer contracts.

#### b) International Arbitrations

In 1986, Canada implemented the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. All provinces have implemented the UNCITRAL Model Law on International Commercial Arbitration, as has the federal government.



22

Current as of September 22, 2016

## Language Considerations

English and French are the two most widely spoken languages in Canada, with Francophones primarily in Québec and Anglophones primarily in the rest of Canada. French and English are also Canada's two official languages. Official bilingualism at the federal level in Canada dates back to the *British North America Act of 1867* (now known as the *Constitution Act, 1867*), which permitted the use of either French or English in Parliamentary debates, as well as in any proceedings before federal courts. Official bilingualism was significantly improved in 1969 with the passage of the *Official Languages Act* and was further reinforced at a constitutional level when Canada's Constitution was repatriated in 1982. Both languages now have equal status, rights and privileges with respect to the operation of, and services provided by, federal institutions. In areas of Canada designated as bilingual, citizens can obtain federal government services in either official language.

The *Official Languages Act* generally does not impose obligations on businesses operating in Canada. Language requirements that do apply to businesses are found in other federal legislation and in some provincial legislation. At the federal level, for example, the *Consumer Packaging and Labelling Act* requires that certain information set out on the labels of consumer prepackaged products be provided in both French and English.

Certain additional requirements must be taken into account when doing business in Québec.

Québec's *Charter of the French Language* (the "Charter") proclaims French as the official language of Québec. Every inscription on a product sold on the Québec market (including imported goods) must be drafted in French, subject to a limited number of exceptions. The same holds true for inscriptions on the product's container or wrapping and on documents supplied with it (e.g., directions for use and warranty certificates) as well as product catalogues and other similar publications. To the extent that another language is also used, it must not be given greater prominence than the French.

The above rule also applies to the website of businesses with one or more establishments in Québec that offer their products and/or services for sale in Québec; such a website must be available in French and the version of the website in another language must not be given greater prominence than the French version. Public signs and commercial advertising must also be in French or in both French and another language provided that French is markedly predominant. In addition, standard form contracts, contracts predetermined by one party and related documents must be in French unless the parties' express intent is to use another language. Businesses operating in Québec must also have a name in French. The use of non-French trademarks is permissible in Québec only where certain requirements have been met.

As well as establishing French as the language of commerce and business, the Charter has an impact on employment matters. Workers in Québec have a right under the Charter to carry on their activities in French. Employers are required to draw up written communications to staff and offers of employment or promotion in French (in addition to any other language used), and are prohibited from dismissing, laying off, demoting or transferring employees for the sole reason that they speak exclusively French or have insufficient knowledge of another language. Proficiency in a language other than French cannot be a condition of obtaining employment unless the nature of the duties related to the position requires such knowledge.

Any enterprise in Québec that employs 50 persons or more for a period of six months must register with the Office québécois de la langue française (the "Office"), which is the government agency responsible for enforcing the Charter. If, after analyzing the enterprise's linguistic situation, the Office considers that the use of French is generalized at all levels of the business, the Office will issue a "francization" certificate to the enterprise. Otherwise, the enterprise must adopt a francization program, the aim of which is to ultimately generalize the use of French throughout the enterprise. An enterprise that employs 100 persons or more is also required to form a "francization" committee that monitors the language situation in the enterprise and reports to management of the enterprise.

The Charter imposes fines for a first offence ranging from C\$600 to C\$6,000 for individuals and from C\$1,500 to C\$20,000 for corporations. Fines are doubled for a subsequent offence. A judge may also impose on the offender a further fine equal to the financial gain realized or derived from the offence, even if the maximum fine set out above has also been imposed. Moreover, a judge may order the removal or destruction of a poster, sign, advertisement or bill-board that does not comply with the Charter.





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