

DOING BUSINESS IN CANADA

DAVIES

Doing Business in Canada

9th Edition

ABOUT THIS GUIDE

Davies' updated *Doing Business in Canada* is designed to provide executives, counsel and potential foreign investors with a practical overview of Canada's legal, political and economic framework. It outlines important considerations and implications of doing business in Canada, particularly in the provinces of Ontario and Québec.

The contents of this Guide are intended as general information and not as legal advice or opinion. We invite you to contact any Davies lawyer to discuss your legal matters (go to our website at dwpv.com or contact one of our offices).

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01

Introduction

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Introduction



➔ Political and Constitutional Structure

Canada is a parliamentary democracy and constitutional monarchy, with a political system originally modelled on that of the United Kingdom. Although Queen Elizabeth II is Canada's official head of state, the governments of Canada are democratically elected. Because Canada is a federal state, legislative and executive jurisdiction is constitutionally divided between the federal government and the 10 provincial governments. Each government is separately elected; federal and provincial governments are often from different political parties.

The federal government has exclusive jurisdiction over some matters; others are reserved for the provincial governments. In other areas, however, both levels of government may regulate different aspects of a particular activity. In addition, provincial governments delegate certain powers to local governments. A business may therefore be regulated at three levels: federal, provincial and municipal.

The federal Parliament has, for the most part, constitutional jurisdiction over issues concerning Canada as a whole, such as international trade, trade between provinces, national defence, citizenship and immigration, criminal law, currency, intellectual property, ports, aeronautics and broadcasting.

The federal Parliament is also responsible for the Yukon, Nunavut and the Northwest Territories, which have been given some authority to govern themselves on local matters through elected territorial councils. In certain regions, as a result of treaties or agreements, Canada's Aboriginal peoples exercise limited self-government.

The 10 Canadian provinces have authority to make laws concerning matters such as property, contracts, natural resources, land use and planning, the administration of justice, education, health care and municipalities. Most general commercial law of concern to businesses is provincial law. However, there is considerable consistency between most of such provincial laws across Canada.

In practice, Canadian federal and provincial governments often cooperate, by cost-sharing programs and delegation of authority, to create consistent national approaches for matters that are under provincial legislative jurisdiction. For example, there are national standards and federal funding for health care. Although provinces have constitutional authority to impose income taxes, all provinces, except Québec, delegate the collection of income taxes to the federal government, thus making income tax rules and procedures relatively uniform throughout Canada.

“ Most general commercial law of concern to businesses is provincial law...there is considerable consistency between most of such provincial laws across Canada”

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Introduction

Canada's constitution includes the *Canadian Charter of Rights and Freedoms*, which guarantees certain rights of individuals. Provincial and territorial governments also have legislation protecting individual rights and freedoms.

→ Legal Structure

All the provinces of Canada, except Québec, are common law jurisdictions, which derive their legal systems from the British common law. Québec is a mixed common law/civil law jurisdiction in which private law matters, such as contracts and property, are governed by a Civil Code. Although Québec civil law is historically derived from France, today it is strongly influenced by Canada's North American location and orientation.

Canada tends to look to the United States rather than Europe for its regulatory models. For example, Canadian securities laws evolve in response to developments in the United States.

Canada's courts of general jurisdiction are provincially administered, but the Supreme Court of Canada acts as a court of final appeal for all of Canada. Although Canada also has a federal court system, its jurisdiction is very limited compared with federal courts in the United States. The Canadian federal court system deals primarily with matters arising under Canadian federal statutes and claims against the federal government. Although all judges of provincial superior courts in Canada, and Federal Court and Supreme Court judges, are appointed by the federal government, the independence of the judiciary is well established, and courts are not subjected to political interference or influence. Each province also has lower courts presided over by provincially appointed judges who hear cases of less importance.

→ Economic System

Canada is an affluent, high-tech industrial society with a market-oriented economic system and high living standards. Since World War II, the impressive growth of the manufacturing, mining and service sectors has transformed the nation's economy from largely rural to primarily industrial and urban. Given its natural resources, skilled labour force, stable political and economic systems and modern capital infrastructure, Canada enjoys solid economic prospects.

The 1989 U.S.-Canada Free Trade Agreement ("FTA") and the 1994 North American Free Trade Agreement ("NAFTA") (which includes Mexico) touched off a dramatic increase in trade and economic integration with the United States. Canada has free trade agreements with other countries as well, such as Panama, Jordan, Colombia, Peru, Costa Rica, Chile and Israel and the European Free Trade

“ Given its natural resources, skilled labour force, stable political and economic systems and modern capital infrastructure, Canada enjoys solid economic prospects”

Association, which includes Iceland, Norway, Switzerland and Liechtenstein. Canada has also entered into many other international agreements to promote and protect foreign investment and economic cooperation.

The exchange rate of the Canadian dollar is allowed to float in relation to other currencies. Canada's central bank, the Bank of Canada, sets key interest rates, in practice, independently of the federal government.

Canada offers many advantages as a place to do business:

- In a comparison of the relative costs of doing business in various countries, "Canada ranks second among the 10 countries, with business costs 7.2 percent lower than in the United States." In the digital services subsector, Canada has "a cost advantage of 17.8 percent relative to the US baseline". In all sectors examined, Canada is one of the countries with the lowest effective tax rates. (*KPMG's Competitive Alternatives 2014*)
- Canada ranks second among the 189 countries studied for the lowest number of procedures, costs and time required to establish a new business. (*Doing Business 2014 – The World Bank Group*)
- Canada's overall economic competitiveness is ranked seventh in the world and second in the G-7. (*The International Institute of Management Development's World Competitiveness Yearbook 2014*)
- Canada ranks fourteenth in the world in the global competitiveness index. (*The World Economic Forum's Global Competitiveness Report 2013-2014*)

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Types of Business Organizations

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Types of Business Organizations



→ Corporations

GENERAL

A corporation is the most frequently used form of business organization in Canada. A corporation has a legal personality distinct from its shareholders and management. A corporation's existence is potentially perpetual, since it is not affected by the departure or death of any or all of its shareholders or managers.

As a separate legal entity, a corporation has rights, powers and obligations similar to those of individuals. It can hold property and carry on a business and can incur legal and contractual obligations.

Shareholders are the owners of a corporation, but they usually do not manage its business or enter into transactions on its behalf. By statute, they are protected from liability for obligations of the corporation. Generally, the authority to manage the corporation rests with the directors, who are elected by the shareholders. However, if the shareholders prefer to retain direct control of the corporation, they can enter into a unanimous shareholder agreement. Such an agreement can effectively transfer responsibility (and liability) for the management of the corporation from the directors to the shareholders.

A corporation may be either public or private. Shares of public corporations are traded on stock exchanges and other public markets. Public corporations are subject to extensive regulation in order to protect investors: see the Corporate Governance and Financing a Business Operation sections of this Guide. By contrast, the transfer of shares in a private corporation is restricted and usually requires the consent of a majority of the directors or shareholders. Private corporations are not subject to most aspects of securities regulation.

The main advantages of the corporation as a business entity are the limited liability of the shareholders, the possibility of perpetual existence and the flexibility of the corporate form for financing and estate planning purposes. The disadvantages include the costs associated with the incorporation, operation, annual maintenance and dissolution of the corporation. Since a corporation is a separate taxpayer, shareholders cannot access directly any tax losses it may generate, and it may be more difficult to use as a tax-efficient vehicle than an unincorporated entity like a partnership.

FEDERAL OR PROVINCIAL INCORPORATION

A business corporation can be incorporated either federally, under the *Canada Business Corporations Act* (the "CBCA"), or in any of the provinces. Each of Ontario and Québec has a *Business Corporations Act* (the "OBCA" and "QBCA", respectively).

“ As a separate legal entity, a corporation has rights, powers and obligations similar to those of individuals”

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Types of Business Organizations

The CBCA, OBCA and QBCA prescribe essentially the same requirements, with some exceptions, the most significant of which are discussed below. Under all of these statutes, incorporations can be effected quickly and at a reasonable cost.

A federal corporation has the right to carry on business under its corporate name in any province of Canada (although it must use a French form of its name in Québec). In contrast, a corporation incorporated under provincial law cannot do so as of right in another province. Hence, an OBCA or QBCA corporation cannot be licensed or registered under its name in another province if a confusingly similar name is already being used there by another corporation. If this is a concern, incorporation under the CBCA may be advantageous, although as a practical matter, a CBCA corporation may need to operate under a different name in any province where its corporate name would be confusing. However, it may be easier to obtain a desired corporate name by incorporating provincially. Under the OBCA and QBCA (unlike the CBCA), proposed corporate names are not subject to pre-clearance for possible confusion with existing names. Incorporators can decide for themselves whether there is any risk of other parties objecting to the names they wish to use.

Both federally and provincially incorporated corporations must satisfy the registration requirements of every province in which they intend to carry on business. In most provinces, corporations must file corporate returns annually to keep their registrations up-to-date.

Generally, only public corporations, whether federally or provincially incorporated, must file financial statements on the public record. The directors and officers of all corporations must be disclosed on the public record, but not the shareholders (except in Québec, where the three largest voting shareholders must be disclosed). In Québec, if all of the powers of the directors have been withdrawn pursuant to a unanimous shareholders' agreement, the names and domiciles of the shareholders or third persons having assumed such powers must be declared on the annual corporate return.

The CBCA and OBCA require at least 25% of the directors to be Canadian residents, unless a corporation has less than four directors, in which case it needs to have at least one Canadian resident. The QBCA does not require that any directors be Canadian residents. All of the CBCA, OBCA and QBCA require, however, that a public corporation have at least three directors, and that a certain number of such directors be independent. Additional corporate governance requirements are imposed by securities regulators on public corporations; see the Corporate Governance section of this Guide. The CBCA, OBCA and QBCA also allow directors and shareholders to participate and to vote at meetings by electronic means.

There are a few other important differences between the CBCA and the OBCA on the one hand, and the QBCA, on the other. The QBCA authorizes the creation of

shares with or without par value and provides for the issuance of shares which are not fully paid up, whereas the CBCA and OBCA prohibit par value shares and the issuance of shares which are not fully paid up. The QBCA has a special regime for sole shareholder corporations, and the sole shareholder may choose not to establish a board of directors and not to comply with some requirements of the QBCA relating to by-laws and meetings of shareholders and directors. The QBCA also allows certificates issued by the Registrar to have, in addition to the date, the time of the issuance of the certificates, which may be useful for some transactions.

The corporate statutes of most other provinces in Canada are generally similar to the CBCA, the OBCA and the QBCA. However, there are differences in detail that may provide additional flexibility to certain investors. For example, British Columbia permits a corporation to hold its own shares, whether directly or through a subsidiary (which is restricted under the CBCA, OBCA and QBCA).

OFFICERS AND DIRECTORS

The daily operations of a corporation are normally carried out by its officers. Officers can be non-residents of Canada, provided they have complied with Canada's immigration laws (see the Temporary Entry and Permanent Residence section of this Guide).

Directors and officers must act honestly and in good faith with a view to the best interests of the corporation. They must also exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Directors and officers may incur personal liability if they cause the corporation to contravene applicable laws. Directors also may be liable under statutes such as the *Employment Standards Act, 2000*, in Ontario, *An Act respecting labour standards in Québec* and the federal *Income Tax Act* for employees' unpaid wages and amounts that should have been remitted to taxation authorities, if the corporation becomes bankrupt.

A corporation may indemnify its directors and officers for personal liability they may incur when acting in such capacities, or purchase insurance for their benefit to cover such liability. However, indemnification will generally cover only those acts which were performed by the directors and officers in good faith. The CBCA, OBCA and QBCA permit broader insurance coverage to be maintained, even in respect of acts contrary to directors' and officers' fiduciary duties, although such insurance may not in practice be obtainable at reasonable cost.

SUBSIDIARY OR BRANCH?

A foreign corporation may carry on business in Canada either through a branch or by setting up a new corporation as a Canadian subsidiary. Tax considerations

“ A foreign corporation may carry on business in Canada either through a branch or by setting up a new corporation as a Canadian subsidiary”

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Types of Business Organizations

will be important in making this choice, but the non-tax considerations discussed below may also be relevant.

Most provinces in Canada do not provide for hybrid forms of corporate entity with certain partnership-like characteristics. In particular, no Canadian jurisdiction provides for limited liability companies (“LLCs”). However, Nova Scotia, Alberta and British Columbia permit the formation of unlimited liability companies (“ULCs”), the shareholders of which do not have limited liability, but which are otherwise similar to ordinary corporations. Although a ULC is treated as a corporation for Canadian tax purposes, it is eligible for flow-through treatment for U.S. tax purposes. Therefore, ULCs are sometimes used in cross-border transactions. However, as a result of the amended Canada-U.S. tax treaty, it may require careful planning for U.S. residents to obtain beneficial tax treatment through the use of a ULC: see the Tax Considerations section of this Guide.

There are important differences between Nova Scotia, Alberta and British Columbia ULCs. In particular, the shareholders of an Alberta ULC are liable for any liability, act or default of the ULC, whereas in Nova Scotia and British Columbia, the shareholders of a ULC have no direct liability to creditors, and their liability arises only when the ULC is wound up and there are insufficient assets to satisfy its obligations.

Subsidiary

If the incorporation of a subsidiary is chosen, the cost of incorporating the corporation and the ongoing expenses of maintaining it must be taken into account. If it is incorporated under the OBCA or CBCA, it must be considered whether appropriate individuals who are resident Canadians are available to serve as directors. Certain corporate records generally must be maintained in Canada. Since the subsidiary is a separate legal entity from its parent, the parent will not generally be liable for obligations incurred by the subsidiary (unless the subsidiary is a ULC).

Branch

An unincorporated branch may be chosen as an alternative to a subsidiary. The foreign corporation must register in all provinces in which it wishes to carry on business. The corporation cannot register if the name of the foreign corporation is the same as or similar to one already in use in that province. In addition, in Québec the foreign corporation must register a French name. Business names used by a branch should also be registered and should not be the same as or similar to names used in the province. A foreign corporation which establishes a branch in Ontario must obtain a licence under the *Extra-Provincial Corporations*

Act (or, in the case of an LLC, register its name under the *Business Names Act*), although this is generally a routine requirement.

→ Partnerships

Partnership is the relationship between persons carrying on business in common with a view to profit. Partners may be individuals, corporations or other partnerships. In Canada, a partnership is not regarded as a separate legal entity from its partners.

There are two principal types of partnership. In a general partnership, all of the partners can participate in management of the business, but are exposed to unlimited liability for partnership obligations. In a limited partnership, limited partners' liability is limited to their investment in the partnership, but they must remain passive investors and not participate in control of the partnership business. Ontario and Québec also permit professionals to practise through a special type of general partnership known as a limited liability partnership, which provides individual partners with a degree of protection against unlimited liability for the negligent acts of other partners.

In Ontario, the governing statutes are the *Partnerships Act* and the *Limited Partnerships Act*, which define the rights and obligations of the partners between themselves and in relation to third parties. Partnership law also includes non-statutory common law and equitable principles.

In Québec, partnerships are governed by the *Civil Code of Québec* and *An Act respecting the legal publicity of enterprises*, which similarly sets out the rights and obligations of partners between themselves and towards third persons, as well as conditions for the creation, operation and dissolution of a partnership.

The provisions of these statutes that address the rights and obligations of partners between themselves can generally be altered by agreement between the partners. Because the relationships between the partners can be determined by agreement, great flexibility is possible in providing for such matters as capital contributions or other financing of the partnership, participation in profits and management structure.

Income and losses of a partnership, although computed at the partnership level, are taxed in the hands of the partners. This tax treatment is the primary reason for using a partnership rather than a corporation, since each partner may offset its eligible share of the partnership's business tax losses against income from other sources.

“ In Canada, a partnership is not regarded as a separate legal entity from its partners”

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Types of Business Organizations

“ A limited partnership combines the advantages of limited liability and the ability to flow tax losses through to passive investors (subject to certain restrictions under tax legislation)”

GENERAL PARTNERSHIPS

The main characteristic of a general partnership is the unlimited liability of each partner for the liabilities and obligations incurred by the partnership to third parties. Each partner may bind the others unless there are restrictions in the partnership agreement of which third parties have notice. However, a partner is generally not liable for obligations incurred before it became or after it ceased to be a partner.

The main disadvantages of a general partnership are the unlimited liability of the partners and the ability of each partner to incur partnership obligations that will bind the other partners.

In Ontario, all the partners of a general partnership must register the name of the partnership under the *Business Names Act*, unless the business is carried on under the names of the partners. In Québec, a general partnership must file a declaration of registration under *An Act respecting the legal publicity of enterprises*. This declaration must include a French name for the purpose of carrying on business in Québec. In both Ontario and Québec, these registrations require that the partnership business and the names and addresses of the partners be disclosed. In Québec, the general partnership must file an annual declaration every year to maintain its registration in good standing.

LIMITED PARTNERSHIPS

A limited partnership combines the advantages of limited liability and the ability to flow tax losses through to passive investors (subject to certain restrictions under tax legislation). This form of business structure is often used for private equity funds, public financings and real estate syndications. A limited partnership is made up of one or more general partners, each of whom has the same rights and obligations as a partner in a general partnership, and one or more limited partners, whose powers and liabilities are limited.

The general partner or partners manage the partnership. A limited partner may not take part in the management of the partnership without jeopardizing the partner's limited liability.

The primary advantage of a limited partnership over a general partnership is the limited liability of the limited partners. This enables passive investors to receive tax benefits without risking their personal assets beyond their investment in the partnership.

To establish a limited partnership in Ontario, a declaration signed by the general partners must be filed under the *Limited Partnerships Act*. The declaration must be renewed every five years, and when the partnership wishes to cease operations a declaration of dissolution must be filed. The names and capital

contributions of the limited partners do not have to be disclosed on the public record, although this information must be disclosed on request.

In Québec, a limited partnership must file a declaration of registration under *An Act respecting the legal publicity of enterprises*. This declaration must include, among other information, the name and domicile of each of the general partners and the names and domiciles of the three limited partners who provided the largest contributions. Every year, the limited partnership will have to file an annual declaration to maintain its registration in good standing.

UNDECLARED PARTNERSHIPS

In Ontario, although a limited partnership cannot be formed except by the filing of a declaration under the *Limited Partnerships Act*, a general partnership may exist without any registration or filing on the public record. (If it uses a firm name or business name other than the name of the partners, that name must be registered under the *Business Names Act*, but the failure to do so would not affect the existence of the partnership). If the relationship satisfies the legal criteria for a general partnership, its members will be liable as general partners for obligations relating to the partnership business and will be bound by any such obligations incurred by any of the partners, even to third parties who are not aware of the existence or identity of the other partners. This reflects the common law principle that an undisclosed principal will be liable in the same manner as a disclosed principal for obligations incurred by its agent.

In Québec, a general or limited partnership which does not file a declaration under *An Act respecting the legal publicity of enterprises* is an undeclared partnership. An undeclared partnership may arise from a written or oral agreement or from acts indicating an intent to form an undeclared partnership. In the absence of an agreement, the relations of partners to each other in an undeclared partnership are treated by the provisions of the *Civil Code of Québec* in the same manner as those of general partners.

If a partner of a Québec undeclared partnership contracts in his or her own name with a third party who is unaware of the existence of the undeclared partnership, only that partner incurs liability to the third party (unlike a general partner, who can bind the other partners). If a third party is aware that a partner of an undeclared partnership is acting in a partnership capacity in dealing with the third party, however, the other partners of the undeclared partnership will also be liable to the third party.

→ Joint Ventures

A joint venture is an agreement entered into by two or more parties to pool capital and skills for the purpose of carrying out a specific undertaking. It may or may not involve co-ownership by the venturers of the project assets. Because it is essentially a contractual relationship not specifically regulated by statute, the venturers are free to agree on whatever terms they choose. Since a joint venture is not a recognized entity for tax purposes, income and losses for tax purposes are computed separately by each joint venturer rather than at the joint venture level.

A joint venture may be difficult to distinguish from a partnership and the parties' characterization of their relationship may not be conclusive. The most important legal distinction is that sharing of profits is essential to a partnership, whereas joint venturers generally contribute to expenses and divide revenues of the project, but do not calculate profit at the joint venture level. Equal participation in management of the business is characteristic of a general partnership, but less usual in a joint venture, where one party often operates the project, or management is contracted out.

Joint venturers who do not want their joint venture to be treated as a partnership should enter into a written agreement setting out their respective rights and obligations in detail and exercise care in dealing with third parties. In Québec, joint venturers should also file the proper declaration under *An Act respecting the legal publicity of enterprises* to avoid being characterized as a general partnership, in which case each partner would be fully liable for partnership obligations and subject to tax as a partner, rather than as a joint venturer.

→ Trusts

Although it has always been possible to use a trust as a form of business organization, only comparatively recently has the income trust become a common form of public offering in Canada. The primary reason for employing a trust rather than a corporate structure is to realize greater tax efficiencies for investors than would be possible by distributing corporate earnings to shareholders by way of dividends. In most cases, the trust is not itself the operating business entity. However, tax changes have reduced the tax advantages of a trust structure and some income trusts have been converted to corporations: see the Tax Considerations section of this Guide.

In Ontario, a trust is primarily governed by the provisions of the declaration establishing the trust and non-statutory principles of equity, although trusts are

“ The primary reason for employing a trust rather than a corporate structure is to realize greater tax efficiencies for investors than would be possible by distributing corporate earnings to shareholders by way of dividends ”

also subject in certain respects to statutes such as the *Trustee Act*. In Québec, trusts are governed by the *Civil Code of Québec* and *An Act respecting the legal publicity of enterprises*. A commercial trust such as a business trust, investment trust or real estate investment trust must now register with the Québec Registraire des entreprises unless the trustee of the trust is already registered.

A trust is not a separate legal entity. In law, its assets are held by the trustees, who are also liable for obligations incurred in carrying on its activities (although the trustees are entitled to be indemnified out of the trust assets for such liabilities). Unlike shareholders of a corporation, investors in a trust have not had the benefit of statutory limited liability. There has therefore been some concern that in certain circumstances it might be possible for investors to be exposed to liabilities arising from the operations of the trust. Ontario has passed legislation clarifying that investors in a publicly traded trust (that is formed under Ontario law and that files its public disclosure documents under Ontario securities laws) will not incur such liabilities as beneficiaries of the trust.

Sole Proprietorships

A business owned by one person is called a sole proprietorship. This is the simplest form of business organization. The individual is responsible for all the obligations of the business. Accordingly, his or her personal assets are at risk if these obligations are not met.

There is no legislation dealing specifically with sole proprietorships; however, a sole proprietor may need to comply with federal, provincial and municipal regulations affecting trade and commerce, licensing and registration. For example, in Ontario, a sole proprietor who carries on business or identifies his or her business to the public under a name other than his or her own name must register the name under the *Business Names Act*. In Québec, every person who uses a name or designation other than his or her own complete name must register a declaration under *An Act respecting the legal publicity of enterprises*.

A sole proprietorship may be suitable for a small enterprise because it avoids many of the costs of setting up and running a corporation and the complex regulatory scheme that governs corporations. Non-capital start-up losses of the business are generally deductible against the sole proprietor's income from other sources. The disadvantages of a sole proprietorship are the unlimited liability of the owner and that the business can be transferred only by selling the assets.

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Types of Business Organizations

→ Contractual Arrangements

FRANCHISING

A franchise is an agreement whereby one party, the franchisor, gives another, the franchisee, the right to make use of a trade-mark or trade name within a certain territory.

Franchising involves an ongoing relationship between the parties. The franchisor generally retains some degree of control over the manner in which the franchisee carries on its business, but neither party is the agent of the other. In Québec, franchises are governed only by the general law of contracts.

Ontario has legislation regulating franchises, which defines “franchise” broadly and may apply to some distribution agreements that might not generally be thought of as franchises. As well as imposing disclosure obligations on franchisors, the Ontario legislation imposes a statutory duty of fair dealing in the performance and enforcement of a franchise agreement and precludes a franchise agreement from contracting out of the application of the legislation, or providing for disputes to be litigated or arbitrated in another jurisdiction. Some other Canadian provinces have similar legislation.

LICENSING

Licensing is a contractual relation between two parties whereby a licensor grants a licensee the right to use a copyright, industrial design, patent, trade-mark, trade name or know-how. The relationship is governed primarily by the general law of contracts, although the federal statutory regime regulating the relevant form of intellectual property may impact to some degree.

“ In deciding on the most appropriate form of business organization, the specific needs of the enterprise must be assessed”

→ Conclusion

In deciding on the most appropriate form of business organization, the specific needs of the enterprise must be assessed. Factors which require particular consideration include: the complexity of the organization, the nature of the business, transferability of interests, participation in management, extent of liability, financing aspects and tax implications (both in Canada and in the home jurisdiction of a non-resident investor).

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Corporate Governance

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Corporate Governance



Corporate governance standards for public companies in Canada are set out in the corporate statutes and in securities laws and regulations. In recent years, many of the changes in governance standards in Canada have been the result of pressure from institutional investors and investor advocacy groups.

→ Financial Statements and Audit Committees

Canadian law requires public companies to provide investors with annual audited financial statements and with quarterly financial statements (which may, but need not, be audited). Financial statements must be accompanied by a management discussion and analysis and are supported by certificates signed by the CEO and the CFO. For the most part, all of these requirements mirror the U.S. requirements.

Canadian law requires public companies to have audit committees that meet standards that are very similar to the U.S. requirements. Internal controls over financial reporting are an important part of public company reporting in Canada, but Canadian securities regulators have not adopted the most onerous requirements of SOX 404. In particular, no management report or audit opinion is required. Instead, the CEO/CFO certification has been enhanced to provide comfort about internal controls.

→ Other Annual Disclosure Requirements

Public companies (other than venture issuers) must file publicly an annual information form, which provides extensive disclosure about the company and its business.

Investors in Canadian public companies are entitled to vote at shareholder meetings in person or by proxy. In order to allow investors to form reasoned decisions about the way in which they will cast their votes, management must send to investors an information circular that includes detailed disclosure about the matters that will come before the meeting, including specific disclosure about director and executive compensation.

Most investors hold their interests indirectly, through the book-based system. Securities regulation and industry practice seek to put all investors in the same position with respect to the receipt of the information circular and their ability to direct the way the shares in which they have invested will be voted. Where an

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“ National Policy 58-201 (the ‘Governance Policy’) sets out 18 best practices drawn from existing Canadian standards and U.S. regulatory standards”

issue to be put before shareholders is likely to be controversial, those concerned with the outcome of the vote (whether management or a shareholder opposed to the management recommendation) are well advised to retain professional advisors.

➔ **Comply or Disclose**

Many areas of governance that are regulated in other jurisdictions fall within the Canadian “comply or disclose” regime. For example, the composition and charter of the compensation committee and of the nominating and governance committee are not mandated, but rather are the subject of best practice guidelines and disclosure requirements. The OSC has also proposed enhancements to the comply or disclose regime to promote increased gender diversity among the leadership of public companies which, if implemented, would require TSX-listed issuers and other non-venture reporting issuers in Ontario to disclose annually, among other things, the extent to which women are represented on boards and in executive officer positions.

National Policy 58-201 (the “Governance Policy”) sets out 18 best practices drawn from existing Canadian standards and U.S. regulatory standards (including securities laws and the listing standards of the NYSE and NASDAQ). Issuers are not required to comply with the standards set out in the Governance Policy, but are required to disclose information about their governance practices as set out in the associated disclosure rule, National Instrument 58-101.

The Governance Policy recommends best practices in the following areas:

- **Board Independence** – A majority of the board should be “independent”. Generally speaking, independence means the absence of any direct or indirect material relationship between the director and the issuer, that is, a relationship which could, in the view of the issuer’s board, reasonably interfere with a member’s independent judgment. Certain relationships are deemed to be material for this purpose. The Governance Policy recommends regular *in camera* meetings for the independent directors and the separation of the positions of chair (who should be an independent director) and CEO. If these positions are not separated, an independent lead director should be appointed with appropriate responsibilities.
- **Role of the Board Generally** – The board should have a written mandate that includes certain specified responsibilities. These responsibilities relate to organizational integrity, strategic planning, risk identification and management, succession planning, communications, internal controls, management information systems and corporate governance.

- Position Descriptions – The board should develop clear position descriptions for the chair of the board and the chair of each board committee. The board, together with the CEO, should develop a clear position description for the CEO.
- Role of the Board in the Issuer's Integrity – The board should play an oversight role with respect to the ethical framework of the organization. The board should satisfy itself as to the integrity of the CEO and other senior officers and that the CEO and other senior officers create a culture of integrity throughout the organization. A code of business conduct and ethics (and any amendments to the code) should be approved by the board and any material departure from the code by a director or senior officer may need to be publicly disclosed.
- Board Effectiveness – There should be a comprehensive orientation program for new directors and ongoing education for all directors, as well as regular board, committee and director assessments.
- Nominating Directors – The board should be responsible for nominating candidates for election by the shareholders. Before doing so, it should consider what competencies and skills the board requires as well as the competencies and skills the board as a whole currently possesses. It should consider the recommendations of a nominating committee composed entirely of independent directors. In making its recommendations, the nominating committee should also consider the competencies and skills required and those currently in place, as well as those which any new nominee would bring to the board. The nominating committee should have a written charter which includes certain specified provisions.
- Executive Compensation – The board should establish a compensation committee composed entirely of independent directors with a written charter and certain specified responsibilities. The compensation committee should be responsible for reviewing executive compensation disclosure before it is publicly disclosed and for making recommendations to the board with respect to CEO compensation (based on established corporate goals and objectives), non-CEO compensation, incentive-based compensation plans and equity-based compensation plans.

➔ Recent Trends and Developments

Many of the most significant changes in Canadian corporate governance standards have come about as a result of investor pressure, as well as increased scrutiny of issuers' practices by shareholder advisory firms, like Institutional Shareholder Services ("ISS"), and corporate governance watchdogs. For

“ Many of the most significant changes in Canadian corporate governance standards have come as a result of investor pressure”

example, it would now be very unusual for a large Canadian company to issue stock options to their directors, largely as a result of the view taken by institutional investors that this practice aligns the interests of directors with the interests of management, not with the interests of shareholders. Practices can be much different for smaller companies. These companies often do not have the cash to compensate directors and so stock options continue to be a common form of director compensation.

The separation of the positions of CEO and chair is also very common in Canada, and increasingly advocated by different stakeholders. Director term limits and mandatory retirement policies also continue to attract the attention of Canadian regulators, proxy advisory firms and shareholder advocacy groups, like the Canadian Coalition for Good Governance (“CCGG”), that are focused on maximizing board accountability.

Canadian public companies, other than issuers that are majority controlled, are now required by the TSX rules to adopt majority voting, which allows investors to vote for individual directors rather than for a slate and provides for a mechanism whereby directors must resign if a majority of votes are withheld from them. A board is required to accept such resignations, other than in exceptional circumstances (which must be publicly disclosed).

While “say-on-pay” votes are not mandatory in Canada, advisory say-on-pay votes on executive compensation have become the norm in Canada and were put to the shareholders of 80% of TSX 60 issuers in 2013, as compared to just over 50% in 2011. Most Canadian issuers that have adopted say-on-pay practices are putting forward advisory, non-binding resolutions substantially in the form recommended by CCGG.

The CCGG, which represents most of Canada’s largest institutional investors (and many smaller institutions), is putting increasing emphasis on board engagement. Each year its members meet with 40 to 50 issuers and their boards to gain a better understanding of their disclosure and of governance issues that are particularly important to CCGG’s members.

In addition to the specific issues mentioned above, corporate governance generally continues to be a hot topic in Canada with significant implications for the leadership of Canadian issuers. For example, the OSC and the Canadian Securities Administrators (the “CSA”) have pledged to address perceived flaws in the proxy voting system noted in Davies’ 2010 paper *The Quality of the Shareholder Vote in Canada*, available on the firm website at dwpv.com. These proxy voting issues and any potential solutions identified likely will continue to foster debate and discussion in 2014.

The CSA has also undertaken a consultation process concerning the possible regulation of proxy advisory firms such as ISS and Glass Lewis. Similar processes

are underway in the United States and Europe. In 2014, the CSA proposed a policy-based approach, providing guidance on recommended practices and disclosure for proxy advisory firms to promote transparency in the services and to foster understanding among market participants about proxy advisory activities. Canadian regulators will likely continue to scrutinize the influence of proxy advisory firms to determine the best means of addressing the perceived influence they have on investors exercising voting rights, while balancing the divergent views expressed by issuers and investors over whether and how to do so.

Shareholder activism in Canada continues to rise. Shareholders have become more receptive to activist proposals due to a shift from “corporate raider” agendas to more sophisticated ideas for improving shareholder value, including a focus on corporate strategy, governance and board independence and effectiveness. Shareholder activism has also emerged as a significant “asset class” with investors buying into the potential returns of activist agendas. This growth in shareholder engagement has led many issuers to adopt strategic tools like advance notice by-laws and enhanced quorum requirements, which themselves are subject to ongoing debate, in an effort to exert more control over activist investors.

For more information about these and other issues relating to corporate governance, please refer to Davies’ *Governance Insights* report available on the firm website at dwpv.com.

04

Financing a Business Operation

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Financing a Business Operation



Corporations may raise capital in several ways, the most common of which are equity and debt financings.

Debt financing may be provided to the corporation by the shareholders, in addition to capital provided by purchasing shares, by third parties, such as banks and other financial institutions, or by offering debt securities in the capital markets. Canadian chartered banks, Canadian subsidiaries or branches of foreign banks and other financial institutions, such as merchant banks and life insurance companies, are all active in providing financing to private and public corporations in Canada. As in most jurisdictions, third-party lenders may require that the corporation's shareholders maintain a certain level of equity investment. Lenders may also require personal guarantees from the shareholders of small private corporations.

There are two principal forms of debt financing available from third-party lenders: operating financing and term financing. Operating financing, as the name suggests, usually finances the ongoing operations of the business, and term financing is usually made available for capital investment or acquisitions. Both operating and term financing generally bear interest at a fluctuating rate linked to market rates of interest. Term financing may require scheduled repayments over a defined period of time.

Lenders providing debt financing, whether on an operating basis or on a term loan basis, may require security for their loans. The security will often consist of a charge covering all assets of the borrower, including inventory, accounts receivable, capital assets, such as machinery and equipment and, in some instances, real estate. The exact nature of the security taken in each instance will depend upon the financial situation and bargaining power of the borrower and the nature of the assets available to secure the debt.

Secured Financing

Property is categorized in two ways in Canadian law: real or immovable property (land, buildings and property which is permanently attached to land) and personal or movable property (generally anything not attached to land, including vehicles, equipment, shares, inventory, accounts receivable and other intangibles).

Security may be taken in real or immovable property in Québec through a hypothec or in any other province through a mortgage or charge. In each case, the secured party must register its security against the property in question in order to protect its security interest and ensure its priority as against third parties.

“ Ontario’s *Personal Property Security Act* is modelled on Article 9 of the U.S. *Uniform Commercial Code*. All other Canadian common law provinces have similar, but not identical, legislation”

Where security is taken on personal or movable property, unless the borrower’s operations are localized in one province, the lender may have to effect registrations in a number of jurisdictions across (or even outside) Canada in order to protect its security interest, since personal property security is primarily (although not exclusively) under provincial jurisdiction.

Ontario’s *Personal Property Security Act* is modelled on Article 9 of the U.S. *Uniform Commercial Code*. All other Canadian common law provinces have similar, but not identical, legislation. With some exceptions, the Act applies to every transaction which in substance creates a security interest, including a lease that secures payment or performance of an obligation, and any lease of goods with a term of more than one year. To perfect its security interest, a secured party must either take control of the property secured or register a financing statement at a searchable computerized registry depending on the type of collateral. Further registrations are required in certain circumstances, such as a debtor name change or a transfer of collateral and to effect a renewal.

The *Civil Code of Québec* generally provides for a single form of consensual security: the hypothec. A hypothec is a charge on movable (personal) or immovable (real) property (which may include future property) which is granted to guarantee the performance of any obligation (present or future) and subsists so long as such obligation continues to exist. Security interests created by hypothecs are set up against third parties by publication in registries established for that purpose or by the secured party taking delivery or control of the property secured. Further publications are required in certain circumstances, such as a debtor name change, and Québec has rules relating to the timing of registration and to the execution and form of security that can differ from those applicable in the other Canadian provinces.

The federal government has authority to legislate over personal property security in limited areas such as shipping, railways and certain security taken by Canadian banks. Although the federal intellectual property statutory schemes do not deal comprehensively with the taking of security interests, security agreements can generally be filed against intellectual property with the Canadian Intellectual Property Office (“CIPO”). If a debtor’s intellectual property is of significant value, a lender will generally register security against it both provincially and federally.

Securities Law

REGULATORY FRAMEWORK

In Canada, securities regulation is within provincial jurisdiction, and each province and territory has securities regulatory legislation which is, broadly speaking, comparable to that of the United States. The Supreme Court of Canada confirmed in 2011 that the day-to-day regulation of securities is under provincial jurisdiction, and struck down the Canadian federal government's proposed federal securities legislation as unconstitutional. However, the federal government and the provinces of Ontario and British Columbia have agreed to establish a cooperative capital markets regulatory system and have invited all other provinces and territories to participate.

The securities laws, regulations and rules and the policies of the securities commissions across Canada are generally similar to each other in most respects. The prospectus requirements, the exemptions from these requirements and continuous disclosure obligations of reporting issuers (that is, public companies) are substantially harmonized across Canadian jurisdictions and further harmonization initiatives are ongoing. However, the lack of complete consistency in securities regulation across the Canadian jurisdictions can complicate securities offerings that are made in more than one jurisdiction, particularly where discretionary exemptive relief is required or novel issues are encountered.

A "security" is broadly defined in Ontario securities legislation as, among other things, any document evidencing title to or an interest in the capital, assets, profits or property of a person or company. A number of different types of agreements and instruments involving monetary consideration are specifically included in the definition of "security", including, among other things, notes, stocks, bonds, debentures, certificates of interest, transferable shares and options or any option, subscription or other interest in or to a security. Depending on the circumstances, both equity and debt financing instruments may come within the definition of "security" and may therefore be subject to applicable provincial securities legislation. In addition, the Ontario securities regulator takes the position that cash-settled derivatives that permit an investor to obtain economic exposure to an underlying asset without acquiring ownership of the underlying asset are securities subject to the application of Ontario securities legislation.

“ A ‘security’ is broadly defined in Ontario securities legislation as, among other things, any document evidencing title to or an interest in the capital, assets, profits or property of a person or company”

“ A distribution of securities includes, among other things, a trade by an issuer in previously unissued securities and a trade in securities from a person who is a ‘control person’ in respect of the issuer”

Generally, in each Canadian jurisdiction, a distribution of securities must be qualified by a prospectus that is cleared by the relevant provincial or territorial securities regulatory authority, unless an exemption from this requirement is available. A distribution of securities includes, among other things, a trade by an issuer in previously unissued securities and a trade in securities from a person who is a “control person” in respect of the issuer. A person is presumed to be a “control person” in respect of an issuer if that person holds more than 20% of the voting rights attached to the securities of the issuer. In addition, certain trades in securities that were previously acquired under an exemption from the prospectus requirements are deemed to be distributions, but securities of a reporting issuer that were acquired under such an exemption are generally freely tradable after a four-month hold period.

The most useful exemptions from the prospectus requirements for a foreign entity financing a business in Canada are the following:

- The *accredited investor exemption* permits certain qualified investors, including institutional investors and persons or companies that meet income or asset tests, to acquire securities on a prospectus-exempt basis; and
- The *substantial purchase exemption* permits a person to acquire securities on a prospectus-exempt basis where each purchaser invests no less than \$150,000.

These two prospectus exemptions do not require purchasers to be provided with a disclosure document. However, where a disclosure document is “voluntarily” provided to purchasers, a purchaser will generally have a right of action against the issuer or selling security holder for rescission or damages if the disclosure document contains a misrepresentation. There may also be a right of action against the directors of the issuer or selling security holder or the dealer, if any, through which the sale was made. If a disclosure document is provided to a purchaser in connection with a trade under these two prospectus exemptions, a copy of the disclosure document generally must be filed with, and fees paid to, the securities regulator.

Canadian securities legislation requires continuous disclosure of any material changes in the affairs of reporting issuers and also includes provisions relating to insider trading and takeover bids.

Several key steps have been taken to grant foreign issuers easier access to the Canadian financial markets. In 1991, a cooperative effort between Canadian provincial securities regulators and the U.S. Securities and Exchange Commission (“SEC”) resulted in a system known as the Multijurisdictional Disclosure System or “MJDS”. Under the northbound MJDS, securities may be offered by a U.S. issuer in Canada primarily in accordance with SEC rules. Rights offerings, takeover and issuer bids, business combinations, offerings of debt and

preferred shares that have received an approved rating, and offerings of equity and other securities by certain large issuers are included within the MJDS.

Some Canadian issuers can similarly access U.S. capital markets via the southbound MJDS rules. Under the southbound MJDS, securities may be offered by a Canadian issuer in the United States using a prospectus prepared in accordance with Canadian securities rules with certain additional disclosure. A Canadian “foreign private issuer” (other than an “investment company” under U.S. legislation) may use the southbound MJDS if it has been subject to the continuous disclosure requirements of any provincial securities regulator for 12 calendar months, and the aggregate market value of the equity shares of the issuer is at least US\$75 million.

The primary benefit for a Canadian issuer of using southbound MJDS is that the review is conducted by Canadian securities regulators, not the SEC (though the SEC reserves the right to review where it has reason to believe that there is a problem with the filing or the offering). In addition, the applicable regulatory review periods are those prescribed by Canadian securities laws, which tend to be considerably shorter than those under U.S. securities laws.

Stock Exchange Listing

The principal stock exchanges in Canada are the Toronto Stock Exchange (the “TSX”) and the TSX Venture Exchange (the “TSXV”). The TSX lists securities of larger, more established companies, whereas the TSXV serves the venture capital market. While each exchange offers alternative methods for listing, the most common type of new listing is in connection with an initial public offering for which a prospectus has been filed with Canadian securities regulators.

A company seeking to list on either exchange must submit a listing application together with a number of supporting documents. The company must provide data to demonstrate that it is able to meet the financial, public float and other listing requirements of the exchange. Once listed, a company must continue to comply with the exchange’s ongoing requirements. These include obtaining the approval of the exchange prior to effecting certain share issuances or other changes in the company’s capital structure (which may also require shareholder approval). The exchanges also impose corporate governance and disclosure standards which are in addition to those mandated by applicable corporate and securities laws.

05

Mergers & Acquisitions

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Mergers & Acquisitions



Canada has a well-established corporate and securities law framework for the acquisition of Canadian public companies. Acquisitions of public companies in Canada usually take the form of a takeover bid, which is an offer to purchase shares made by the acquiror directly to shareholders of the target company, or a plan of arrangement or amalgamation, which are statutory procedures subject to approval by the shareholders of the target company at a shareholders' meeting. Acquisitions in Canada can occur on a negotiated basis with the support of the target company or on an unsolicited basis without the support of the target company (in which case a takeover bid would be the only practical structure).

→ Takeover Bid

A takeover bid is an offer to purchase shares of a public company that is made by the acquiror to the shareholders and is subject to acceptance by shareholders holding a requisite number of shares. Takeover bids are specifically regulated by Canadian securities legislation. Canada has a securities commission or similar regulatory authority for each of its provinces and territories with separate legislation in each such province or territory. However, the rules regarding takeover bids are substantially similar in all Canadian jurisdictions and, much like other areas of securities legislation, national or multilateral instruments have been adopted in the provinces and territories to harmonize the legislation in this area.

→ Consideration

An acquiror of a Canadian company by way of takeover bid can pay with cash, securities or a combination of cash and securities. The governing principle behind takeover bid law in Canada is that shareholders should be treated equally and, therefore, subject to certain exceptions, all shareholders must be offered the same consideration or choice of consideration.

Like the United Kingdom and unlike the United States, Canada has a “fully financed” rule with respect to takeover bids. This rule means that an offeror commencing a takeover bid must have adequate financing arrangements in place to ensure the payment of the cash purchase price to the shareholders at closing. This does not mean that the offeror must have the cash on hand when the takeover bid is commenced, but rather, if it does not have the cash on hand, it must have an adequate commitment from a lender to provide the financing.

If securities of the acquiror are to be offered as consideration, there are a number of factors that the acquiror would need to consider. The takeover bid circular would need to include prospectus-level disclosure regarding the acquiror,

“ The governing principle behind takeover bid law in Canada is that shareholders should be treated equally and, therefore, subject to certain exceptions, all shareholders must be offered the same consideration or choice of consideration ”

including in certain cases *pro forma* financial statements giving effect to the acquisition. The acquiror would also become subject to ongoing public disclosure requirements in Canada. A takeover bid circular offering security consideration is not subject to approval from the Canadian securities regulatory authorities. However, if the issuance of the securities is also subject to U.S. securities laws, a plan of arrangement may be a preferred structure in order to take advantage of an exemption from the U.S. registration requirements that is available for Canadian arrangements. Although a tax deferral for shareholders of the target company is not available where target shares are exchanged for securities of a foreign entity, an “exchangeable share” structure can be utilized to provide such tax deferral.

→ Process

A takeover bid can be commenced in one of two ways. A bid can be commenced by mailing a takeover bid circular and offer to the shareholders or, in the case of an unsolicited or “hostile” bid, by placing an advertisement in a newspaper. A takeover bid is required to be open for acceptance for at least 35 days in Canada, but may be open for longer and may be extended by the offeror.

After the expiry of the takeover bid, if all of the conditions to its completion have been met or waived, the offeror “takes up” (accepts the tenders of shares and announces that it is completing its takeover bid) and pays for the shares tendered to the bid. If less than 100% of the outstanding shares have been tendered to the bid (which is usually the case), the acquiror may acquire the remaining shares in one of two ways. If 90% or more of the outstanding shares have been tendered, corporate law in Canada generally allows the offeror to “force out” the remaining shareholders at the same price paid under the takeover bid by sending a notice to the non-tendering shareholders. Such shareholders then only have the right to receive such consideration or to exercise a dissent right to go to court to obtain the “fair value” for their shares. If less than 90% but more than 66 2/3% of the outstanding shares have been tendered, the offeror may proceed to a second-step amalgamation or arrangement transaction with the target company whereby the remaining shareholders are squeezed out for the same consideration as in the takeover bid (subject to a dissent right to obtain fair value). An amalgamation or arrangement generally requires approval at a 66 2/3% level. Given that the shares acquired by the offeror under the bid can be counted towards the required 66 2/3% approval, this would ensure that the vote on the amalgamation or arrangement would be favourable. This process for such second-step transactions requires the holding of a shareholders’ meeting, which adds another period of approximately

35 to 45 days following the expiry of the takeover bid to complete the acquisition of all the shares.

→ Arrangement or Amalgamation

A plan of arrangement is a flexible statutory procedure that can include steps such as the acquisition of shares of the target company by the acquiror. A plan of arrangement is very common in negotiated M&A deals in Canada due to the flexibility of the structure. An amalgamation is a statutory combination or “merger” of two or more corporate entities. In the context of an acquisition of a Canadian public company by way of amalgamation, a special purpose company formed by the acquiror would amalgamate with the target company and the shareholders of the target would receive the acquisition consideration. Arrangements and amalgamations require approval by the shareholders of the target company. In addition, an arrangement requires court approval.

→ Consideration

An acquiror of a Canadian company by way of plan of arrangement or amalgamation can pay with cash, securities or a combination of cash and securities. While unlike the rules that govern takeover bids, there is no specific prohibition on offering different consideration or providing different treatment to different shareholders, there are rules that will apply if related parties of the target company are offered different consideration or if they receive a “collateral benefit”. These rules may include an obligation to obtain an independent valuation of the target shares, as well as approval by a majority of the votes cast by minority shareholders at the shareholders’ meeting. A typical example of different treatment is an acquisition by a private equity buyer where management is required to reinvest a portion of the proceeds or to take a portion of the proceeds as an equity interest in the acquired business going forward.

If securities are to be offered as consideration, the considerations discussed above in the context of takeover bids would also be applicable.

→ Process

In a plan of arrangement scenario, a target applies to the court for a procedural order to set the level of shareholder approval required for the transaction (which is generally 66 2/3% of the votes cast at the shareholders’ meeting) and the procedures in connection with the shareholders’ meeting to approve the

“ Arrangements and amalgamations require approval by the shareholders of the target company. In addition, an arrangement requires court approval”

“An arrangement or amalgamation can be completed in one step and, from a practical perspective, lowers the threshold of acceptance for the transaction compared to a takeover bid...”

transaction. The target then mails an information circular to its shareholders and holds a meeting to approve the transaction (generally approximately 30 days following such mailing). The target then returns to the court (very often on the day of the shareholders' meeting or a day or so thereafter) for a ruling on the fairness of the transaction. For an amalgamation, there is a similar shareholder meeting process, but there is no need to obtain any court orders or approvals. Following shareholder and, in the case of an arrangement, court approval, the parties would close the transaction.

Transactions by way of plan of arrangement or amalgamation can only generally be undertaken on a friendly basis (“friendly” being a relative term as an activist shareholder could acquire board positions or otherwise exert pressure and force a transaction that the board of the target was not originally willing to consider).

A transaction by way of plan of arrangement provides the parties with an enhanced level of flexibility as stock options or other convertible securities can be dealt with and tax planning steps can be implemented in the arrangement steps. An arrangement or amalgamation can be completed in one step and, from a practical perspective, lowers the threshold of acceptance for the transaction compared to a takeover bid (in scenarios where an acquiror is seeking to acquire 100% of a target company, a takeover bid is typically subject to the tender of at least 66 2/3% of all outstanding shares whereas an arrangement or amalgamation is subject to the approval of 66 2/3% of the votes cast by shareholders represented at the shareholders' meeting). However, the element of court approval for an arrangement and the hearing on the fairness of the transaction provides for the possibility of stakeholders to intervene in the court process if they are not in favour of the transaction. Due to the flexibility provided by arrangement structures, acquisitions of public companies in Canada by way of amalgamation have not been as common as acquisitions by way of plan of arrangement.

→ Negotiated Acquisition

Negotiated or “friendly” acquisitions in Canada are typically sequenced such that the acquiror provides a non-binding indication of interest to the target company and, in certain cases, the target company may provide the acquiror with the right to negotiate exclusively with the target company. Before due diligence access is provided, the target company will request that the acquiror execute a confidentiality agreement with, in many cases, a standstill provision restricting the acquiror from proceeding with an unsolicited acquisition. Typically, the acquiror will complete its due diligence investigations before a definitive acquisition agreement is signed as it is rare for a definitive agreement to contain a due diligence condition.

In assessing a change of control transaction, the directors of the target company have a fiduciary duty to act in the best interest of the company. Generally, the board of directors is required to seek the best value reasonably available in the circumstances, but the board does not need to conduct an auction or market check in every change of control transaction.

The definitive acquisition agreement provides for, among other things, the technical steps to implement the transaction and the support of the board of directors of the target company for the acquisition. The definitive agreement would contain provisions preventing the target company from soliciting, or responding to, alternative acquisition proposals from third parties. However, it would be customary for there to be a “fiduciary out” permitting the board of the target company to respond to a proposal that is superior to the agreed transaction and to terminate the definitive agreement in order to accept the superior proposal, subject to the payment of a break-up fee by the target company to the acquiror (typically in the range of 2% to 4% of the transaction value). In certain circumstances, there may be a “go shop” provision allowing the target company to actively seek alternative proposals during a limited period of time. It is also typical for the acquiror to have the right to match any superior proposal in order to preserve its transaction. The acquiror may enter into lock-up agreements with shareholders of the target company in order to obtain their commitment to support the transaction. In appropriate circumstances there may be other forms of “deal protection”, such as the granting of an option to the acquiror to purchase an asset of the target company or the issuance of shares of the target company to the acquiror concurrent with the execution of the definitive agreement.

Prior to approving the entering into of the definitive acquisition agreement, the board of directors of the target company would typically receive an opinion from its financial advisors that the consideration offered in the transaction is fair to the shareholders of the company from a financial point of view. Upon entering into the definitive agreement, a press release would be issued announcing the transaction.

The general approach taken to disclosure of an acquisition transaction is that disclosure must be made when the parties have agreed on the price and structure of the transaction. Practically speaking, this generally coincides with the time that the parties enter into the definitive acquisition agreement. There have been examples of target companies making earlier disclosure, but this has not become the norm. However, the Toronto Stock Exchange may require the target company to disclose the existence of merger negotiations if market activity indicates that trading is being unduly influenced by rumours.

“ The definitive acquisition agreement provides for, among other things, the technical steps to implement the transaction and the support of the board of directors of the target company for the acquisition”

“ Less commonly, a target company may seek to enhance shareholder value through alternative means such as through a recapitalization, spin-off or a strategic alliance”

➔ Unsolicited Acquisition

Unsolicited or “hostile” takeover bids for Canadian public companies are not unusual. They are made to bypass the board of directors of the target company and take the offer directly to shareholders. A takeover bid is the only practical transaction structure available for an unsolicited acquisition. Unlike a negotiated acquisition, the acquiror in an unsolicited takeover bid would not have access to confidential due diligence information and would not receive the cooperation of the target company in seeking regulatory approvals for the acquisition. However, in many cases the target company may agree later to a negotiated transaction, for example if there is an increase in the offer price.

Canadian unsolicited bids are considerably easier and take far less time than unsolicited transactions in the United States because there are far fewer structural and other takeover defences available in Canada than in the United States. In light of the inability of Canadian target companies to utilize structural defences for an extended period of time, the success of an unsolicited bid will depend primarily on whether the target company is able to find a superior alternative transaction or to otherwise convince the shareholders to reject the bid. The most typical response of a Canadian company subject to an unsolicited takeover bid is to conduct an auction process to seek superior alternatives. Less commonly, a target company may seek to enhance shareholder value through alternative means such as through a recapitalization, spin-off or a strategic alliance.

A shareholder rights plan or “poison pill” is the primary defensive mechanism available to target companies in Canada. A rights plan may be pre-existing or it may be implemented as a tactical plan in the face of or in response to an unsolicited bid. It has become common practice for an unsolicited bidder faced with a rights plan to request that Canadian securities regulators nullify the rights plan in order to provide shareholders with the opportunity to consider the bid. The regulators generally have nullified rights plans when they have outlived their legitimate purpose of permitting the target company to develop alternatives to the unsolicited bid. Although each case will depend upon its own particular circumstances, it is generally considered that there will be an outside time limit by which Canadian securities regulators will nullify a rights plan in the range of 45 to 70 days from the start of the bid. Recently, in situations where a rights plan was approved by shareholders during the pendency of an unsolicited bid, Canadian securities regulators in certain of the provinces have declined to nullify the rights plan.

There have been some recent policy initiatives to change the approach of Canadian securities regulators to rights plans. The Canadian securities regulators have published for comment a proposed rule that would shift decision

making regarding rights plans from securities regulators to shareholders by allowing a rights plan adopted by a target board to stay in place, provided shareholder approval of the plan is obtained within 90 days from the date of adoption or, if adopted after a takeover bid has been made, within 90 days from the date the takeover bid was commenced. The other key elements of the proposed rule include the following: a rights plan must be approved annually by shareholders; an issuer cannot adopt a new rights plan for 12 months if it fails to obtain shareholder approval of a rights plan within the prescribed time limits (unless a subsequent takeover bid is commenced); and shareholders can terminate a rights plan at any time by majority vote.

For additional information, visit Davies' website at dwpv.com to view our publication, *Canadian Mergers and Acquisitions – Guide for Foreign Investment Banks and Bidders*.

06

Foreign Investment

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Foreign Investment



The federal *Investment Canada Act* (the “ICA”) may affect the ability of a person to acquire or establish a business in Canada. The purpose of the ICA is to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada. The Investment Review Division (the “IRD”), which is part of the federal government’s Department of Industry, is responsible for administering the ICA and for promoting and reviewing significant non-cultural investments in Canada by non-Canadians. Investments in cultural businesses are reviewed under the ICA by the federal government’s Department of Canadian Heritage (“Canadian Heritage”). Any non-Canadian who proposes to establish a new business or acquire an existing business in Canada should be aware of the provisions of the ICA.

➔ Application of the *Investment Canada Act*

In general, any acquisition by a non-Canadian of control of a business carried on in Canada will be either notifiable or reviewable under the ICA. Whether such an acquisition is notifiable or reviewable will depend on the value of the assets of the Canadian business being acquired. The ICA applies even if the business is not currently controlled by Canadians and also applies where a Canadian business is acquired indirectly through the acquisition of a foreign corporation with a Canadian subsidiary.

Notification, when required, may be made either prior to closing or within 30 days after closing and involves the filing of only very basic information concerning the investor and the acquired business. Notification does not represent an impediment to an acquisition.

However, if an acquisition is subject to review under the ICA, it may not be completed unless the Minister of Industry, or in the case of an acquisition of a “cultural business”, the Minister of Canadian Heritage, is satisfied that the acquisition is likely to be of “net benefit to Canada”.

Investments to establish new Canadian businesses are always subject to notification. In certain limited circumstances, an investment to establish a new cultural business may also be subject to review.

In addition to the general requirements for notification or review, the ICA also contains broad provisions allowing the federal government to review any acquisition on national security grounds.

“ The purpose of the ICA is to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada”

➔ What Is a “Canadian Business”?

The term “Canadian business” is defined in the ICA to mean a business carried on in Canada that has: (i) a place of business in Canada; (ii) an individual or individuals in Canada who are employed or self-employed in connection with the business; and (iii) assets in Canada used in carrying on the business. The term “business” is, in turn, defined to include any undertaking or enterprise capable of generating revenue and carried on in anticipation of profit.

➔ Who Is a “Non-Canadian”?

A “non-Canadian” is an individual, government, government agency or entity that is not a “Canadian”. An individual is a “Canadian” for the purposes of the ICA if he or she is a Canadian citizen or a permanent resident of Canada who has been ordinarily resident in Canada for not more than one year after first becoming eligible to apply for Canadian citizenship. (Permanent residents may apply for Canadian citizenship after three years in Canada.)

The rules for determining whether a corporation is a “Canadian” under the ICA are complex and essentially require a determination of whether the individuals who are the ultimate controlling shareholders of the corporation are “Canadians”. Where shares in a corporation are owned by a partnership, joint venture or certain trusts, the ICA deems such shares to be owned by the partners, joint venture members or beneficiaries. This “look through” principle does not apply to corporations.

Determining whether shareholders are Canadian may be practically impossible in the case of a widely held corporate acquiror, in which case the determination may be based on the citizenship or permanent resident status of the members of the board of directors of the acquiror. In this case, a corporation would be “Canadian” only if it is not controlled in fact through ownership of its voting shares and at least two-thirds of the members of its board of directors are Canadians.

There are also special rules for determining whether partnerships and trusts are “Canadian”.

➔ “Acquisition of Control”

The ICA includes detailed provisions defining the concept of an “acquisition of control”. In summary, these provisions provide that control can be acquired only through the acquisition of: (i) voting shares of a corporation; (ii) “voting

interests” of a non-corporate entity (which for partnerships and trusts means an ownership interest in the assets of the entity that entitles the owner to receive a share of the profits and to share in the assets on dissolution); or

(iii) all or substantially all of the assets of a Canadian business. The acquisition of shares of a non-Canadian company with a Canadian division, but no Canadian subsidiaries, is not an “acquisition of control” of a Canadian business within the meaning of the ICA.

For the purposes of determining whether an investor has acquired control of a corporation, the following general rules apply:

- acquisition of a majority of voting shares is deemed to be acquisition of control;
- acquisition of one-third or more, but less than a majority of voting shares is presumed to be acquisition of control, unless it can be shown that the acquired shares do not give control in fact to the investor; and
- acquisition of less than one-third of voting shares is deemed not to be acquisition of control.

Similarly, for the purposes of determining whether an investor has acquired control of a non-corporate entity, the following general presumptions apply:

- acquisition of a majority of voting interests is deemed to be acquisition of control; and
- acquisition of less than a majority of voting interests is deemed not to be acquisition of control.

→ Thresholds for Review

(A) WTO INVESTORS

The ICA includes two sets of review thresholds based on the value of the assets of the Canadian business: (i) the general thresholds; and (ii) the higher WTO thresholds applicable to acquisitions by or from a “WTO investor”. Acquisitions that fall below these thresholds are subject only to notification, whereas acquisitions of assets equal to or over these thresholds are subject to a “net benefit” review.

The definition of a “WTO investor” under the ICA is complex. In general, however, an individual is a WTO investor if he or she is a “national” of a country (other than Canada) that is a member of the WTO (“WTO Member”) or has a right of permanent residence in a WTO Member. A corporation or other entity will be a WTO investor if it is a “WTO investor-controlled entity” as defined in the ICA. A

“ The ICA includes two sets of review thresholds based on the value of the assets of the Canadian business: (i) the general thresholds; and (ii) the higher WTO thresholds applicable to acquisitions by or from a ‘WTO investor’”

widely held public company will generally be a WTO investor for the purposes of the ICA if no person or voting group controls the public company and at least two-thirds of the members of its board of directors are any combination of WTO investors and Canadians or if it can be established that a majority of the voting shares of the public company is owned by WTO investors.

(B) REVIEW THRESHOLDS FOR WTO INVESTORS

A direct acquisition by a WTO investor is reviewable only when the value of the assets of the entity carrying on the Canadian business and all other entities in Canada, the control of which is being acquired, is equal to or greater than the threshold for review for WTO investors.

That threshold is currently \$354 million in book value of assets. However, pursuant to amendments enacted on March 12, 2009, and to come into effect on a date to be determined by the federal Cabinet, that threshold will change such that review will be required if the “enterprise value” (to be defined by forthcoming regulations) of the assets of the Canadian business is equal to or greater than: (i) \$600 million, in the case of investments made during the first two years after the thresholds come into force; (ii) \$800 million, in the case of investments made during the third and fourth years after the thresholds come into force; and (iii) \$1 billion, in the case of investments made between the fifth year after the thresholds come into force and December 31 of the sixth year after the thresholds come into force. This threshold will thereafter be adjusted on an annual basis. It is expected that investments by WTO investors that are “state-owned enterprises” will continue to be subject to the existing book value threshold.

Indirect acquisitions of most Canadian businesses by or from a WTO investor are not reviewable (regardless of the value of the assets), but will still be notifiable under the ICA.

(C) BUSINESSES EXCLUDED FROM WTO REVIEW THRESHOLDS

The higher WTO investor thresholds do not apply to the acquisition of control of a Canadian business that is a cultural business.

A “cultural business” includes a business that carries on any of the following activities: (i) publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine readable form, other than the sole activity of printing or typesetting of books, magazines, periodicals or newspapers; (ii) production, distribution, sale or exhibition of film or video recordings; (iii) production, distribution, sale or exhibition of audio or video music recordings; (iv) publication, distribution or sale of music in print or machine

“The higher WTO investor thresholds do not apply to the acquisition of control of a Canadian business that is a cultural business”

readable form; or (v) any radio communication in which the transmissions are intended for direct reception by the general public, any radio, television and cable television broadcasting undertakings and any satellite programming and broadcast network services.

There is no *de minimis* exception to the determination of whether a business carries on a cultural business. A business will be considered a cultural business even if its cultural activities represent only a small part of its overall operations.

(D) GENERAL REVIEW THRESHOLDS

The following investments in Canadian businesses, other than those which qualify for the WTO review thresholds described above, are subject to review by the Minister:

- a direct acquisition of a Canadian business with assets of \$5 million or more;
- an indirect acquisition of a Canadian business with assets of \$50 million or more; and
- an indirect acquisition of a Canadian business with assets of \$5 million or more, if the assets of the Canadian business represent more than 50% of all the assets acquired in the international transaction.

In certain circumstances, acquisitions may be subject to review under the ICA regardless of the value of the assets involved where the business activity in question is “related to Canada’s cultural heritage or national identity”. Such business activities include a business that carries on any of the cultural activities described above (other than radio, television or other broadcasting activities).

Again, there is no *de minimis* exception to the determination of whether a business carries on cultural activities. A corporation primarily engaged in some other type of business which also, for example, distributes some books or magazines for sale may be considered to be a business related to Canada’s cultural heritage, even if such distribution and sales represent only a small part of that corporation’s activities.

In addition, “anti-avoidance” provisions in the ICA permit the Minister to deem an entity which carries on or proposes to carry on any cultural activities to be a “non-Canadian” on the basis that the entity is controlled in fact (possibly through means other than the ownership of voting shares) by one or more non-Canadians. The Minister may also deem a transaction to be an acquisition of control where one of the entities involved carries on or proposes to carry on any cultural business. The Minister has the discretion to make such a determination retroactive.

➔ Investments by State-Owned Enterprises

Pursuant to amendments enacted in 2013, specific rules now apply to an investment in a Canadian business by a “state-owned enterprise”. The term “state-owned enterprise” is broadly defined to include a foreign government or its agencies, an entity that is controlled or influenced directly or indirectly by a foreign government or an individual acting under the direction of a foreign government or agency.

In addition, the amendments broaden the scope for determining an entity to be “non-Canadian” by giving the Minister of Industry the discretion to deem an entity to be non-Canadian if the Minister is satisfied that the entity is controlled in fact by one or more state-owned enterprises. Moreover, the Minister has discretion to determine that an investment by a state-owned enterprise constitutes an “acquisition of control” even where it is below the thresholds otherwise applicable (for example, an acquisition of less than one-third of the voting shares could be deemed an acquisition of control) if the Minister is satisfied that there has been an acquisition of control in fact by a state-owned enterprise.

Notwithstanding the pending amendments to raise the WTO investor threshold to \$600 million in enterprise value (discussed above), the state-owned enterprise amendments contemplate that investments by WTO investors that are state-owned enterprises will remain subject to the existing book value threshold.

“ If an acquisition is subject to review, the Minister must be satisfied that the proposed acquisition is likely to be of ‘net benefit to Canada’ ”

➔ The Review Criterion — “Net Benefit to Canada”

If an acquisition is subject to review, the Minister must be satisfied that the proposed acquisition is likely to be of “net benefit to Canada”. The ICA requires the Minister to take into account certain factors, including: (i) the effect of the acquisition on the level and nature of economic activity in Canada (including employment in Canada); (ii) the degree and significance of participation by Canadians in the Canadian business in particular and in the relevant industry in general; (iii) the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada; (iv) the effect of the investment on competition in the relevant industry or industries in Canada; (v) the compatibility of the investment with Canadian industrial, economic and cultural policies, taking into account the policy

objectives of affected provinces; and (vi) the effect of the investment on Canada's ability to compete in world markets. The IRD and Canadian Heritage have released specific policies with respect to the application of these criteria to various sectors, including the book publishing, film and uranium industries in Canada.

Where the acquiror is a foreign "state-owned enterprise", ICA guidelines issued in December 2012 state that the "net benefit to Canada" review will focus particularly on whether the acquiror adheres to Canadian standards of corporate governance and whether the Canadian business will continue to operate on a commercial basis. In addition, investments by foreign state-owned enterprises to acquire control of a Canadian oil sands business will be found to be of net benefit on an exceptional basis only.

In order to establish "net benefit" under these criteria, the Minister usually requires undertakings from the acquiror. Typical undertakings relate to maintaining certain employment levels in Canada, guaranteeing participation of Canadians as directors and in management, processing resource products in Canada, making capital expenditures or investing in research and development in Canada and transferring technology to Canada. However, NAFTA imposes certain restrictions on the types of undertakings that the Minister may require from NAFTA investors. The concept of a "NAFTA investor" is similar to the definition of a "WTO investor", except that it refers to individuals who are "nationals" of the United States or Mexico.

“ In order to establish ‘net benefit’ under these criteria, the Minister usually requires undertakings from the acquiror”

→ Consultations

When IRD or Canadian Heritage receives an application for review, they consult with all the provinces in which the Canadian business has assets or employees, as well as federal government departments with relevant expertise. This allows the affected provinces and departments to review the proposed investment and inform IRD and/or Canadian Heritage if they have any concerns or objections. Finally, the Competition Bureau is charged with providing advice regarding the effect of the investment on competition in the relevant industry or industries in Canada.

→ Timing of Review Procedure

The ICA sets out certain time limits for the review procedure. Within 45 days after a completed application has been received, the Minister must either indicate whether he or she is satisfied that the investment is likely to be of net benefit to Canada or extend the review period for a further 30 days, following

which the Minister must indicate his or her assessment regarding the likely net benefit to Canada. (However, if the Minister requires more time, the investor may be requested to consent to an extension of the review period.) Where the Minister has advised the applicant that he or she is not satisfied that the investment is likely to be of net benefit to Canada, the applicant has the right to make representations and submit undertakings within 30 days of the date of the notice of the Minister's decision (or any longer period that may be negotiated).

➔ Prohibitions and Remedies

Non-Canadians who implement a reviewable investment in contravention of the ICA may be ordered to divest themselves of control of the acquired Canadian business. Generally, the ICA prohibits the implementation of an investment until the completion of the Minister's review, but this prohibition does not apply in some circumstances, including an acquisition of control of a corporation incorporated outside Canada or where the Minister is satisfied that the delay in implementing the acquisition would result in undue hardship. However, in circumstances where closing before completion of the review is permitted, subsequent divestiture could be required if the Minister is not ultimately satisfied that the transaction is likely to be of net benefit to Canada. Where a NAFTA investor has acquired a cultural business that is required to be disposed of under the ICA, the federal government may acquire all or part of the cultural business.

“Irrespective of whether an investment is subject to a ‘net benefit to Canada’ review, the ICA provides for the review of investments that ‘could be injurious to national security’”

➔ National Security Review

Irrespective of whether an investment is subject to a “net benefit to Canada” review, the ICA provides for the review of investments that “could be injurious to national security”.

Under this process, Cabinet may, on the recommendation of the Minister, order a national security review. If Cabinet orders a review, the Minister is required to send a notice to the investor that the investment will be reviewed, and the proposed transaction cannot be completed while the review is pending. If the transaction has already been completed, a review can still be ordered (and remedies, including divestiture of the Canadian business, can still be required) following implementation of the transaction.

The expression “national security” is not defined, and there are no monetary thresholds that must be exceeded to trigger a national security review. Moreover, the general “net benefit” review threshold requirement that there be an “acquisition of control” of a “Canadian business” has been relaxed such

that a national security review could occur where there has been an acquisition “in whole or in part” of an entity carrying on all or any part of its operations in Canada if the entity has: (i) a place of operations in Canada; (ii) an individual or individuals in Canada who are employed or self-employed in connection with the entity’s operations; or (iii) assets in Canada used in carrying on the entity’s operations.

The national security review is carried out by the Minister in consultation with the Minister of Public Safety and Emergency Preparedness. The Minister has until 45 days following the filing of a notification or an application for review, or until 45 days following implementation of a transaction not subject to notification or review, to issue a notice to a non-Canadian that its proposed investment may be subject to a national security review. The entire review process can take up to 130 days.

Alternatively, the federal Cabinet can order a national security review within 45 days of the filing of a notification or an application for review, or within 45 days of implementation of a transaction not subject to notification or review, without a notice of possible review first being issued. If this occurs, the entire national security review process can take up to 105 days.

If, following the review, the Minister is satisfied that the investment would be injurious to national security, then the federal Cabinet is authorized to take any measures that it considers advisable to protect national security, including imposing conditions on the investment or the outright prohibition of a proposed investment (or divestiture in the case of a completed investment).

For additional information, visit Davies’ website at dwpv.com to view our publication, *Investment Canada Act: Guide for Foreign Investors in Canada*.

“ The national security review is carried out by the Minister in consultation with the Minister of Public Safety and Emergency Preparedness”

07

Competition Law

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Competition
Law

Like many other countries, Canada has a complex set of competition laws. Among other things, these laws: (i) prohibit cartel behaviour; (ii) prohibit abuses of a dominant position; (iii) regulate mergers and acquisitions; and (iv) otherwise govern the conduct of businesses in their relationships with competitors, customers and suppliers. Canada's competition laws are contained in a single federal statute called the *Competition Act* (the "CA"). In contrast to jurisdictions like the United States, Canada does not have provincial competition laws, although several provinces have fair business practice laws directed primarily towards consumer protection. With the exception of activities that are specifically exempted or actively regulated, all business activities in Canada are subject to the CA.

“Canada’s competition laws are contained in a single federal statute called the *Competition Act*”

Administration and Enforcement of the *Competition Act*

The CA is administered by the Competition Bureau (the “Bureau”), which is part of the federal Department of Industry. The head of the Bureau is the Commissioner of Competition (the “Commissioner”), who has the statutory responsibility for administering and enforcing the CA. Bureau staff routinely investigate complaints from the public concerning competition matters. The CA also permits, and in some cases requires, the Commissioner to commence a formal inquiry. Once an inquiry has been commenced, the Commissioner has a broad range of formal enforcement powers and may obtain authority from a court to: (i) enter and search premises and seize records; (ii) require the production of records or the provision of written information; or (iii) require a person to appear and be examined under oath or affirmation. The Commissioner has increasingly resorted to the use of such powers over the past several years.

Separate from the Bureau, a specialized tribunal (the “Competition Tribunal” or “Tribunal”) composed of judges of the Federal Court (Trial Division) and lay members, has jurisdiction over cases under the non-criminal provisions in the CA. Appeals from the Competition Tribunal may be made to the Federal Court of Appeal on questions of law or mixed fact and law, or, with leave, on questions of fact.

“ The criminal conspiracy provisions in the CA prohibit agreements between competitors to fix or increase prices; fix or lessen production or supply of a product; or allocate sales, customers or territories”



Criminal Offences Under the *Competition Act*

CONSPIRACY

The CA contains a number of criminal offences, the most significant of which is the conspiracy offence. The criminal conspiracy provisions in the CA prohibit agreements between competitors to fix or increase prices; fix or lessen production or supply of a product; or allocate sales, customers or territories. (As discussed below, the CA also contains civil provisions dealing with other agreements between competitors that prevent or lessen competition substantially.) Proof that the agreement would be likely to lessen competition is not required. Liability will be avoided, however, if the agreement is “ancillary” to a broader agreement that does not contravene the conspiracy offence and is reasonably necessary to give effect to the objective of that broader agreement.

The Bureau has issued Competitor Collaboration Guidelines, which describe the Bureau’s approach to determining whether to assess an agreement or collaboration between competitors under the criminal conspiracy provisions, the civil agreements provisions or other provisions of the CA. These Guidelines indicate that the Bureau intends to apply the criminal provisions only to so-called “naked restraints” on competition, which are described as “restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture”. However, restraints implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture may be subject to review under the civil agreements provisions discussed below.

BID RIGGING

Bid rigging is any agreement whereby a person: (i) agrees not to submit a bid or tender in response to a call for bids or tenders; (ii) agrees to withdraw a bid or tender submitted in response to a call for bids or tenders; or (iii) submits a bid or tender that is arrived at by an agreement with another person. Bid rigging is illegal if it is not disclosed to the person calling for the bids or tenders before the time when any bid or tender is submitted or withdrawn, whether or not the agreement is likely to have any effect on competition.

As with the criminal conspiracy provisions, there is no requirement to show that the bid rigging had any effect on competition. Therefore, the market power of the parties to the bid-rigging agreement and the actual effect of the agreement on the bidding process are irrelevant.

OTHER CRIMINAL OFFENCES

Other criminal offences under the CA include telemarketing, double ticketing, pyramid selling, conspiracy relating to professional sport and certain agreements among federal financial institutions. Misleading advertising can be dealt with under either a criminal provision or a non-criminal civil provision of the CA. For the Bureau to pursue criminal charges for misleading advertising, the government would have to prove that the accused knowingly or recklessly made a false or misleading representation.

→ Penalties

The CA provides for significant fines and, in some cases, imprisonment if there is a contravention of the criminal provisions. For example, conspiracy is punishable by up to 14 years imprisonment, a fine of up to \$25 million, or both. Individuals in Canada have received jail sentences for conduct contrary to the conspiracy provisions. The trend in Canada is towards more frequent prosecutions of individuals and larger fines for conspiracy and bid-rigging offences.

Unlike U.S. law, there is no limitation period relating to indictable criminal offences under the CA, such as conspiracy and bid rigging.

“ The CA provides for significant fines and, in some cases, imprisonment if there is a contravention of the criminal provisions”

→ Immunity from Prosecution

The Commissioner has an immunity policy, which may allow an applicant who is “first in” to report a criminal offence (such as conspiracy or bid rigging) to receive a recommendation of immunity from prosecution in exchange for cooperation in the prosecution of others, provided that the applicant meets the other criteria set out in the immunity policy. Subsequent applicants may seek another form of lenient treatment, such as a reduction in sentence, but will not normally be eligible for a recommendation of immunity unless the “first-in” party ultimately does not qualify.

→ Non-Criminal Reviewable Matters Under the *Competition Act*

ABUSE OF DOMINANT POSITION

The Tribunal may, on application by the Commissioner, make an order requiring, among other things, that a party pay an “administrative monetary penalty” of up

to \$10 million (and up to \$15 million for each subsequent order) or cease certain conduct or dispose of assets or shares if it finds that:

- (a) one or more persons substantially or completely control a class or species of business throughout Canada or any part of Canada;
- (b) such person or persons have engaged, or are engaging, in a practice of anti-competitive acts; and
- (c) the practice has had, is having or will likely have the effect of preventing or lessening competition substantially.

A person may be considered to “control a class or species of business” if it has sufficient market power to set prices above competitive levels in a market for a considerable period of time. If a firm has a very large market share, it will very likely have market power, but considerations such as the number of competitors and their respective market shares, excess capacity in the market and ease of entry will also be taken into account. Further, it is not necessary for a person to compete in a market itself in order for it to control that market. As a result, the abuse of dominance provisions could potentially apply, for example, to a large customer or supplier that might be considered to possess market power in an upstream or downstream market.

There is little definitive guidance on when a company will be found to have the degree of market power required to trigger the potential application of these provisions. However, when a firm’s market share is above 40-45%, or the aggregate market share of a small group of firms which arguably might be “jointly dominant” exceeds this threshold, there is a danger that the abuse provisions could apply.

The CA contains a non-exhaustive definition of “anti-competitive acts” and a wide range of conduct which, if carried out by a person having market power for an intentionally predatory, exclusionary or disciplinary purpose against a participant in the relevant market, could potentially qualify as an anti-competitive act.

REFUSAL TO DEAL

The Tribunal may order a supplier to accept a person as a customer if it finds that: (i) the person is substantially affected in its business or precluded from carrying on its business due to its inability to obtain adequate supplies of a product anywhere in a market on usual trade terms; (ii) the person is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market; (iii) the customer is willing and able to meet the usual trade terms of the suppliers of the product; (iv) the

product is in ample supply; and (v) the refusal to deal is having or is likely to have an adverse effect on competition in a market.

In deciding whether to exercise its discretion to make an order for supply once all of the elements described above have been established, the Tribunal has indicated that it considers a number of factors, including whether the respondent has legitimate reasons for discontinuing supply (e.g., to realize economies in distributing the product), the duration of the supply relationship and the manner in which any cut-off of the customer was implemented.

PRICE MAINTENANCE

The Tribunal may make an order prohibiting a person from engaging in price maintenance or requiring a person found to be engaging in price maintenance to accept another person as a customer on usual trade terms. Price maintenance occurs where: (a) a person either (i) by agreement, threat, promise or any like means, has influenced upward, or discouraged the reduction of, the price at which its customer or another reseller of its product sells or offers to sell the product or (ii) has refused to supply a product to or has otherwise discriminated against, another person because of the low pricing policy of that other person; and (b) such conduct has had, is having or is likely to have an adverse effect on competition.

While the price maintenance provisions have most often been applied in the context of “vertical” resale price maintenance between a supplier and its retail distributors, the wording is broad enough to also potentially apply to “horizontal” attempts to maintain or raise prices of competitors. The Bureau has occasionally sought to enforce the price maintenance provisions in that context.

AGREEMENTS THAT SUBSTANTIALLY PREVENT OR LESSEN COMPETITION

The Tribunal may, on application by the Commissioner, make an order prohibiting any person from doing anything under an agreement or arrangement between competitors if the Tribunal finds that the agreement or arrangement (whether existing or proposed) has, or is likely to have, the effect of preventing or lessening competition substantially. While this civil provision was only introduced in 2010 and has to date been the subject of little enforcement action, it is expected that the Commissioner will use this provision to deal with anticompetitive agreements among competitors where the criminal offence (discussed above) does not apply.

Agreements that fall within the scope of these civil provisions likely will be examined in a manner consistent with the approach to mergers outlined in the Bureau’s Merger Enforcement Guidelines.

“The CA applies to all mergers in Canada, while the *Investment Canada Act* is targeted at the acquisition by non-Canadians of existing Canadian businesses and the establishment of new Canadian businesses by non-Canadians ...”

OTHER NON-CRIMINAL REVIEWABLE MATTERS

Other non-criminal reviewable matters under the CA include exclusive dealing, tied selling and market restriction. As noted above, misleading advertising can be dealt with under civil or criminal provisions.

➔ Private Rights of Action

The CA allows a private party to sue for and recover “an amount equal to the loss or damage proved to have been suffered by him” as a result of a defendant engaging in conduct contrary to the criminal provisions of the CA or failing to comply with an order made pursuant to the CA.

In addition, the CA provides private parties with a limited right of access to the Tribunal under the refusal to deal, price maintenance, exclusive dealing, tied selling and market restriction provisions. The Tribunal cannot award damages to an aggrieved party. In order to lessen the risk of strategic litigation, the CA includes several safeguards, such as requiring an applicant to obtain prior leave of the Tribunal. The Tribunal may also award costs against any party in accordance with the *Federal Court Rules*.

➔ Acquiring a Business in Canada

The CA also establishes a comprehensive framework for reviewing and controlling mergers and acquisitions in Canada. In addition, transactions that exceed certain financial thresholds and, in the case of share acquisitions, that exceed an additional voting interest threshold may be subject to pre-merger notification requirements and corresponding waiting periods. The CA applies to all mergers in Canada, while the *Investment Canada Act* is targeted at the acquisition by non-Canadians of existing Canadian businesses and the establishment of new Canadian businesses by non-Canadians (see the Foreign Investment section of this Guide).

SUBSTANTIVE MERGER REVIEW

Any merger (defined to mean the acquisition or establishment, direct or indirect, of control over or a significant interest in all or part of a business of a competitor, supplier, customer or other person) may be challenged under the CA by the Commissioner before the Tribunal. The Commissioner may bring an application before the Tribunal in respect of a proposed merger or in respect of a completed merger provided the application is made within one year of closing. The Tribunal may issue an order with respect to all or any part of a proposed merger, and may dissolve a completed merger or order divestiture of assets

or shares. Under certain circumstances, the Tribunal may also make any other order to which the Commissioner and the parties to the merger consent. The Tribunal also has the power to grant injunctive relief.

Before making any order, the Tribunal must determine that the merger prevents or lessens, or is likely to prevent or lessen, competition substantially in the relevant market. In making this determination, the Tribunal generally applies economic and legal analyses similar to those employed by U.S. courts in antitrust matters. Among the factors that the Tribunal may consider are the strength of remaining competition, whether the merger results in the removal of a vigorous competitor, whether the acquired business has failed or is likely to fail, the extent and availability of acceptable substitutes, barriers to entry, the ability of customers or suppliers to exert countervailing power, and innovation in the market. In addition, the CA includes an efficiencies defence that provides that the Tribunal will not issue a remedial order if it finds that the merger is likely to result in gains in efficiency that will be greater than and offset the anticompetitive effects.

“ Before making any order, the Tribunal must determine that the merger prevents or lessens, or is likely to prevent or lessen, competition substantially in the relevant market”

PRE-MERGER NOTIFICATION

In addition to the substantive review procedure that may apply under the CA, advance notification may be required for certain large mergers. Subject to certain exceptions, if a proposed acquisition of assets or shares, an amalgamation or other combination to establish an operating business in Canada exceeds certain prescribed thresholds and includes a Canadian operating business, the parties to the merger are required to notify the Commissioner in advance.

Parties to a notifiable merger transaction in Canada are precluded from completing the merger before the expiry of a statutory waiting period. This waiting period is similar to that in the U.S. merger review process under the *Hart-Scott-Rodino Antitrust Improvements Act*. The waiting period in Canada expires 30 days following the pre-merger notification filing unless, prior to the end of that 30-day period, the Commissioner issues a “supplementary information request” to the merging parties for production of documents and/or responses to questions. If such a request is issued, a new waiting period is triggered and expires 30 days following compliance with the request. The Commissioner may terminate or waive the waiting period (including the initial 30-day waiting period) at any time by issuing an advance ruling certificate or no-action letter indicating that the Commissioner does not intend to challenge the merger.

In the context of an unsolicited takeover bid, where a bidder files a pre-merger notification under the CA, the Commissioner is required to notify the target company immediately, whereupon the target company is required to file a

pre-merger notification within 10 days. The timing of the target's response does not, however, affect the running of the waiting period.

In general, two size thresholds must be met for the mandatory pre-merger notification rules to apply. First, the parties to the merger, together with their affiliates, must have total assets in Canada or total annual gross revenues from sales in, from or into Canada with a value that exceeds \$400 million. Second, the transaction itself must be of a minimum size. For acquisitions of assets or the formation of an unincorporated business combination, the aggregate value of the Canadian assets acquired or contributed, or the annual gross revenues from sales in or from Canada from such assets, must exceed \$82 million (this is the threshold for 2014; it is reviewed annually). Share acquisitions are subject to mandatory pre-merger notification where the aggregate value of the Canadian assets or annual gross revenues from sales in or from Canada of the corporation whose shares are acquired and all other corporations controlled by that corporation would exceed \$82 million. In addition, the acquisition must result in the acquiror holding a minimum percentage of voting shares for the mandatory pre-merger notification rules to apply. In the case of public corporations, this threshold is more than 20% (or 50% if more than 20% of the voting shares are already owned) and, in the case of private corporations, this threshold is more than 35% (or 50% if more than 35% of the voting shares are already owned).

08

Tax Considerations

08

**Tax
Considerations**



This chapter provides a summary of certain considerations arising from Canadian income tax, sales taxes and other taxes that may be relevant to persons considering doing business in Canada.

Income Tax

LEGISLATION

Income tax is imposed in Canada by the federal government and by the provincial and territorial governments.

The federal government levies income tax under the *Income Tax Act* (the “Tax Act”). It covers federal income tax for individuals and other taxpayers, including corporations and trusts, whether resident in Canada or non-resident. A partnership is generally a flow-through entity for Canadian tax purposes and not itself a taxable entity (unless deemed to be a specified investment flow-through (“SIFT”) partnership, as further discussed below). The Tax Act is administered by Canada Revenue Agency (“CRA”).

Each provincial and territorial government levies income tax computed on a similar basis as federal income tax, at different rates.

For the remainder of this section, except where indicated otherwise, descriptions of taxation provisions refer only to the Tax Act.

JURISDICTION TO TAX

The primary basis for taxation is the residence of the taxpayer. Canada does not impose tax on the basis of citizenship.

Canadian residents are generally subject to income tax in Canada on their worldwide income, regardless of source, but are generally entitled to tax credits or deductions for foreign taxes paid.

Non-residents of Canada are subject to taxation on Canadian source income, subject to relief by way of rate reduction or, to a limited extent, elimination of Canadian tax, under a tax treaty. Canada has an extensive network of treaties, with more than 90 treaties currently in force. Appendix I contains a complete list of the Canadian tax treaties in force current to June 1, 2014.

The 2014 federal budget announced that the government intends to implement rules designed to curb “treaty shopping” structures where a person not entitled to the benefits of a particular treaty invests in Canada through an entity resident in the relevant country to gain Canadian tax benefits under the treaty. The proposed rule would deny treaty benefits otherwise arising from transactions

where one of their main purposes is to obtain such treaty benefits. The budget recognizes, however, that one of the objectives of treaties is to encourage trade or investment and accordingly that treaty benefits may be a relevant consideration to a resident of the treaty country in deciding whether to invest in Canada. The federal government has announced that it will review the proposed rules following the release by the Organization for Economic Co-operation and Development (OECD) of its action plan on “base erosion and profit shifting”, expected to be released in September 2014. The federal government has invited comments from taxpayers regarding the application of the proposed rules and is currently reviewing those submissions.

The principal sources of income of non-residents that are subject to tax in Canada are:

- income from a business carried on in Canada;
- income from an office or employment performed in Canada;
- gains realized on the disposition of “taxable Canadian property”; and
- certain types of passive income such as dividends paid by a Canadian corporation or rent from Canadian real estate.

TAXABLE CANADIAN PROPERTY

Taxable Canadian property is generally limited to:

- real property situated in Canada;
- assets used in a business carried on in Canada;
- a share of a private corporation, an interest in a trust or an interest in a partnership more than 50% of the value of which was derived from any combination of real or immovable property situated in Canada, Canadian resource property, timber resource property, or interests, options or rights in such property at any time in the 60-month period prior to the disposition of such shares or other interests; and
- units of a mutual fund trust and listed shares of a corporation, where at any time during the 60-month period preceding the disposition, a 25% ownership threshold is exceeded and at that time more than 50% of the value of the units or shares was derived from any combination of real or immovable property situated in Canada, Canadian resource property, timber resource property, or interests, options or rights in such property.

DETERMINATION OF CANADIAN RESIDENCE

The term “resident in Canada” is not defined in the Tax Act. A person’s residence is determined by common law criteria, subject to the specific deeming rules in the Tax Act that deem certain persons to be either resident or not resident in Canada.

A corporation incorporated in Canada after April 26, 1965, (or, in certain limited situations, before this date) is deemed to be resident in Canada.

There is no statutory rule that deems a corporation incorporated outside Canada to be resident in Canada. Under the common law test of residence, a corporation will be considered to be resident in Canada if its central management and control is located in Canada. Central management and control is generally considered to refer to the superior or directing decision-making in respect of a corporation that is normally exercised by its board of directors. As a result, the place where the board of directors exercises its decision-making powers will generally be the place in which the central management and control of the corporation is located.

In the case of an individual, the courts have generally held that residence is determined on the basis of the degree to which an individual “settles into or maintains” his or her ordinary mode of living at the place in question. In addition, an individual will be regarded as establishing Canadian residency if he or she is ordinarily resident in Canada. The determination of whether an individual is ordinarily resident in Canada depends on whether Canada is the place where the individual, in the settled routine of his or her life, regularly, normally or customarily lives. In addition, the Tax Act deems an individual who “sojourns” in Canada for 183 or more days during a year to be resident in Canada throughout that year.

In general, a trust will be resident in Canada for income tax purposes if one or more Canadian residents exercise the central management and control of the trust. A careful examination of the facts is necessary to determine where the central management and control of a trust is exercised. In addition, some non-resident trusts will be deemed to be resident in Canada in certain circumstances.

A taxpayer who is considered under Canadian domestic law to be resident in Canada and at the same time resident in another country may be deemed by an applicable tax treaty to be resident in only one country for tax purposes.

“ ...a corporation will be considered to be resident in Canada if its central management and control is located in Canada”

TAX REPORTING

Annual Tax Returns

Canadian resident taxpayers are generally required to file an annual income tax return. Partnerships that carry on business in Canada or that are “Canadian partnerships” (i.e., partnerships all members of which are Canadian residents) are generally required to file an annual information return.

Any non-resident of Canada who, in a taxation year, has a taxable capital gain or disposes of taxable Canadian property is generally required to file a Canadian tax return in respect of that year, unless no tax is payable by the non-resident for the taxation year or a prior taxation year and the taxpayer has either received a Section 116 certificate in respect of each disposition of taxable Canadian property during the year (as discussed below) or such dispositions were exempt from the Section 116 certificate requirements.

A non-resident corporation is required to file a Canadian tax return for any taxation year in which it carries on business in Canada directly or through a partnership. A non-resident individual carrying on business in Canada directly or through a partnership is also required to file a Canadian income tax return, but only in respect of a taxation year in which Canadian tax is owing by the non-resident on such business income.

The filing obligation generally applies regardless of whether the non-resident is entitled under an applicable tax treaty to relief from Canadian taxation.

Section 116 Certificates

There is a reporting and tax collection mechanism that applies to dispositions of most kinds of taxable Canadian property by non-residents. A non-resident vendor must notify CRA in writing of such a disposition, providing particulars of the transaction, and is entitled to obtain a certificate (commonly referred to as a “Section 116 certificate”) from CRA, upon satisfying CRA that no Canadian tax is owing (e.g., because there is no gain or because any gain is exempt under an applicable tax treaty), or by paying 25% of the gain to CRA on account of the ultimate tax liability or by posting acceptable security.

In addition, any person, whether a resident or non-resident of Canada, acquiring taxable Canadian property from a non-resident is required to withhold and remit to CRA 25% of the purchase price or, where the non-resident vendor provides a Section 116 certificate, 25% of the amount, if any, by which the purchase price exceeds the limit indicated in the Section 116 certificate. The rate is increased to 50% for certain types of property, including depreciable property (e.g.,

machinery and equipment, and buildings). If the property is “taxable Québec property”, an additional withholding applies, at a rate of 12% (30% where the 50% federal rate applies), and a separate certificate (equivalent to a Section 116 certificate) must be obtained from the Québec tax authority. Failure to obtain a satisfactory Section 116 certificate from the non-resident vendor or, in the alternative, to make the required withholding and remittance, will make the purchaser liable for the amounts that should have been withheld and remitted.

These requirements do not apply to certain excluded property, such as listed shares, units of a mutual fund trust, debt securities and any “treaty-exempt property” (as defined in the Tax Act). A purchaser is also exempt from the withholding obligation under Section 116 in respect of the acquisition of taxable Canadian property (other than certain specified taxable Canadian property, such as depreciable property) from a non-resident person where (i) the purchaser concludes after reasonable inquiry that the non-resident person is, under a tax treaty between Canada and a particular country, resident in the particular country, (ii) any gain from the disposition of the property would be exempt from Canadian income tax by virtue of such treaty and (iii) the purchaser provides CRA with notice of the acquisition within a specified period.

Notification requirements also apply in respect of dispositions of taxable Canadian property that is “treaty-protected property” to a related person.

GENERAL RULES

Determination of Income

In very general terms, income for purposes of the Tax Act means income from business or property, income from office or employment and taxable capital gains.

Income from business or property is generally equivalent to the profit from the business or property calculated in accordance with “well accepted principles of business (or accounting) practice” or “well accepted principles of commercial trading”, adjusted as required by specific rules in the Tax Act.

Income also includes one-half of the capital gain (referred to as the taxable capital gain) realized on a disposition of capital property, subject to reduction by allowable capital losses. The amount of the capital gain generally equals the proceeds of disposition less the sum of the “adjusted cost base” of the property under the Tax Act (roughly the cost of acquisition) and any costs of disposition. If capital cost allowance (tax depreciation) has been taken in respect of the capital

“ Income also includes one-half of the capital gain (referred to as the taxable capital gain) realized on a disposition of capital property, subject to reduction by allowable capital losses”

“ Various anti-avoidance rules may apply to limit the availability of losses, including those that may be utilized after an acquisition of control of a corporation ”

asset, part of the proceeds may be ordinary income (a recapture of the capital cost allowance previously claimed).

Employment income includes wages, bonuses and taxable employment benefits. Remuneration paid to directors constitutes income from employment. Deductions from employment income are very limited.

Employers are required to make regular “source deductions” for income tax and social security contributions from employees’ income (including taxable benefits) and remit the amount to the tax authorities on behalf of the employees. Directors of corporations may be personally liable if a corporate employer fails to make or remit source deductions. Employers may also be required to pay provincial payroll taxes.

The remainder of this section summarizes some key rules relevant to the computation of income for Canadian tax purposes and the taxation of common business entities.

Losses

Canadian rules do not permit formal loss consolidation or other relief within a corporate group; however, there are established techniques that have been accepted by CRA for shifting losses between members of the same corporate group, subject to certain limitations.

Non-capital losses of a taxpayer from business or property can generally be carried back three years or forward 20 years to reduce taxable income of the taxpayer. Losses incurred prior to 2006 are subject to more restrictive carry forwards.

Net capital losses may be carried back three years or forward indefinitely, but generally can be applied only against taxable capital gains.

Various anti-avoidance rules may apply to limit the availability of losses, including those that may be utilized after an acquisition of control of a corporation (or certain changes in the beneficiaries of a trust). The Tax Act was recently amended to deem a person or group of persons to have acquired control of a corporation in certain circumstances where the person or group acquires more than 75% of the fair market value of the corporation’s shares but does not acquire legal control of the corporation.

Interest Expense and Other Financing Costs

Reasonable interest expense on funds borrowed or indebtedness incurred for the purpose of earning income from business or property is deductible on an accrual or cash basis (depending upon the method regularly followed by the taxpayer).

Non-interest costs, including commissions and fees, incurred to borrow money or incur debt for an income-earning purpose or to issue treasury shares are generally deductible on a straight-line basis over five years.

Québec has legislation that limits the deductibility of financing costs to the amount of income generated by the investment. This rule applies only to individuals subject to tax in Québec.

Income from Shares

Taxable dividends received by a Canadian resident corporation from a “taxable Canadian corporation” are generally fully deductible to the recipient corporation (subject to certain anti-avoidance rules), permitting dividends to pass up through a chain of taxable Canadian corporations without taxation. A taxable Canadian corporation is generally a Canadian resident corporation incorporated in Canada that is not exempt under the Tax Act by reason of special rules applicable in limited circumstances (e.g., Crown corporations, pension corporations).

Dividends received by an individual are taxable, subject to the dividend tax credit, which reduces the effective rate of taxation on dividends paid by a taxable Canadian corporation and is intended to compensate (partially) for underlying corporate tax paid by the dividend payer. The dividend tax credit for certain “eligible dividends” more fully compensates individual shareholders for the underlying corporate tax paid.

Dividends received by a Canadian resident corporation from a non-resident corporation are included in income, subject to certain deductions permitted under the Canadian foreign affiliate rules and subject to the foreign tax credit rules. The foreign affiliate rules are complex, but, in general terms, provide that earnings from an active business carried on by a foreign affiliate in a jurisdiction with which Canada has a tax treaty, or in a non-treaty jurisdiction that has agreed to exchange tax information with Canada, may be repatriated to Canada free of Canadian tax. This regime affords some tax planning opportunities for Canadian-based multinational enterprises. Canada has 20 tax information exchange agreements currently in force, with several others either signed but not yet in force, or currently being negotiated.

Conversely, under the foreign affiliate rules, Canadian residents are required to include their share of the “foreign accrual property income” (passive income or income deemed to be passive) of a controlled foreign affiliate whether or not distributed to the Canadian resident.

Canadian residents are also required to include, in certain circumstances, an amount of deemed income in respect of an interest in any “offshore investment fund property”.

“ This regime affords some tax planning opportunities for Canadian-based multinational enterprises”

A shareholder of a Canadian private corporation, whether resident in Canada or non-resident, is generally entitled to the return of share capital free from Canadian tax (including Canadian withholding tax). This is an important planning point for non-residents acquiring shares of a Canadian private corporation, especially since capital may be returned without first distributing earnings and profits by way of dividend.

Depreciation

Taxpayers are permitted deductions (“capital cost allowance”) at prescribed rates in respect of depreciable property used in a business, including machinery and equipment, buildings and certain intangible property. Land is not eligible for tax depreciation. Capital cost allowance is generally computed by reference to the aggregate undepreciated capital cost of various asset classes and not the undepreciated capital cost of each individual asset.

A similar deduction is permitted in respect of eligible capital expenditures incurred for the purpose of earning income from a business, including purchased goodwill. The 2014 federal budget launched a consultation on a proposal to create a new class of depreciable property to replace the existing regime for eligible capital property.

Resource Expenditures

Canadian resource expenditures (other than expenditures related to the acquisition of tangible property, which would generally be treated as depreciable property) are classified as either Canadian oil and gas property expense (“COGPE”), Canadian development expense (“CDE”) or Canadian exploration expense (“CEE”). Expenditures related to the acquisition of Canadian oil and gas properties or rights (including oil sands properties) are generally classified as COGPE. Expenditures related to the acquisition of Canadian mining properties or rights are generally classified as CDE. Expenditures in respect of the exploration and development of Canadian resource properties are generally classified as either CDE or CEE.

Once classified as COGPE, CDE or CEE, the expenditures are added to the corresponding cumulative accounts. Subject to certain restrictions, a taxpayer may deduct in a taxation year 10% of its cumulative COGPE, 30% of its cumulative CDE and 100% of its cumulative CEE.

Some provinces, such as Québec, offer similar or additional incentives.

Capital Tax

The federal government imposes a capital tax on financial institutions at a rate of 1.25% of their “taxable capital employed in Canada” in excess of \$1 billion.

Corporate Reorganizations

The Tax Act permits many corporate reorganizations to be effected on a “rollover” or tax-deferred basis to shareholders. Some reorganizations, such as share-for-share exchanges, are relatively straight forward from a tax perspective, whereas others, such as tax-deferred spin-offs, have complex statutory and administrative restrictions.

Partnerships

Partnerships are common investment vehicles in Canada because they are generally flow-throughs for tax purposes. Although partnerships are not taxpayers *per se* under the Tax Act, a partnership is required to compute its income as though it were a taxpayer resident in Canada. Each member of the partnership includes in income the member’s allocable share of the income, gain or loss of the partnership. Special rules apply to limited partners that may, in certain circumstances, restrict their ability to claim losses of a limited partnership allocated to them.

Trusts

Unlike partnerships, trusts resident in Canada are taxable entities under the Tax Act. However, certain trusts, including personal trusts and mutual fund trusts, may be eligible for an offsetting deduction in respect of amounts distributed to beneficiaries. The effect of such rules is to reduce (or eliminate) tax at the trust level. Such distributions are generally taxable in the hands of the beneficiaries.

As previously noted, the Tax Act may deem non-resident trusts to be resident in Canada in certain circumstances.

SPECIFIED INVESTMENT FLOW-THROUGHS

The Tax Act includes rules related to the taxation of certain publicly traded trusts and partnerships referred to as “specified investment flow-through” entities or “SIFTs”. Under the SIFT rules, SIFTs and their unitholders are taxed in a manner similar to corporations and their shareholders. Certain real estate investment trusts (REITs) are exempt from SIFT taxation. Certain “cross-border” income trusts that invest in non-Canadian assets may also be exempt from SIFT taxation.

GENERAL ANTI-AVOIDANCE RULE

The Tax Act includes a broadly worded anti-avoidance rule (“GAAR”) to prevent “abusive avoidance transactions”. The rule supplements specific anti-avoidance rules in the Tax Act. GAAR is not intended to apply to a transaction that is undertaken primarily for *bona fide* purposes other than to obtain a tax benefit, or that does not result in an abusive tax avoidance. If GAAR applies, CRA may

“ Partnerships are common investment vehicles in Canada because they are generally flow-throughs for tax purposes”

“ The Canada-U.S. tax treaty generally eliminates withholding tax for payments of interest to non-arm’s length U.S. persons...”

re-determine the tax consequences of a transaction or series of transactions resulting in tax liability for one or more participants in the transaction(s).

The Tax Act also includes certain provisions which require the reporting of so-called aggressive tax planning transactions. These transactions include those in which two of the three following hallmarks are present: (1) the fees of the advisor or promoter are based or contingent upon a resulting tax benefit, or attributed to the number of participants or those offered an opinion or advice; (2) the advisor or promoter has “confidential protection” (i.e., there is an obligation not to disclose the transaction to third parties including tax authorities); and/or (3) any person, advisor or promoter receives “contractual protection” (i.e., any direct or indirect form of insurance against the tax risk of the transaction). Penalties for non-disclosure can be significant.

Québec has adopted similar rules, but in Québec taxpayers have the option of disclosing a transaction that would otherwise not be subject to the aggressive tax reporting rules. If it is unclear whether GAAR applies, such a preventive disclosure can have the benefits of shortening the reassessment period within which Québec can challenge the transaction under GAAR and precluding Québec from assessing a penalty in respect of GAAR.

SPECIAL RULES FOR NON-RESIDENTS

Withholding Tax

A person resident (or deemed resident) of Canada who makes a payment to a non-resident in respect of most types of passive income (including dividends, rent and royalties) is generally required to withhold tax equal to 25% of the gross amount of the payment.

Interest that is “participating debt interest” and interest paid or credited by a Canadian resident to a non-arm’s length non-resident person is also subject to withholding tax. Conversely, interest that is neither “participating debt interest” nor subject to the thin capitalization rules is exempt from withholding tax when paid to an arm’s length non-resident person. The Canada-U.S. tax treaty generally eliminates withholding tax for payments of interest to non-arm’s length U.S. persons that are entitled to the benefits of such treaty.

The 25% withholding rate may be reduced under an applicable tax treaty. For dividends, the typical treaty rate is 15%, except where the shareholder is a corporation that beneficially owns 10% or more of the voting shares of the dividend payer, in which case the rate is generally reduced to 5%. The typical treaty rate on royalties is 10% and may be reduced to 0% on certain royalties.

A partnership, any member of which is a non-resident, is itself deemed to be a non-resident under the Tax Act. Consequently, a payment by a Canadian

resident to a partnership with any non-resident members is subject to full withholding tax. However, in practice CRA may permit the payer to look through the partnership and withhold based on the residence and treaty status of the members of the partnership.

Although withholding tax is imposed on the non-resident recipient, the resident payer is required to deduct the tax and remit it to CRA on behalf of the non-resident, failing which the resident payer becomes liable for the tax. While it is not required by law, CRA expects Canadian payers to obtain Forms NR301, NR302 and/or NR303 (depending on the legal status of the non-resident payees) from non-residents in respect of which withholding tax rates are reduced by an applicable tax treaty.

A non-resident carrying on business through a Canadian branch may be deemed to be a resident of Canada for purposes of the withholding tax rules. The effect of these rules is to make certain payments made by the non-resident to another non-resident subject to Canadian withholding tax.

A 15% “back-up” withholding obligation is also imposed on payments made to non-residents in respect of services performed in Canada. This “back-up” withheld amount may be refunded or credited to the non-resident when it files a Canadian tax return. A similar 9% “back-up” withholding obligation applies to payments made to a non-resident for services performed in Québec.

Canadian Branch vs. Canadian Subsidiary

In general, from a Canadian income tax perspective, there is little difference between carrying on business through a Canadian branch of a non-resident entity and carrying on business through a wholly owned Canadian subsidiary. However, most branch assets are typically “taxable Canadian property” whereas shares of a Canadian subsidiary may not be (depending on the subsidiary’s assets). Consequently, the sale of a subsidiary is much less likely to be subject to the Section 116 certificate requirements discussed above than the sale of a branch. A non-resident branch performing services in Canada is also subject to the “back-up” withholding discussed above.

A Canadian incorporated subsidiary of a non-resident corporation is a Canadian resident for Canadian income tax purposes and is therefore subject to tax in Canada on its worldwide income. Certain types of payments (including dividends, rent and royalties) made by a subsidiary to its non-resident parent are subject to withholding tax as discussed above.

Similarly, Canadian tax will apply to the profits attributable to an unincorporated branch of a non-resident carrying on business in Canada. The allocation of items of income and expense between head office and the Canadian branch may be

“...the use of a ULC by a U.S. resident must be carefully considered and may require additional steps or intermediate entities in order to be beneficial”

unclear and can result in ambiguity in the computation of branch income for purposes of the Tax Act. In addition, the Tax Act imposes a branch profits tax on the profits of the Canadian branch not reinvested in Canada. The branch profits tax is intended to parallel the dividend withholding tax.

Hybrid Entities

Nova Scotia, Alberta and British Columbia corporate law permits the establishment of unlimited liability companies or “ULCs”. These entities are treated like regular Canadian resident corporations for Canadian tax purposes, but in the United States are eligible to be treated as flow-through entities for U.S. tax purposes. This dual or “hybrid” tax characterization can be a useful planning feature. However, as a result of specific provisions in the Canada-U.S. tax treaty, the use of a ULC by a U.S. resident must be carefully considered and may require additional steps or intermediate entities in order to be beneficial.

The Canada-U.S. tax treaty generally treats U.S. limited liability companies as a look-through for the purposes of applying the provisions of such treaty.

Capitalization of a Canadian Corporation

A Canadian corporation may be capitalized with equity or with a combination of debt and equity.

As noted above, share capital of a Canadian private corporation can generally be returned to shareholders free from Canadian tax, including Canadian withholding tax applicable to non-resident shareholders.

A distribution to a shareholder in excess of such share capital will be deemed to be a dividend for purposes of the Tax Act. Deemed dividends to non-resident shareholders are subject to withholding tax in the same manner and at the same rate (including any reduced treaty rate) as regular dividends.

Repayment of principal loaned to a Canadian corporation by a non-resident shareholder is not subject to withholding tax, but, where applicable, tax must be withheld in respect of interest paid or credited on the loan.

Subject to the thin capitalization rule discussed below and the general limitations on interest expense and losses described above, a Canadian subsidiary may deduct interest paid or credited by it to a non-resident in computing its income.

Thin Capitalization and Interest Imputation

The “thin capitalization rule” is intended to prevent a Canadian-resident corporation or trust, as well as a non-resident corporation or trust that carries

on business in Canada or earns rental income that is subject to tax on a net basis, or a partnership of which such a corporation or trust is a partner, from excessively reducing its taxable Canadian profits, and hence its liability for Canadian tax, by maximizing its interest expense to related non-resident creditors. In very general terms, the Canadian business is denied an interest deduction to the extent that its “relevant debt” exceeds 1.5 times its “relevant equity”. In certain circumstances, interest subject to the thin capitalization rules may be treated as a deemed dividend or trust distribution subject to withholding tax. The 2014 federal budget expanded these rules by including situations where a third party lends funds to the Canadian business and a relevant non-resident provides security for the loan or lends funds to the third party on a limited recourse basis, or on condition that a loan be made to the Canadian business. Accordingly, a secured guarantee by a foreign parent of the debts of a Canadian business is now subject to the thin capitalization rules. Unsecured guarantees are unaffected. Based on discussions with the Department of Finance, it is anticipated that the 2014 federal budget proposals will be scaled back in certain respects before they are issued in final form (which is expected to be later in 2014).

Conversely, where a Canadian resident corporation has made a loan to a non-resident and it is outstanding for one year or more, and the loan does not bear a reasonable rate of interest, interest income calculated at a prescribed rate on the principal amount outstanding is imputed by the Tax Act to the Canadian lender. Moreover, if the loan is made to a shareholder of the corporation or a person with which such shareholder does not deal at arm’s length (other than a foreign affiliate of the corporation), the principal amount of the loan may be deemed to be a dividend for Canadian withholding tax purposes.

Foreign Affiliate Dumping Rules

The 2012 federal budget introduced rules targeting so-called “foreign affiliate dumping” transactions occurring after March 29, 2012. The foreign affiliate dumping rules may apply to deem a non-resident controlled Canadian corporation to have paid a dividend for withholding tax purposes where it makes an investment in a foreign affiliate. Although there are many variations, foreign affiliate dumping generally involves a non-Canadian parent transferring shares of a non-Canadian subsidiary to a wholly owned Canadian corporation for inter-company debt and shares of the Canadian corporation. The issuance of shares by the Canadian corporation is generally to comply with the debt-to-equity thin capitalization limit. The interest on the inter-company debt is deductible by the Canadian corporation, but the income from the foreign subsidiary is generally exempt from Canadian taxation under Canada’s foreign affiliate system. This

“ The foreign affiliate dumping rules may apply to deem a non-resident controlled Canadian corporation to have paid a dividend for withholding tax purposes where it makes an investment in a foreign affiliate”

allows the Canadian corporation to use the interest expense on the inter-company debt to shelter income from its existing Canadian operations.

The debt dumping provisions apply where a Canadian corporation is controlled by a non-resident parent, the Canadian corporation makes an investment in a foreign corporation that becomes a “foreign affiliate” of the Canadian corporation, and the investment may not reasonably be considered to have been made by the Canadian corporation (rather than by the foreign parent or another foreign person that does not deal at arm’s length with the Canadian corporation) primarily for *bona fide* purposes other than to obtain a tax benefit. For these purposes, the term “investment” is defined broadly. Accordingly, due care must be exercised in any situation involving foreign affiliates. Where the rules apply, the consequences are as follows:

- The Canadian corporation is deemed to have paid, at the time it acquires the investment in the foreign subsidiary, a dividend to the foreign parent for withholding tax purposes in an amount equal to the fair market value of any non-share consideration paid by the Canadian corporation for such acquisition.
- No amount will be added to the Canadian corporation’s tax paid-up capital in respect of any shares issued by the Canadian corporation in consideration for the acquisition of the investment in the foreign subsidiary. This will prohibit any addition in the equity component of the debt-to-equity thin capitalization ratio, and will impede the ability to extract assets from Canada on a tax-efficient basis in the future.
- No amount will be reflected in the contributed surplus of the Canadian corporation as a result of the acquisition of the investment in the foreign subsidiary for the purposes of: (i) the debt-to-equity thin capitalization ratio; and (ii) the rules allowing for a conversion of contributed surplus to tax paid-up capital without triggering a deemed dividend.

TRANSFER PRICING RULES

Canada, like many other countries, employs transfer pricing rules to protect its tax base. The rules are designed to ensure that the income of Canadian taxpayers (and their corresponding Canadian tax liability) is not artificially reduced through non-arm’s length transactions with related non-residents.

The transfer pricing rules apply to Canadian residents and to non-residents carrying on business in Canada; therefore, these rules are potentially relevant to both Canadian subsidiaries (and parent companies) and Canadian branches.

The pricing of goods and the quantum of management fees, guarantee fees and royalties are common matters for transfer pricing scrutiny.

Where a Canadian taxpayer or a partnership participates in one or more transactions with a non-arm's length non-resident and either (i) the terms of the transactions differ from those that would have been made by arm's length persons or (ii) the transactions are not *bona fide* transactions entered into for non-tax purposes and would not have been entered into by arm's length persons, then CRA can make adjustments pursuant to the transfer pricing rules in the Tax Act, including imputing income or denying deductions.

In addition, penalties can be levied. Where a taxpayer's transfer pricing adjustments for a year exceed the lesser of \$5 million and the taxpayer's gross revenue for the year computed in accordance with the Tax Act, a penalty equal to 10% of the total transfer pricing adjustments applies unless reasonable efforts were made to apply arm's length terms. For these purposes, a taxpayer will be deemed not to have made reasonable efforts to apply arm's length terms unless the taxpayer makes or obtains complete records of the transactions establishing the appropriateness of the transactions from a transfer pricing perspective no later than the taxpayer's tax return due date (or in the case of a partnership, its annual information return due date). This rule is often referred to as the contemporaneous documentation requirement.

CRA has special audit powers in transfer pricing matters and can require that a taxpayer produce contemporaneous documentation within 90 days of CRA making a formal request. In recent years, CRA has become more aggressive in its auditing of transfer pricing records.

A Canadian corporation will be deemed to have paid a dividend to a non-arm's length non-resident (other than a controlled foreign affiliate), even where such non-resident is not a shareholder of the Canadian corporation, where an excessive transfer price has been paid, thereby decreasing the Canadian corporation's assets and increasing the non-resident's assets. However, a non-resident is allowed to repatriate the amount of the transfer pricing adjustment to avoid the withholding tax on the deemed dividend.

TAX INCENTIVES AND SPECIAL REGIMES

The federal government and many provincial governments provide tax incentives for certain business activities in the form of tax credits, reduced tax rates and accelerated write-offs of qualifying expenditures. In addition, special tax regimes may apply to certain undertakings, notably, as discussed above, the exploration and development of resource properties. The applicable rules and eligibility criteria are complex and beyond the scope of this summary; however,

“ In recent years, CRA has become more aggressive in its auditing of transfer pricing records”

some of the more common tax incentives available federally and in Ontario and Québec are noted below. In addition, the Tax Act provides reduced tax rates and certain other benefits to corporations that meet the definition of “Canadian-controlled private corporation” or “CCPC”, essentially a private Canadian corporation that is not controlled directly or indirectly in any way by one or more public corporations or non-residents or any combination of them.

Scientific Research and Experimental Development Incentives

The Tax Act contains generous incentives for “scientific research and experimental development” (“SR&ED”).

SR&ED means systematic investigation or search carried out in a field of science or technology that is basic or applied research or experimental development, including work with respect to engineering, design, operations research, mathematical analysis and testing. Some activities are explicitly excluded from SR&ED, including marketing, quality control, social science research, mineral or oil and gas exploration or production, commercial production and routine data collection.

SR&ED expenses incurred on income account generally include all expenses directly related to research and development, such as salaries, cost of materials consumed in SR&ED and the lease costs of equipment used in SR&ED. A portion of payments to Canadian resident corporations or other entities, such as universities, for SR&ED conducted in Canada on behalf of the payer can also generally be included in SR&ED expenditures. Certain SR&ED expenditures made outside Canada, namely, salaries and wages of Canadian-resident employees carrying on SR&ED outside Canada, in support of SR&ED carried on in Canada by the taxpayer, may also qualify.

Broadly speaking, SR&ED incentives take the form of immediate deductions for qualifying current and capital expenditures and a 15% investment tax credit that may be applied to reduce income tax owing. Investment tax credits may be carried over and applied in other taxation years subject to limits in the Tax Act. More generous SR&ED incentives are available to qualifying CCPCs, namely a 35% fully refundable tax credit for the first \$3 million of current SR&ED expenditures.

Provinces may also provide incentives for SR&ED carried on within their jurisdictions.

Québec provides for fully refundable income tax credits of up to 30% with respect to salaries paid to employees working on SR&ED projects undertaken in Québec. Other Québec incentives include a 28% tax credit for eligible expenditures for research carried out by a university or public research centre

and a tax holiday (*i.e.*, full or partial exemption from Québec income tax on employment income) for foreign researchers for up to five years.

In Ontario, an additional deduction is permitted for a portion of certain eligible SR&ED expenditures incurred by a corporation in Ontario, whether directly or through a partnership.

Ontario also provides incentives to corporate taxpayers with a permanent establishment (*e.g.*, a branch or office) in Ontario in the form of two refundable tax credits: the innovation tax credit (the “ITC”) and the Ontario business-research institute tax credit (the “OBRICT”). The ITC is designed to encourage small corporations to undertake SR&ED and is clawed back as the corporation’s paid-up capital or taxable income increases beyond certain thresholds.

Corporations with paid-up capital equal to or greater than \$50 million or taxable income equal to or greater than \$800,000 are not eligible for any amount of the ITC.

Subject to obtaining a ruling from the Ontario government before the expenditures are incurred, the OBRICT is generally available for expenditures of a corporation, incurred directly or through a partnership, pursuant to a research contract entered into between the corporation and an eligible research institute (*e.g.*, a university, college or non-profit research organization) in respect of eligible SR&ED carried on directly by the research institute in Ontario.

Film Tax Credits

The federal government and many provincial governments, including Ontario and Québec, offer an array of incentives for film and video production in Canada. Incentives may also be available for films and videos produced outside Canada where the production corporation incurs eligible labour expenditures in Canada or the relevant province.

Sales and Other Taxes

GOODS AND SERVICES TAX

General Rules

Canada imposes a 5% goods and services tax (“GST”) on the consumption or use in Canada of most tangible or intangible property and the supply of services. A parallel system of input tax credits (“ITCs”) is designed to ensure that intermediate users of goods and services receive a credit for the GST they pay, so that only the final consumer or end-user in the chain of supply effectively

bears the GST. GST is imposed under Part IX of the *Excise Tax Act* (the “ETA”) and is administered by CRA (except in Québec).

A person, whether resident in Canada or non-resident, who in the course of commercial activities makes a supply (defined in the ETA as a “taxable supply”) of property or a service in Canada is generally required to register for the GST unless the person’s aggregate annual worldwide taxable supplies do not exceed \$30,000 (taxable supplies of related parties must be considered for these purposes). Therefore, any non-resident that makes a taxable supply in Canada and has worldwide non-exempt sales of \$30,000 or more (including non-Canadian sales) will generally be required to register for the GST. For the purposes of the ETA, “person” is defined broadly to include, among other things, an individual, a corporation, a trust and a partnership.

Exempt Supplies

The supply of certain types of property and services, defined in the ETA as an “exempt supply”, is expressly exempted from the GST. The most common types of exempt supplies are:

- supplies of financial services (such as loans or securities transactions, including the sale or issuance of shares, and some related services);
- supplies (including sales and leases) of used residential real estate;
- certain supplies made by Canadian charities or other non-profit entities; and
- supplies of most medical and dental services.

Zero-Rated Supplies

The supply of certain types of property or services, defined in the ETA as a “zero-rated supply”, is treated as a “taxable supply”, but with the rate of tax being 0%, *i.e.*, no GST is charged. The principal categories of zero-rated supplies are:

- supplies of most forms of property or services for export;
- supplies of prescription drugs and basic groceries;
- supplies of certain agricultural products; and
- supplies of most forms of financial services to a non-resident.

Input Tax Credits

In general terms, a registrant engaged exclusively in making taxable supplies (including zero-rated supplies) is entitled to claim ITCs equal to all GST that the registrant has paid in connection with property or services acquired for consumption, use or supply in its commercial activities. Conversely, a supplier who is engaged exclusively in making exempt supplies is not entitled to claim ITCs. A registrant who makes both exempt and taxable supplies must allocate its GST expense reasonably between the two activities, and is generally permitted to claim ITCs only for the GST expense allocated to the making of taxable supplies.

Collection and Reporting

Although the GST is payable by the recipient, a supplier which is (or is required to be) a registrant for GST purposes is liable, in most cases, to collect and remit the GST payable by the recipient to the federal government on a periodic basis. The supplier may net its ITCs against the GST collected and thus remit only the balance (if any) to the federal government. If the supplier's ITCs exceed the GST collected in any reporting period, the federal government will refund the excess to the supplier.

GST and ITCs are calculated, reported and paid or refunded on a regular periodic basis. The reporting period of a registrant may be monthly, quarterly or annually, depending upon the registrant's revenues and whether the registrant elects to report on a more frequent basis than is otherwise required.

Other Commodity Taxes

Businesses involved in bringing goods into Canada, or manufacturing and selling goods in Canada, may also be affected, either directly or indirectly, by certain other taxes and duties imposed in Canada. Most products imported into Canada are subject to two types of commodity taxes in addition to the GST, namely customs duties and provincial sales tax. Products such as alcohol and tobacco are subject to additional excise duties.

PROVINCIAL SALES TAX

Every province except Alberta imposes a retail sales tax (commonly referred to as provincial sales tax or "PST"), or charges a harmonized sales tax ("HST") that is imposed on the same basis as, and includes, the GST described above,

or, in Québec, Québec sales tax (“QST”), discussed below. Currently, British Columbia, Manitoba and Saskatchewan impose PST. HST is charged at a rate of 13% in Ontario, New Brunswick and Newfoundland, 15% in Nova Scotia and 14% in Prince Edward Island. A vendor in the business of selling taxable goods or providing taxable services in any one or more of these provinces is generally required to obtain a vendor's permit from each relevant provincial government and to collect and remit sales tax on taxable sales within that province.

The Québec QST is a goods and services tax system, which closely parallels the concepts and provisions of the GST (including the requirement to register and collect tax). The Québec tax authority is responsible for the collection and administration of both GST and QST in Québec. QST applies at the rate of 9.975% for a combined rate with GST of 14.975%.

➔ Other Taxes — Property Taxes and Fees

LAND TRANSFER TAXES

Many provinces impose tax on the transfer of real property (including with respect to certain leasehold interests). Ontario transferees of real property are generally liable for land transfer tax at a rate of 1.5% of the consideration paid. Québec also levies a land transfer tax at similar rates. Certain deferrals and exemptions may be available in respect of land transfer tax, particularly in the context of qualifying inter-corporate transfers amongst affiliated corporations. Certain transfers of real property may also be subject to GST (and QST or HST depending on the relevant provincial jurisdiction).

The City of Montréal levies land transfer taxes at slightly higher rates than the rest of Québec.

The City of Toronto also imposes tax on the transfer of real property located in Toronto at a rate of up to 1.5%, which is in addition to the Ontario land transfer tax described above.

MUNICIPAL PROPERTY TAXES

Real property owners may also be subject to municipal property taxes and levies, generally based upon the assessed value of the property. The tax rates vary from one jurisdiction to another.

Appendix I: Canada's In-Force Tax Treaties

(current to June 1, 2014)

Algeria	Iceland	Peru
Argentina	India	Philippines
Armenia	Indonesia	Poland
Australia	Ireland	Portugal
Austria	Israel	Romania
Azerbaijan	Italy	Russia
Bangladesh	Ivory Coast	Senegal
Barbados	Jamaica	Serbia
Belgium	Japan	Singapore
Brazil	Jordan	Slovak Republic
Bulgaria	Kazakhstan	Slovenia
Cameroon	Kenya	South Africa
Chile	Korea	Spain
China (PRC)*	Kuwait	Sri Lanka
Colombia	Kyrgyzstan	Sweden
Croatia	Latvia	Switzerland
Cyprus	Lithuania	Tanzania
Czech Republic	Luxembourg	Thailand
Denmark	Malaysia	Trinidad & Tobago
Dominican Republic	Malta	Tunisia
Ecuador	Mexico	Turkey
Egypt	Moldova	Ukraine
Estonia	Mongolia	United Arab Emirates
Finland	Morocco	United Kingdom
France	Netherlands	United States
Gabon	New Zealand	Uzbekistan
Germany	Nigeria	Venezuela
Greece	Norway	Vietnam
Guyana	Oman	Zambia
Hong Kong	Pakistan	Zimbabwe
Hungary	Papua New Guinea	

*Excluding Hong Kong, with which Canada has a separate treaty.

09

Industrial and Intellectual Property

09

Industrial and
Intellectual
Property

Canadian legal principles regulating intellectual property are generally similar to those in most other industrialized countries and those of WTO members. There are some notable exceptions, however, that can affect the protection of intellectual property rights in Canada. Most matters relating to intellectual property in Canada, including registration of rights, are administered by the Canadian Intellectual Property Office (“CIPO”).

In January 2014, the Canadian government tabled in Parliament five important international treaties related to intellectual property. These treaties include the *Madrid Protocol*, the *Singapore Treaty* and the *Nice Agreement* relating to trade-marks, the *Hague Agreement* relating to industrial designs, and the *Patent Law Treaty* relating to patents. In March 2014, the Canadian government also introduced new legislation proposing major amendments to the *Trade-marks Act* in order to align Canadian laws with these new international treaties when they are ratified and come into force.

These proposed amendments are consistent with other recent legislative changes introduced by the Canadian government regarding enforcement of copyright and trade-mark rights and new anti-counterfeiting legislation, including new border measures, new civil causes of action and new criminal offences, designed to better protect intellectual property rights in Canada.

“ Canadian legal principles regulating intellectual property are generally similar to those in most other industrialized countries and those of WTO members”

Patents

Canadian patents are governed by the federal *Patent Act*, which is generally consistent with patent legislation in other countries that, like Canada, are signatories to the *Paris Convention for the Protection of Industrial Property* and the *Patent Cooperation Treaty*. Canada is also a signatory to the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (“TRIPS”) and is in the process of adhering to the *Patent Law Treaty*.

To be the subject matter of a Canadian patent, an invention must be novel and useful, and must not be obvious to a person skilled in the particular art or subject matter of the invention. The invention may be any new and useful product, process, machine, composition of matter or any improvement thereof. In certain specific cases, computer-implemented inventions could be patentable in Canada if they provide functional and useful results, and are not merely the calculation of an algorithm. Applications for patents of medicines entail their own special regime that includes a number of specific reporting and pricing requirements.

To be novel, an invention and the related claims of the patent must not have been previously disclosed or published in Canada or anywhere else in the world.

“ Once a patent is granted, and subject to the payment of annual fees, it remains valid for a non-renewable term of 20 years from the date of the filing of the application in Canada ”

As such, any public disclosure of an invention, more than 12 months before the filing date of a Canadian patent application, could be a bar to patentability.

To be useful, an invention must be workable and of industrial value. For example, a scientific principle or abstract theorem cannot be the subject matter of a patent.

Lastly, an invention must not be obvious to someone skilled in the relevant art or subject matter, taking into consideration the state of knowledge and prior art existing in that area at the time of the invention, without the benefit of hindsight.

Patents are normally granted to an original inventor or to his or her legal representatives or assignees. Companies that employ inventors or are actively involved in research and development should therefore clarify the ownership of any potential or future inventions in written agreements with those individuals or employees likely to participate in the creative process. In addition, a patent is granted on the basis of the first to file, unlike the first to invent rule applied in some other jurisdictions. Because of the importance of the filing date of an application, an applicant should make every effort to file at least the minimum permitted information as early as possible.

Once a patent is granted, and subject to the payment of annual fees, it remains valid for a non-renewable term of 20 years from the date of the filing of the application in Canada. The patentee enjoys exclusive rights to make, construct or use the invention that is the subject matter of the patent, and to enjoin others from doing so. These exclusive rights may be assigned or licensed by the patentee. Any such assignment or licence should be in writing and recorded with CIPO.

A patentee can bring a civil action for infringement of its patent rights. Available remedies may include an injunction, damages or an accounting for profits resulting from the infringement. In some cases, the court may also grant punitive damages.

There is no requirement in Canada that a product be marked as patented, although it may be prudent to do so, in order to give notice of the existence of a patent to third parties. However, it is a criminal offence to mark an article as “patented” if it has not been patented in Canada.

Trade-Marks

Canadian trade-marks are governed by the federal *Trade-marks Act*. Canada is a signatory to the *Paris Convention* and TRIPS, and is in the process of adhering to

the *Nice Agreement* related to the classification of goods and services and the *Madrid Protocol* related to international filing of trade-mark applications.

In Canada, unlike many other countries, trade-mark rights can exist from the usage of a mark in commerce alone, without registration. An unregistered mark may therefore prevent subsequent use or registration by another person of a confusingly similar mark, if the prior user can prove that its mark is distinctive and has acquired goodwill through use in the same trading area in Canada. However, unregistered trade-mark rights can be limited in scope and, at times, more difficult to enforce. As such, registration of a trade-mark in Canada is always advisable.

To be registered, a trade-mark must be distinctive of the unique and single source of the products or services for which it is used. As such, registration may be refused if a mark is the name or surname of an individual, is deceptive or merely descriptive, or if it is confusing with another trade-mark or trade name that was previously used or registered in Canada. Trade-marks which are not initially distinctive may become registrable through extended use in Canada, so as to have acquired recognition and distinctiveness in Canada.

The proposed new legislation introduced in March 2014 suggests that evidence of use of a mark in Canada will no longer be required to secure registration, regardless of whether or not an applicant has registered and used its mark abroad. This constitutes a significant departure from existing legislation.

However, if a mark is not used in commerce in Canada for a period of three consecutive years following registration, and if such non-use cannot be excused, the registration may be cancelled, at the request of any third party.

Generally, once a trade-mark application has been examined, and if no successful opposition is filed, the mark will be registered for a term of 15 years, which may be renewed for an indefinite period of time so long as the mark is used in commerce in Canada and remains distinctive. Under the proposed new legislation, this period of protection would be reduced to 10 years, but would remain renewable. Once registered, the owner of a Canadian trade-mark is granted the exclusive right to use the mark throughout Canada, irrespective of the extent or area of use in Canada.

Trade-marks may be assigned or licensed to third parties. A written licence agreement is generally advisable. In order to maintain the distinctiveness of a licensed trade-mark, the trade-mark owner must exercise direct or indirect control on the quality of products manufactured and sold or services offered by its licensee. To the extent that the existence of the licence is made public, for example by written notice, there is a presumption that the use of the trade-mark by the licensee is lawful and within the control of the owner.

“ In Canada, unlike many other countries, trade-mark rights can exist from the usage of a mark in commerce alone, without registration”

The owner of a trade-mark may bring a civil action for infringement of its trade-mark rights, acts of passing-off or unfair competition and can seek remedies including an injunction, damages or an accounting of profits resulting from the infringement, punitive damages or any other order deemed appropriate by the court.

While there are no requirements regarding the markings of products or services protected under a registered trade-mark in Canada, symbols such as “TM” or “®” are often used to give notice to third parties of the existence of trade-mark rights. However, the ® symbol should not be used unless the mark is registered in Canada.

➔ Copyright

Canadian copyrights are governed by the federal *Copyright Act*. Canada is a signatory to the *Berne Convention for the Protection of Literary and Artistic Works*, TRIPS and other World Intellectual Property Organization treaties and conventions related to copyrights.

Copyright arises automatically in Canada upon creation of the work, in respect of any original literary (including computer software), dramatic, musical or artistic work, including a compilation, and in a sound recording, provided that the work created is original and has been fixed on a permanent support. Copyright can be granted if the author of the work is a citizen or subject of, or ordinarily resident in, a country that is a party to the *Berne Convention* or a member of the WTO.

Registration of copyright is not mandatory to confirm the existence of a copyright, but does serve as *prima facie* evidence of copyright ownership, and strengthens the remedies available to a party whose copyright is infringed. The *Copyright Act* also provides a system for the registration of copyright interests and assignments or licensing of copyrights. Assignments or licences must be in writing and recorded to be enforceable against third parties.

In most cases, the author of the work is the initial owner of the copyright. The most prominent exception to this rule is that copyright in works created in the course of employment belong initially to the employer, unless there is an agreement to the contrary. In the case of an independent contractor or consultant, it is advisable to stipulate ownership of the copyright in a written agreement.

The existence of a copyright gives the copyright holder an exclusive right to use, publish, produce, reproduce, translate, broadcast or adapt the copyright works, to perform or cause them to be performed in public and to give the right to others to do any of those rights and commercially exploit the work covered by the copyright. Generally, copyright exists in Canada for the life of the author and

“ Generally, copyright exists in Canada for the life of the author and 50 years following the end of the year of his or her death ”

50 years following the end of the year of his or her death. Different criteria are applied to determine the duration of copyright in certain types of works, such as photographs, sound recordings, posthumous works and jointly authored works.

In addition to the rights mentioned above, the *Copyright Act* gives authors certain moral rights. These include the right of an author or creator to claim authorship of the work and the right of integrity of the work; that is, the right to restrain or sue for damages in respect of any distortion or modification of the work, which prejudices the integrity or reputation of the creator. Moral rights exist for the same term as copyright in the work. They belong to the author alone and may not be assigned, although they may be waived in whole or in part. The assignment of a copyright in a work does not by itself constitute a waiver of any moral right.

The *Copyright Act* also establishes a regulatory framework for the collective administration of performing rights, including a compulsory licensing scheme to collect royalties for distribution of a work to the public by telecommunications media.

Infringement of copyrights can give rise to criminal sanctions, fines and civil actions for relief including an injunction, damages (including statutory damages), an accounting of profits resulting from the infringement and punitive damages.

Marking of copyright material is not essential in Canada, but it may be prudent and is required in order to obtain copyright protection under certain international treaties.

Domain Names

The Canadian Internet Registration Authority (“CIRA”) is responsible for the “.ca” system, which is governed by Canadian law. The “.com” domain name system, which designates commercial activities, is governed and managed by the United States under American law.

In order to be eligible to register a “.ca” domain name, “persons”, including both private individuals and companies, need first to meet certain Canadian presence requirements. These include holding Canadian citizenship or permanent resident status in the case of individuals, and being incorporated under the laws of Canada or any of Canada’s provinces or territories, in the case of companies. This is done to ensure that the “.ca” domain names remain a public resource for Canadians’ social and economic development. A person which does not meet these Canadian presence requirements, but which nonetheless owns a registered trade-mark under Canada’s *Trade-marks Act*, may also register for a “.ca” domain name providing that the domain name consists of or includes the exact word component of that registered trade-mark.

Registration is on a “first-come first-served” system, which no longer requires evidence of entitlement to a proposed domain name. However, the registrant of a domain name must ensure that the domain name does not violate any third party’s intellectual property rights, does not defame any person and does not contravene any applicable laws. Canadian companies and Canadian individuals are free to register as many domain names as they wish.

Registration of a “.ca” domain name does not give the registrant any additional rights, other than, possibly, common law trade-mark rights that may exist or be created through commercial use of the domain name, beyond the mere right to use the name as a domain name.

CIRA has a dispute resolution policy that regulates domain name conflicts and has the power to transfer or cancel domain name registrations.

Industrial Design

Canadian industrial designs are governed by the federal *Industrial Design Act* and are also protected under the *Paris Convention* and TRIPS. Canada is also in the process of adhering to the *Hague Agreement*.

“Industrial design” generally refers to any 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, excluding any utilitarian features, which have a fixed appearance and are visible at the time of purchase or during normal use.

Registration is mandatory for the protection of industrial designs. In addition, no registration can be obtained if the industrial design application is filed more than 12 months after making the design public or offering it for commercial use. This includes distributing samples of an article bearing the design, selling or exhibiting such articles for sale, publishing the design in advertising or other printed material of any sort, or public use of articles bearing the design.

Subject to payment of the maintenance fee, registration grants an exclusive right to make, sell, rent, license or import for trade or business the design applied to any article for which it is registered, for a period of 10 years. In certain cases, designs may also be eligible for protection under trade-mark or copyright legislation. An industrial design registration protects not only the specific design registered, but also any design not differing from it.

Industrial designs may be assigned or licensed. However, such assignment or licence must be in writing and be recorded with CIPO.

The owner of a registered industrial design may bring a civil action for infringement of the design and may obtain remedies including an injunction,

damages, an accounting for profits resulting from the infringement or punitive damages.

Though marking an article embodying a registered design with notice of the registration is not required, it may be helpful in a court proceeding for infringement, especially to counter a defence that the infringer was not aware, and had no reasonable grounds to suspect, that the design was registered. The article or its label or packaging can be marked with a capital “D” in a circle, together with the name, or an abbreviation of the name, of the design’s registered owner.

➔ Other Forms of Protection

Certain other specialized intellectual property rights are provided for in other federal statutes, including the *Plant Breeders’ Rights Act* and the *Integrated Circuit Topography Act*.

➔ E-Commerce

Canada has taken initiatives to create a legal and regulatory infrastructure that fosters the growth of e-business and Internet activity, including increasing Canada’s e-government capabilities, enacting federal and provincial legislation concerning privacy protection and electronic transactions and pursuing a wide range of regulatory policy initiatives.

All of the provinces of Canada and one territory have passed electronic commerce-enabling legislation in order to normalize the legal rules applicable to documentary communication, irrespective of the medium used. This legislation usually addresses issues related to electronic document equivalency and reliability, digital signatures and electronic record creation, maintenance and retention. In addition to provincial legislation, the federal government has enacted the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”), which, among other things, deals with electronic documents and governs the rules applicable to the use of “electronic alternatives ... where federal laws contemplate the use of paper to record or communicate information or transactions”. PIPEDA also deals with data protection and privacy, as is discussed further below.

As long as the general legal principles of contract formation are adhered to, laws in Canada concerning the creation of contractual obligations are generally media-neutral. However, legal issues may arise with regard to whether enforceable contracts can be formed through such on-line contracting methods as “click-wrap” or “browse-wrap” agreements. Businesses should consult their

“ ...legal issues may arise with regard to whether enforceable contracts can be formed through such on-line contracting methods as ‘click-wrap’ or ‘browse-wrap’ agreements”

legal advisors before putting into place such on-line contracting methods so as to ensure that they comply with the requirements of an enforceable contract under Canadian law.

Advertising on the Internet is subject to the provisions of the *Competition Act*, which impose a dual criminal and civil adjudicative regime (see the Competition Law section of this Guide). In addition, other statutes, such as the *Food and Drugs Act*, provincial consumer protection legislation and, in Québec, the *Charter of the French Language*, provide specific restrictions on the content and style of an advertisement in relation to certain classes or types of products. For example, under the *Charter of the French Language*, the advertisements for products available in Québec posted on the website of a company having an address or a physical establishment in Québec must be available in French. However, advertisements for products such as cultural or educational products (i.e., books, CDs, etc.) may be exclusively in a language other than French, provided that the products themselves are in that other language.

Canada’s Anti-Spam law (“CASL”) was proclaimed in force July 1, 2014. CASL is designed to be one of the strictest anti-spam laws in the world, in order to protect consumers and businesses from dangerous forms of spam. Spam, which is the word used to refer to unsolicited commercial e-mail, has been estimated as constituting 86% of all e-mail worldwide. A drain on both business and personal productivity, spam is considered a threat to consumer confidence in the e-commerce marketplace. CASL is not limited to counteracting spam; it also regulates activities that are perceived to discourage the use of electronic means of carrying out commercial activities, such as downloading computer programs and the harvesting of e-mail addresses. CASL contains provisions that prohibit the sending of commercial electronic messages (including e-mail, text messages, instant messages and other electronic messages sent with a commercial purpose) without the prior consent of the intended recipient. It also prohibits the unauthorized installation of computer programs on another’s computer system, the altering of transmission data in an electronic message and other activities that could impact upon electronic commerce. CASL is aimed at punishing the senders of electronic messages and perpetrators of activities originating in Canada or affecting Canadian residents that involve identity theft, phishing, pharming, spyware and other forms of fraud or the misleading of consumers. CASL requires express opt-in consent (in contrast to PIPEDA, discussed below, under which opt-out consent and implied consent can be permissible in some circumstances). CASL provides for both administrative monetary penalties of up to \$10 million for corporations and \$1 million for individuals to be imposed on offenders. CASL also provides for a private right of action (coming into effect in 2017), which will permit consumers and businesses to commence enforcement proceedings and recover damages of up to \$1 million per day.


CASL will be phased in over three years, with the commercial electronic message provisions coming in effect since July 1, 2014. CASL and the regulations made under it contain detailed requirements and rules on matters such as the form of electronic messages, exemptions from the consent requirement and inclusion of a mandatory unsubscribe mechanism in such messages. Businesses should consult with counsel to understand the highly complex provisions of CASL and its impact on their operations in Canada.

Data Protection and Privacy

PIPEDA applies to the collection, use and/or disclosure of personal information in the course of any commercial activity within Canada. “Personal information” means information about an identifiable individual, but does not include the name, title or business telephone number of an employee of an organization (commonly referred to as “business card” information). “Commercial activity” means “any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists”. Businesses are required to establish an administrative structure to ensure that 10 “privacy principles” are implemented: (1) accountability; (2) identification of the purpose for which the information is gathered; (3) consent; (4) limitations on collection; (5) limitations on use, disclosure and retention; (6) accuracy; (7) ensuring appropriate safeguards are in place; (8) openness; (9) individual access; and (10) challenging compliance. These principles are based on the international OECD *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*.

Under PIPEDA, private sector businesses are required to implement privacy policies in respect of the collection, use and disclosure of personal information and to make those policies available to their customers. In addition, PIPEDA requires businesses to make the information collected about individuals available to them upon request.

PIPEDA applies in all provinces of Canada (including Ontario) other than those provinces that have enacted privacy legislation that the federal government has determined to be substantially similar to the privacy provisions of PIPEDA. Québec, Alberta and British Columbia have all enacted legislation, which has been determined to be substantially similar. The provincial legislation enacted in those provinces applies to the collection, use and disclosure of personal information for private sector businesses in those provinces that are not federal works. PIPEDA continues to apply to entities in those three provinces that are federal works (such as banks, railways and telephone companies). This includes information both originating from and received in Québec, British Columbia or Alberta. While PIPEDA does not apply to organizations with respect to the

 **PIPEDA applies to the collection, use and/or disclosure of personal information in the course of any commercial activity within Canada”**

“ This proposed amendment addresses a significant gap in PIPEDA that has made due diligence and the completion of business transactions difficult ”

collection of employee information unless the organizations are federal works, such information is protected under the equivalent provincial privacy legislation. Organizations located in Yukon, Nunavut and the Northwest Territories are considered to be federal works, undertakings and businesses for the purposes of PIPEDA. Most provinces also have specific legislation governing the privacy of personal health information.

There is currently a bill before Parliament, Bill S-4, to amend PIPEDA in several important ways, including clarifying what is business contact information and what is personal contact information. Currently, the definition of “personal information” excludes certain business contact information, but that list of exclusions does not include a person’s business e-mail address. In one complaint to the federal Privacy Commissioner, the use of a person’s business e-mail address without his consent was found to be contrary to the requirements of PIPEDA. The PIPEDA amendments address this anomaly and create a new “business contact information” definition that includes a person’s business e-mail address. This new definition is coupled with a new statutory provision, which states that Part 1 of PIPEDA does not apply to business contact information if this information is collected, used or disclosed “solely for the purpose of communicating or facilitating communication with the individual in relation to their employment, business or profession”.

Bill S-4 includes an exception for use and disclosure of personal information without the knowledge or consent of the individual for the purpose of a prospective business transaction. Generally, the exception would permit the use and disclosure of personal information without consent when the information is necessary for the parties to decide whether to proceed with the transaction and, if they have decided to do so, the information is necessary to complete the transaction; and the parties have entered into a confidentiality agreement that requires the recipient to (i) use and disclose personal information only for purposes related to the transaction; (ii) use appropriate security safeguards to protect personal information; and (iii) return or destroy personal information if the transaction is not concluded. The business transaction exception also imposes further requirements once the transaction is completed, including restrictions on use and disclosure, and an obligation to notify persons whose information may have been transferred. This proposed amendment addresses a significant gap in PIPEDA that has made due diligence and the completion of business transactions difficult.

Following the lead of many U.S. states, the proposed amendments to PIPEDA would provide for a data breach notification protocol. Organizations would be required by the amendments to report to the federal Privacy Commissioner any “material” breaches of security safeguards in relation to personal information under their control. Materiality is to be judged in relation to the sensitivity of the

information at risk, the number of persons whose information has been affected and whether or not the breach was an isolated incident or part of a systemic problem. Organizations are directed to consider various factors (such as the sensitivity of the personal information involved and the probability of misuse of the information) in making their own determination about whether to notify affected individuals. The amendments would also impose a positive obligation on organizations to notify other organizations or government institutions that may be able to reduce the risk of harm emanating from the breach, if certain conditions, to be set forth in regulations, are satisfied.

PIPEDA requires informed consent to collect, use or disclose an individual's personal information. The validity of the consent is currently interpreted in the light of the "reasonable expectations" of the individual from whom it is sought. Bill S-4 seeks to clarify this provision by providing that consent will be valid only if it is reasonable to expect that the individual providing it understands "the nature, purpose and consequences of the collection, use or disclosure of personal information" to which they are consenting.

10

Real Estate

10

Real Estate



Canada occupies an immense geographical area totalling 9,976,000 square kilometres, or 3,851,000 square miles. With a growing population and extensive land available for commercial, industrial, residential and recreational development, Canada attracts substantial foreign investment in property.

In general, each province has jurisdiction over the ownership, use and development of real property within its boundaries, with a few exceptions that are under federal jurisdiction, such as lands reserved for Canada's Aboriginal peoples, national parks, military reserves and harbours. Provincial real property law has evolved from English common law principles, except for Québec, where real property is governed by the *Civil Code of Québec*.

→ Land Titles System

Most provinces in Canada record land ownership under a computerized land titles system (under which title to real property is certified by the land registrar) or are converting from a registry system (under which title is not certified) to the land titles system. Newfoundland and Prince Edward Island are still under the registry system. The Québec system allows both paper and electronic registration, but does not provide for certification of title by the land registrar.

Ontario has 54 land registry offices, which register, store and manage documents such as transfers, charges and plans of surveys. It is the first jurisdiction in the world to provide electronic registration of land-related documents, with electronic registration being mandatory in some, but not all, regions in Ontario.

In Ontario, electronic land registration replaces the need to register paper documents at a land registry office. Using specialized software called Teraview, documents are registered electronically and signatures are affixed electronically by the parties' representatives. Representatives are authorized to electronically sign, complete and register the documents. Documents prepared and submitted by authorized users of the Teraview system on behalf of other parties are deemed to be documents of those other parties.

→ Land Ownership Structures

Most land in Canada is held in fee simple or its equivalent in Québec (absolute ownership for an indefinite duration) rather than on a leasehold basis (tenure where one party has the right to occupy a property for a fixed duration).

“ Provincial real property law has evolved from English common law principles, except for Québec, where real property is governed by the *Civil Code of Québec*”

“The REIT structure has grown in popularity over the past decade, as REITs provide a number of advantages to both real estate companies and REIT unitholders”

USE OF NOMINEES

For a variety of reasons, beneficial owners of real property may wish to use a separate entity – usually a single purpose corporation – to hold registered title to the property as bare trustee or nominee (mandatary in Québec). For example, the beneficial owner may not be a legal entity that is capable of holding title in its own name, or may be a joint venture between multiple parties. Other advantages are the ability to keep the identity of the beneficial owner confidential and to transfer beneficial ownership without having to register such transfer on title. The nominee corporation will usually be named as the purchaser or vendor, mortgagor or mortgagee or lessor or lessee in all agreements pertaining to the property.

In general, a declaration of trust or nominee agreement will be entered into to document the relationship between the bare trustee or nominee (or mandatary) and the beneficial owner. A bare trust or mandate exists where the only function of the nominee is to hold property for the beneficiary and to deal with the property only in accordance with directions from the beneficiary.

REAL ESTATE INVESTMENT TRUSTS (REITS)

A REIT is a special form of business trust established to invest in real estate, often through the direct acquisition of income-producing real estate assets. In addition to investing in income-producing properties, REITs may also buy, develop, manage and sell a wide variety of real estate assets. Investors in the REIT are usually issued units, which represent an undivided beneficial interest in the REIT assets and a corresponding share of the income and losses of the REIT.

The REIT structure has grown in popularity over the past decade, as REITs provide a number of advantages to both real estate companies and REIT unitholders. These include favourable tax treatment and improved tax efficiency on distributions to unitholders (see the Tax Considerations section of this Guide), improved access to equity markets for real estate companies and a generally stable stream of income with the potential for high yield capital growth for real estate investors.

JOINT VENTURE STRUCTURES

Commercial real estate properties may also be held through a joint venture structure. A joint venture is not a specific type of legal entity, but describes various relationships between two or more parties through which they can jointly own and manage property. There are several alternative joint ownership legal structures, the most common being joint venture corporations, partnerships and co-ownerships or co-tenancies (these are described in the Types of Business Organizations section of this Guide).

A joint venture corporation owns the assets of the venture. The parties hold shares in the corporation and usually enter into a shareholders' agreement to govern their relationship. Joint venture corporations provide many of the same advantages as corporations in general, including limited liability, ease of administration and certainty of legal rights and obligations.

A joint venture may also hold property through either a general or a limited partnership. A partnership, unlike a corporation, is not a separate legal entity, which may enable the flow-through of losses to the partners for tax purposes. Another advantage of a partnership structure is its flexibility, as the partnership agreement can provide freely for the allocation of profits and losses between the partners and other aspects of their relationship.

Another common structure for real estate joint ventures is a co-ownership or co-tenancy. Each co-tenant or co-owner has an undivided ownership interest in the joint venture property. Co-tenants or co-owners will typically enter into a co-ownership agreement which governs their relationship and the ability of each party to deal with its interest. Unlike a partnership, each co-tenant or co-owner has no right to act as an agent for any other co-tenant or co-owner and is not liable for the debts of other co-tenants or co-owners.

Foreign Ownership

In general, Canada does not impose significant restrictions on foreign ownership of real property. Pursuant to the federal *Citizenship Act*, a non-resident can acquire, hold and dispose of real property in the same manner as a Canadian citizen or resident. However, provinces may restrict the acquisition of land by foreign individuals or corporations.

In Ontario, the *Aliens' Real Property Act* grants non-citizens the same rights as Canadians to hold or dispose of real property. Under the *Extra-Provincial Corporations Act*, a corporation incorporated outside Canada must obtain an extra-provincial licence to acquire, hold or convey real property in Ontario, but such licences are easily obtained.

In Québec, pursuant to *An Act respecting the acquisition of farm land by non-residents*, non-residents of Québec cannot acquire farm land unless they receive the authorization of the Commission de protection du territoire agricole du Québec, the authority in charge of preserving agricultural land in Québec. Some other provinces have similar restrictions to preserve agricultural land.

“ In general, Canada does not impose significant restrictions on foreign ownership of real property”

“Land use planning is the responsibility of provincial governments and is supervised at the provincial level, but significant planning functions are typically delegated to regional governments and municipalities”

→ Land Use Planning

Land use planning is the responsibility of provincial governments and is supervised at the provincial level, but significant planning functions are typically delegated to regional governments and municipalities.

In Ontario, the *Planning Act* provides the principal means for the government to control the development and use of land. Land use is controlled through such instruments as the official plan (a long-range general plan for a region or municipality) and zoning by-laws (which regulate, for each parcel of land in the municipality, the uses permitted and other matters such as required parking and the type, size, height and location of buildings and structures). For a purchaser of land, both the official plan and particular zoning by-laws are crucial. Most municipalities require that site plans be approved before the construction of any new development. Site plans set out the details of a development, including the location of buildings and related facilities, such as landscaping, services, driveways and parking spaces. Most municipalities also require the developer to enter into an agreement ensuring construction and ongoing maintenance in accordance with the site plans.

In Ontario, any subdivision of land requires the consent of the local committee of adjustment or subdivision control committee pursuant to the *Planning Act*. This requirement also applies to a mortgage, or the grant of any other interest in land (such as a lease) for 21 years or more (inclusive of all renewals), where the mortgage or interest is granted over only part of a landholding. The failure to obtain such a consent when otherwise required will result in the failure of the deed, mortgage or lease to create any interest in the real property. Although there are a number of exemptions to the requirement for consent, most contracts for the purchase of real property in Ontario are made subject to any required consent. The cost and responsibility for obtaining such consent is usually allocated to the vendor. A developer wishing to subdivide land and sell lots may be required to submit a draft plan of subdivision for approval. Normally, the municipality will require the developer to enter into development agreements with it, whereby the developer agrees to provide sewers, roads and other services for the subdivision, the dedication of certain lands for public use and certain other public benefits.

In Québec, under *An Act respecting land use planning and development*, each regional county municipality adopts a development plan setting out general land development and land use policies. The council of each municipality within the regional county municipality has the power to adopt zoning, subdivision and building by-laws, but these by-laws must be consistent with the objectives of the development plan. Municipal councils may impose certain conditions for the approval of subdivisions, such as minimum lot areas and dimensions and

provisions for rights-of-way. Similarly, metropolitan communities in Québec adopt metropolitan land use and development plans setting out general policies which are implemented in detail by cities.

➔ Title Insurance, Title Opinions and Due Diligence

When an agreement of purchase and sale is signed, it is generally the responsibility of the purchaser (through its lawyer) to conduct due diligence on the property. This will generally include title and zoning searches, off-title searches and inquiries and a review of all leases, surveys and other agreements associated with the property.

The traditional approach in most commercial real estate transactions in Canada was for purchasers and lenders to receive title opinions from their lawyers in respect of any property that was being acquired or mortgaged. A title opinion would be based on the title search, off-title inquiries and other due diligence investigations conducted by the lawyer. If a defect in title was not addressed in such an opinion and a loss was suffered, the purchaser or lender could sue its lawyer for negligence or breach of contract, in addition to its remedies against the vendor or mortgagor.

In recent years, Canadian lenders and purchasers are increasingly accepting title insurance policies in lieu of title opinions. In a typical title insurance policy, there is a duty on the title insurer to indemnify or reimburse the insured for any actual losses suffered as a result of a defective title, as well as a duty to defend and pay the legal defence costs and expenses in the event of a claim that threatens the insured's title to the property.

“ In recent years, Canadian lenders and purchasers are increasingly accepting title insurance policies in lieu of title opinions”

➔ Regulation of Real Estate Brokers

Real estate brokers are regulated by each province in Canada. In Ontario, real estate brokers are governed by the *Real Estate and Business Brokers Act, 2002*. The Act is administered by the Real Estate Council of Ontario (“RECO”). Subject to certain exceptions, such as Canadian financial institutions, the Act requires a person who trades in real estate to be registered as a brokerage, broker or salesperson.

A brokerage is defined in the Act as an entity trading in real estate for reward. A broker or salesperson is an individual employed by a brokerage in such capacities. No broker or salesperson can trade in real estate on behalf of, or accept any commission or other remuneration for trading in real estate

“ ... the potential application of the Act must be carefully examined by other lenders (both Canadian and foreign) when considering lending on the security of real property in Ontario”

from, any brokerage other than the brokerage which employs such broker or salesperson. A registered broker or salesperson must be a Canadian resident and may not trade real estate in Ontario from an office outside Ontario. No action can be brought for commission or other remuneration for services in connection with a trade in real estate, unless at the time of rendering the services, the person bringing the action was registered or exempt from registration under the Act.

The Act and regulations made under it set out detailed requirements of registration for brokerages, brokers and salespersons, including compliance with a code of ethics. Brokerages must hold funds belonging to their clients (such as deposits) in separate trust accounts. If a registrant breaches any of the requirements applicable to it, RECO can impose various sanctions under the Act, including fines, freezing assets or placing restrictions on its registration.

In Québec, real estate brokers are subject to similar rules. In addition, pursuant to the *Real Estate Brokerage Act* and the *Regulation respecting the issue of broker's and agency licences*, a person applying for a broker's or agency licence must have an establishment in Québec.

➔ Regulation of Mortgage Brokers and Lenders

Mortgage brokers and lenders in Ontario are regulated by the *Mortgage Brokerages, Lenders and Administrators Act, 2006*. Under the Act, no person can carry on the business of dealing or trading in mortgages in Ontario, or carry on business as a mortgage lender in Ontario (which the Act defines as lending money in Ontario on the security of real property) unless the person holds a brokerage licence issued under the Act by the Superintendent of Financial Services, or is exempted under the Act. Canadian financial institutions subject to regulation under other legislation, such as banks, insurance and trust companies and credit unions, do not require licences under the Act, but the potential application of the Act must be carefully examined by other lenders (both Canadian and foreign) when considering lending on the security of real property in Ontario.

In Québec, persons engaging in brokerage transactions relating to loans secured by immovable hypothecs are governed by the *Real Estate Brokerage Act*.

11

Environmental Law

11

Environmental Law



→ Legal Framework

In Canada, environmental matters are regulated at the federal, provincial, territorial and local levels. Although provincial and territorial governments generally take the lead in regulating most environmental matters, in recent years the federal and municipal governments have become more active in environmental protection. Some harmonization of programs and standards has taken place in Canada, but in most circumstances, separate federal, provincial, territorial and municipal requirements apply. In particular, each province and territory in Canada has its own unique environmental impact assessment and protection regimes.

→ Contaminated Property

The contamination of soil and groundwater is primarily regulated by the provinces and territories. Although the Supreme Court of Canada has confirmed the operation of the statutory “polluter pay” principle, purchasers of real property must be aware that they may be held liable for pre-existing contamination on and migrating from newly acquired property. Tenants should ensure that leases provide protection from such liability.

For example, in Ontario, the *Environmental Protection Act* (the “EPA”) provides for administrative orders to be issued against anyone who owns or has management or control of a contaminated property, whether or not that person or entity caused the contamination. Where the discharge of a contaminant continues after a sale or tenancy, the new owner or tenant may also be viewed as having permitted the discharge to take place even if it did not cause the source of contamination. Such owners and tenants may be subject to remediation liability, but there is generally no positive statutory obligation in Ontario to clean up historic contamination.

The EPA provides some limited protection from statutory liability. If appropriate investigations and remedial work are conducted and a record of site condition (“RSC”) is filed, an owner or tenant is protected from regulatory action with respect to contaminants identified in the RSC (except in certain circumstances where contamination migrates from the site or the regulator believes there is a danger to health or safety). It is also obligatory to file an RSC when a change to a more sensitive property use is planned.

As in Ontario, Québec’s *Environment Quality Act* (the “EQA”) subjects the polluter to clean-up obligations upon the issuance of an order from the Minister responsible for the EQA. Such an order may also be made against any person that has or had “custody” since March 2003 of a contaminated

“ ...purchasers of real property must be aware that they may be held liable for pre-existing contamination on and migrating from newly acquired property. Tenants should ensure that leases provide protection from such liability”

site (e.g., as owner, tenant or otherwise), even if such person did not cause the contamination. A secured creditor that takes possession of a contaminated site might also be deemed to have “custody” of the site and be liable for its clean up.

In many instances, decontamination in Québec must be undertaken through the use of rehabilitation plans and implementation schedules that are approved by the Minister, which may provide for land use restrictions. A rehabilitation plan that provides for land use restrictions must be registered against the land, which makes the plan binding on any subsequent purchaser of the land.

While rehabilitation pursuant to an order by the Minister must be conducted in accordance with EQA procedures, no positive statutory duty to decontaminate a contaminated site currently exists in Québec. However, ceasing to carry on certain regulated industrial and commercial activities, or carrying on different activities on land where such regulated activities were carried on, requires conducting and delivering a characterization study to the Minister. If the characterization study reveals any contaminants in excess of permitted amounts, a rehabilitation plan must be filed with the Minister. When contaminants are found at the boundaries of the land in concentrations exceeding the regulatory limits, or if there is a serious risk of off-site contamination of water, the person with “custody” of the land must also give notice to the owners of adjacent lands and to the Minister. In certain circumstances, notices of contamination, as well as characterization studies, must be registered against the land. In addition, municipalities are required to maintain publicly accessible lists of contaminated sites.

➔ Operating Liability

Generally, Canadian provinces and territories have two principal mechanisms for protection of the environment with respect to commercial and industrial operations (including resource extraction): a general prohibition against the discharge of contaminants; and a system of permits or certificates required for activities that may impair the environment. In addition, decommissioning and rehabilitation costs related to waste and wastewater management facilities may have to be secured through financial assurances.

Ontario’s EPA, for example, prohibits unlawful discharges of contaminants into the environment and requires any parties that cause or permit such discharges to notify the regulators immediately of an unlawful discharge. Those who cause or permit unlawful discharges may face offence liability, environmental penalties and administrative orders. To avoid such liability, all operational discharges (to air, water or land) must be approved by the provincial Ministry of the Environment. Conditions and requirements (including financial assurances) may apply to such approvals and any alterations to discharging equipment (including

sewage and water works) must also be approved. Ontario recently implemented a legislative framework to modernize environmental approvals, introducing a simplified registry process for low-risk activities and to permit single-site, multi-media approvals and single, multi-site approvals for more complex facilities. This proposed risk-based approach, similar to what is already found in British Columbia and Alberta, is intended to provide greater flexibility for business.

Québec's EQA imposes a duty not to pollute, to report accidental discharges to the Minister and to clean up discharges of contaminants without delay. A certificate of authorization must be obtained before undertaking any construction, industrial activity, use or change of an industrial process if it seems likely that it could result in the release of contaminants. As in Ontario, the range of regulated contaminants is very broad. In particular, the Minister has a broad statutory discretion to impose restrictions relating to wetlands. The applicant for a certificate of authorization or other authorization must file a declaration identifying its officers, directors and certain shareholders, and stating whether such persons have been convicted within specified periods of various offences, including offences under the EQA and certain offences under the *Criminal Code*.

While Canadian municipalities have traditionally regulated noise and discharges to municipal sewers, municipalities have recently become more active in regulating toxics at the local level. For example, many Canadian municipalities have recently banned the cosmetic use of pesticides. Similarly, the City of Toronto recently passed a by-law requiring public disclosure of certain toxics being used or released at facilities in Toronto. This community right-to-know program is intended to expand on the current federal National Pollutant Release Inventory and Ontario's Toxics Reduction Strategy, which both focus on larger facilities.

Finally, operations that cause environmental damage to adjoining properties, or permit the escape of harmful substances, may incur civil liability to injured parties under general legal principles such as (in common law provinces like Ontario) negligence, nuisance or the strict liability tort called the rule in *Rylands v. Fletcher*. In Québec, the Civil Code prohibits companies from causing abnormal inconvenience. In a recent decision, the Supreme Court of Canada concluded that such provision creates a no-fault liability scheme in respect of neighbourhood disturbances and ordered the operator of a cement plant to pay damages to its neighbours for the annoyance suffered (even though the cement plant had complied with all applicable environmental legislation).

“ Ontario recently implemented a legislative framework to modernize environmental approvals...”

“Directors and officers of a corporation have statutory obligations under federal and certain provincial environmental laws to take reasonable care to ensure that the corporation complies with such laws”

➔ Director and Officer Statutory Liability

Directors and officers of a corporation have statutory obligations under federal and certain provincial environmental laws to take reasonable care to ensure that the corporation complies with such laws. Under the federal *Canadian Environmental Protection Act, 1999*, directors and officers have a statutory duty to take reasonable care to ensure that the corporation complies with all requirements under that Act. In Ontario, there is a more limited statutory duty requiring directors and officers to take all reasonable care to prevent the corporation from (i) causing an unlawful discharge, (ii) contravening administrative orders, and (iii) contravening obligations with respect to approvals, notification of unlawful discharges and hazardous waste management. In Québec, if an entity or its employee or agent commits an offence under the EQA, its directors and officers are presumed to have committed the offence unless they can establish that they exercised due diligence and took all necessary precautions to prevent the offence. Also, the directors and officers of a legal person that has defaulted on payment owing under the EQA or the regulations, share liability with the legal person, for payment of the amount, unless they can establish that they exercised due diligence to prevent the failure which led to the claim.

Directors and officers may also incur operational liability if they are found to have personally permitted a discharge or deposit. In general, officers are more likely than directors to be subject to such liability, because their management responsibilities may result in more control over the discharge or deposit (as distinct from the general supervisory role of directors).

➔ Environmental Impact Assessment

Environmental impact assessment (“EIA”) is a tool used by the federal, provincial and territorial governments to ensure that any significant adverse environmental impacts of a regulated project are considered and mitigated before the project is permitted to proceed. Such EIA processes typically require substantial public and Aboriginal consultation obligations (see the discussion of the latter under “Crown’s Duty to Consult and Accommodate Aboriginal People” below). If the project is under both federal and provincial jurisdictions, the federal government encourages co-ordination with the provinces and may substitute the EIA process of another jurisdiction for its own.

The federal *Canadian Environmental Assessment Act, 2012*, requires an EIA in respect of most large-scale development projects including infrastructure works, chemical and pharmaceutical manufacturing, oil and gas, mines, pulp and paper and electricity generation. Federal EIAs arise only with respect to areas of federal legislative jurisdiction, such as fisheries and migrating birds. Federal EIAs must be completed within two years. Provincial EIA regimes also require an assessment of certain private sector projects. Many provincial regimes require consideration of projects of a smaller scale than those assessed federally. In Canada's North, the federal government no longer has sole responsibility for assessing proposed projects. As a result of comprehensive land claim settlements, self-government agreements and devolution to territorial governments, the federal government now works with Aboriginal peoples, resource and environmental regulatory boards and the territorial governments to review and approve EIAs of proposed projects in the North.

Canada's environmental assessment process, particularly in the North, presents a complex challenge for project proponents, and delays for controversial projects are common. Further, environmental groups and other stakeholders may use the courts to challenge EIA approvals. As a result, judicial review of EIAs, even at the early scoping stage, is not uncommon and can cause project delays.

Climate Change

Canada's climate change regulatory framework continues to be characterized by significant uncertainty and divergence as various mandatory and voluntary initiatives continue to emerge at the federal, provincial and regional levels in Canada. Canada has withdrawn from the *Kyoto Protocol* and has undertaken to negotiate a new international climate change treaty by 2015 (to come into force in 2020).

The federal government has emphasized the importance of harmonizing Canada's approach to climate change with that of the United States as a means of maximizing progress on reducing greenhouse gas emissions while maintaining economic competitiveness. As a result, Canada's 2020 emissions reduction target under the *Copenhagen Accord* – a 17% reduction from 2005 levels – is identical to the current U.S. target and subject to adjustment to remain consistent with the United States.

The federal government currently requires large industrial facilities that emit 50,000 tonnes or more of greenhouse gases per year to report the quantity of such emissions to Environment Canada. Federal carbon-dioxide emissions regulations are being developed for various sectors, for example, fuel and vehicle efficiency standards have been implemented. Federal regulations have also been finalized recently for coal-fired power plants. While the federal government's

“ Canada’s environmental assessment process, particularly in the North, presents a complex challenge for project proponents, and delays for controversial projects are common”

regulations for the oil and gas sector were expected to be released in 2013, the status of these key regulations is currently unclear. As a result, it is also unclear how federal regulations will be aligned with the divergent provincial approaches, most notably Alberta's renewed regulatory framework (which is expected to be released in 2014). Québec is progressively implementing a cap-and-trade carbon-dioxide emission system under the EQA and the Regulation respecting the delegation of management of certain parts of a cap-and-trade system for greenhouse gas emission allowances.

Current federal regulatory measures cannot achieve Canada's 2020 target and provincial and current regional initiatives are not sufficient to address the emissions gap. As a result, Canada's climate change regulatory framework is expected to continue to evolve significantly over the next few years.

➔ Crown's Duty to Consult and Accommodate Aboriginal People

“The Crown's duty to consult and accommodate can be triggered by a federal, provincial or territorial approval, licence, permit or any other activity that could potentially adversely affect Aboriginal or treaty rights...”

In Canada, the federal and provincial governments (*i.e.*, the “Crown”) have a legal duty to consult with First Nation, Inuit and Métis (collectively “Aboriginal”) communities when the Crown has knowledge (real or constructive) of established or asserted Aboriginal or treaty rights (*e.g.*, traditional uses of land, such as hunting, fishing, trapping and the harvesting and gathering of plants, interests in culturally relevant archaeological sites, etc.) and contemplates conduct that might adversely affect these rights. Such consultation may, in appropriate circumstances, lead to a duty on the Crown to accommodate Aboriginal people. Accommodation measures vary widely including, for example, the modification of a proposed project, enhanced environmental monitoring, training and employment for Aboriginal people and financial contributions to Aboriginal communities.

The Crown's duty to consult and accommodate can be triggered by a federal, provincial or territorial approval, licence, permit or any other activity that could potentially adversely affect Aboriginal or treaty rights, such as the expansion or initiation of resource extraction operations. As a result, the federal and provincial governments have instituted Crown consultation processes for proposed projects within their jurisdiction. For projects involving both federal and provincial/territorial governments, the Crown generally tries to coordinate consultation efforts to minimize duplication. The Crown will also try to coordinate its consultation process with any existing consultation or participation procedures required by land claim or similar self-government agreements.

The scope and content of the Crown's duty to consult and accommodate varies widely and is proportionate to the strength of the asserted Aboriginal or treaty right and the seriousness of the potentially adverse impact upon it. In other words, the consultation activities to be undertaken and how they are approached will vary from project to project. For example, if there is little impact on an asserted or established Aboriginal or treaty right, the level of consultation required may simply be a duty to give notice, disclose and share information and discuss important decisions to be taken in relation to the proposed project. Where the adverse impact on Aboriginal rights is potentially greater, the Crown's consultation requirements would be more substantial (e.g., more extensive consultation, mitigation and/or accommodation).

However, there is no legal duty on the Crown to ultimately reach an agreement with an Aboriginal group. This means that Aboriginal groups do not have a "veto" over what the Crown can do. Rather, the Crown's duty to consult and accommodate is about a fair decision-making process, and in all cases the Crown must act in good faith to provide meaningful consultation appropriate to the circumstances. The Crown has frequently been subject to litigation alleging failure to fulfill its consultation obligations.

Aboriginal peoples have unique knowledge about the local environment, and this Aboriginal traditional knowledge is seen as an important part of project planning, resource management and environmental assessment. The CEAA, for example, gives those conducting an environmental assessment the discretion to consider Aboriginal traditional knowledge. When sharing their traditional knowledge, some communities may request that an Aboriginal traditional knowledge access agreement (also referred to as a protocol agreement, or memorandum of understanding) be negotiated, setting out how that knowledge will be accessed and used.

A private sector proponent does not have an independent common law duty to consult with or accommodate Aboriginal people (but may have an express statutory obligation to consult, such as in Ontario's Environmental Screening Process or renewable energy appeal process for electricity projects, or under Ontario's *Mining Act*). However, while the common law legal duty to consult rests solely with the Crown, private sector proponents often play an important role in the Aboriginal consultation process. For example, the Crown often delegates certain procedural aspects of consultation regarding a proposed project to the project proponent, including day-to-day consultation activities. In these cases, the Crown will generally supervise these activities and their outcomes to ensure that any impacts of the proposed project on established or asserted Aboriginal or treaty rights are appropriately addressed, mitigated and/or accommodated.

While the final responsibility for consultation and accommodation rests with the Crown, private sector proponents often help fund Aboriginal participation in

“ ...Aboriginal groups do not have a ‘veto’ over what the Crown can do”

“ IBAs can mitigate risks of Aboriginal litigation, direct action or negative publicity”

the consultation process and enter into impact and benefit agreements (“IBAs”) to facilitate Aboriginal accommodation. IBAs can mitigate risks of Aboriginal litigation, direct action or negative publicity. In exchange for access and some restriction of rights, the Aboriginal community may receive employment, education and community benefits, as well as some form of royalty interest, revenue sharing and/or equity participation. Project proponents are well advised to ensure that appropriate consultation and accommodation has been conducted as the failure to do so represents a significant risk of project delays and increased project costs for project proponents. Developers with delegated or statutory responsibilities should identify and engage potentially affected Aboriginal communities as early as possible. A memorandum of understanding with such communities as to consultation protocols may be advisable. As well, IBAs are often a useful tool to achieve a cooperative working relationship with impacted Aboriginal communities.

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Employment Law

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Employment Law



Canadian employment legislation applies to employees who work in Canada even if the employer is outside Canada. Most employees are under provincial jurisdiction, but federal legislation governs employees of federally regulated undertakings such as telecommunications, railways, banking and certain interprovincial enterprises.

➔ Minimum Standards

Each province has employment standards legislation setting out minimum entitlements for employees. Similar standards are provided for employees under federal jurisdiction by the *Canada Labour Code*.

The main areas covered by this legislation include minimum wages, overtime, hours of work, vacation and holidays, pregnancy and/or parental leaves of absence, mass layoffs and notices of termination. Employment standards legislation applies to most employees, but most statutes provide specific exemptions from their requirements for certain types of employees (for example, commissioned travelling salespersons).

In general, the standards imposed are relatively consistent across Canada. However, there can be significant differences in detail between jurisdictions, not only in the standards required, but also in other matters, such as the remedies available to employees. For example, in Ontario an employer can only be ordered to reinstate a terminated employee in limited circumstances (for example, if the employer has improperly terminated an employee because she has taken pregnancy leave), whereas the *Canada Labour Code* and Québec legislation give employees potentially much broader rights to seek reinstatement.

The legislated minimum standards cannot be contracted out of nor waived by employees. Terms more favourable to employees than the minimum standards can also be agreed upon, in either an individual employment contract or, in the case of unionized employees, a collective agreement. In Canada, agreed terms of employment will typically be more generous to employees, at least in certain respects, than the statutory minimum standards. In addition, non-statutory legal principles may also impose additional obligations on employers, particularly in connection with the termination of employees: see “Termination of Employees” below.

In Ontario and Québec, employment standards legislation provides that where a purchaser of all or part of a business employs any of the former employees, their employment is deemed to be continuous for the purpose of the legislation (e.g., if the purchaser later terminates any of these employees, it must recognize their prior service with the seller in giving notice of termination). The *Ontario Employment Standards Act, 2000*, also provides for related employers to be

“ ...there can be significant differences in detail between jurisdictions, not only in the standards required, but also in other matters, such as the remedies available to employees”

“An employee who is successful in challenging the employer’s conduct may request to be reinstated in his or her employment, in addition to being awarded any lost wages”

treated as a single employer for purposes of the Act. This is meant to prevent employers from splitting their payroll in order, for example, to avoid payment of severance pay, which is payable to employees with more than five years of service, if the employer has a payroll of \$2.5 million or more, or there is a “mass layoff” of 50 or more employees during a six-month period because all or part of the business has closed.

In Québec, *An Act respecting labour standards* generally does not apply to senior managerial personnel, which has been interpreted as applying only to a limited group of individuals who participate in the decision-making process with respect to the policies and the strategies of the organization.

The Québec statute provides recourse for employees who are victims of specified prohibited practices, including psychological harassment. A remedy is also available to employees who have more than two years of service and who believe they were dismissed without cause. An employee who is successful in challenging the employer’s conduct may request to be reinstated in his or her employment, in addition to being awarded any lost wages.

The Québec statute allows an employee to be absent from work for an extended period of time for reasons related to his or her health or the health of his or her family. For example, an employee can be absent for as much as 104 weeks if his or her minor child has a serious and potentially fatal illness (rights to leaves of absence under the Ontario statute are much less generous). Moreover, the employer has the obligation, at the end of the leave of absence, to reinstate the employee in his or her former position with the same benefits, including the wages to which the employee would have been entitled had the employee remained at work.

In both Ontario and Québec, additional requirements are imposed in respect of simultaneous (or within certain specified time-frames) terminations of large numbers of employees, which may include the giving of additional notice to employees and providing prescribed information regarding the impact of the termination to provincial authorities.

➔ Labour Relations

Canada promotes the principle of collective bargaining between employers and employees. Employees, excluding those in managerial positions, may form bargaining units represented by specific trade unions. Unions are often organized along industry lines, such as the automotive or retail industry.

Once a union has been certified and has given notice to the employer, the employer has a duty to bargain with the union in good faith to reach a collective agreement. A number of statutory conditions must be met before employees

can lawfully strike or an employer can lawfully lock them out. Conciliation, arbitration and mediation are tools available to help employers and employees settle disputes. Labour disputes are adjudicated in Ontario by the Ontario Labour Relations Board, in Québec by the Commission des relations du travail and for federally regulated employees by the Canada Industrial Relations Board. These specialized tribunals also deal with issues relating to the organization of unions and their representation of employees, with a view to preventing unfair labour practices and encouraging good faith bargaining.

While some Canadian jurisdictions limit the use of strikebreakers and require employers to maintain striking workers as employees, the *Québec Labour Code* prohibits altogether an employer from hiring anyone to replace striking or locked-out employees unless the replacement is a management employee who works in the establishment affected by the strike or lock-out.

→ Equality

HUMAN RIGHTS

The federal government and all the provincial governments have adopted human rights legislation, which prohibits discrimination in the workplace.

In Ontario, the *Human Rights Code* provides that, subject to *bona fide* occupational requirements, an employer must treat people equally without discrimination or harassment on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex (including pregnancy and breastfeeding), sexual orientation, age, record of offences, marital status, family status, gender identity, gender expression or physical or mental disability. Alcohol or drug dependence has been found to be a disability for the purpose of the *Human Rights Code*. Therefore, employers in Ontario generally cannot impose mandatory drug testing of all employees. The Human Rights Tribunal of Ontario deals with all claims of discrimination filed under the Code. It resolves applications through mediation and adjudication. It can make orders where it finds that a complaint is justified, awarding monetary compensation or other restitution to the complainant, or requiring a party in contravention of the Code to comply with it.

The Québec *Charter of human rights and freedoms* provides that no one may discriminate on prohibited grounds in respect of the hiring, apprenticeship, duration of probationary period, vocational training, promotion, transfer, displacement, laying-off, suspension, dismissal or conditions of employment of a person or in the establishment of categories or classes of employment. The prohibited grounds are race, colour, sex, pregnancy, sexual orientation, civil

“The federal government and all the provincial governments have adopted human rights legislation, which prohibits discrimination in the workplace”

“ Ontario and Québec each have adopted, through a *Pay Equity Act*, the principle of equal pay for work of equal value”

status, age (except as provided by law), religion, political convictions, language, ethnic or national origin, social condition, handicap or the use of devices to palliate a handicap. However, the Charter specifies that distinction, exclusion or preference based on the aptitudes or qualifications required for employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or an institution devoted exclusively to the well-being of an ethnic group is deemed non-discriminatory. It also provides that every employer must pay equal wages to every employee performing equivalent work at the same place without discrimination on prohibited grounds.

Québec’s Commission des droits de la personne et des droits de la jeunesse investigates complaints of discrimination and acts as a conciliator between the parties. If conciliation fails, the matter may go to negotiated settlement or before an arbitrator or, if recourse to such remedies is not agreed to by the parties, to a hearing before the Tribunal des droits de la personne. The Tribunal may impose any remedial measures, including the reinstatement of a worker, when such outcome would be fair and expedient under the circumstances.

PAY EQUITY

It is illegal in every province in Canada to pay a woman less for doing the same job as a man.

Ontario and Québec each have adopted, through a *Pay Equity Act*, the principle of equal pay for work of equal value. Women in “female job classes” who perform jobs of similar value to employees in “male job classes” have the right to salary readjustments.

In Ontario, the Act applies to all private sector employers who employ 10 or more employees and all employers in the public sector. However, in the private sector certain provisions of the Ontario Act, requiring an employer to devise a pay equity plan, apply only to employers with 100 or more employees. In Québec, the Act applies to private and public sector employers with 10 or more employees. Employer obligations vary depending on the number of employees and include devising a pay equity plan if the employer employs 50 or more employees, and setting up a pay equity committee if it employs 100 or more employees.

EMPLOYMENT EQUITY

The *Employment Equity Act* applies to federal sector employers only. The legislation is an “affirmative action/hiring quota” system designed to encourage employers to hire and promote women, Aboriginal people, persons with disabilities and visible minorities. Certain non-federal sector employers must comply with the *Employment Equity Act* in order to obtain contracts with the federal government.

→ Employment Insurance

Employers and employees in Canada are required by the *Employment Insurance Act* to contribute to the employment insurance account administered by the federal government. Employee premiums are calculated each year. For 2014, the employee premium is 1.93% (1.53% in Québec) of insurable earnings up to a maximum of \$48,600 (so that the maximum employee premium in 2014 is \$913.68 (\$743.58 in Québec)). The employer must pay a premium equivalent to 1.4 times the employee's premium. The employer's contributions are deductible for tax purposes as a normal business expense and may be reduced if the employer supplies a salary insurance scheme to its employees.

Employment insurance benefits are paid to employees who lose their jobs due to layoff or termination. Employees on maternity leave, parental leave or absent due to illness are also covered.

Self-employed persons are ineligible. Also, no benefits are paid to those who quit a job without cause or who are fired for misconduct.

In Québec, the provisions of the *Act respecting parental insurance* provide a parental insurance plan that grants benefits to the parents upon the birth of a child or the adoption of a minor. Every employee resident in Québec and every Québec employer is required to pay a premium. The 2014 contribution is 0.559% for the employee and 0.782% for the employer of earnings up to a maximum of \$69,000. The maximum contribution payable in 2014 by the employee is \$385.71 and by the employer is \$539.58.

→ Canada Pension Plan

The Canada Pension Plan ("CPP") is compulsory. With the exception of employers and employees in Québec, all employers and employees in Canada are required to contribute to this Plan. Québec has a provincial pension scheme ("QPP") which provides benefits comparable to the CPP.

All provinces also have pension benefits standards legislation governing the elements of a private pension plan.

For more details regarding the CPP, QPP and pension benefits standards legislation, see the Retirement, Employee Benefits and Savings Plans section of this Guide.

“ For 2014, the employee premium is 1.93% (1.53% in Québec) of insurable earnings up to a maximum of \$48,600 (so that the maximum employee premium in 2014 is \$913.68 (\$743.58 in Québec))”

➔ Occupational Health and Safety and Workers' Compensation

Each of the provinces has enacted legislation to establish certain standards for occupational health and safety and to compensate employees who are injured in the course of their employment. The *Canada Labour Code* has similar regulatory standards for employees and employers under federal jurisdiction.

In Ontario, employers must meet the safety standards in the *Occupational Health and Safety Act*, which:

- encourage health and safety programs through mandatory committees of management and worker representatives;
- impose duties on employers, supervisors, workers and other persons (e.g., owners) concerning workplace safety;
- provide employees with access to information regarding the presence of hazardous materials at the workplace;
- permit employees to refuse to work where they have reason to believe that their safety or that of another employee is endangered; and
- protect employees from violence and harassment.

The legislation is enforced internally by workplace health and safety committees and externally by inspectors appointed by the Ontario Ministry of Labour. Directors and officers of a corporation have a duty to take reasonable care to ensure that the corporation complies with the statute.

Some Ontario employers must register with the Workplace Safety and Insurance Board under the *Workplace Safety and Insurance Act*. The failure to do so within 10 days of becoming an "employer" is an offence. Most workers injured in accidents arising from employment or suffering from an occupational disease may receive compensation from the fund established under this legislation, but cannot sue the employer for damages arising from such injuries.

In Québec, *An Act respecting occupational health and safety* is intended to eliminate dangers to the health, safety and physical well-being of workers. It grants an employee the right to refuse to perform work if there is reasonable cause to believe that the work would expose him or her to risks to health, safety or physical well-being or expose an unborn or breast-fed child to such risks, in the case of a pregnant or breast-feeding worker. Employees cannot contract out of the statute, although employees may agree with employers upon more favourable working conditions than the minimum standards required by law.

Québec's *Act respecting industrial accidents and occupational diseases* provides compensation for injuries arising from employment and may include income replacement, compensation for bodily injuries, treatment, rehabilitation and death benefits. Compensation is based on a no-fault system. Workers injured by accidents arising from employment or suffering from an industrial disease may receive compensation from the fund established for such purposes; they cannot, however, sue the employer for damages. In certain circumstances, the statute may apply to employers who do not have an establishment in Québec at the time when the accident occurs or the disease is contracted.

Under the Workplace Hazardous Material Information System, employers in all provinces have an obligation to provide information and educational programs to employees who work with hazardous materials.

➔ Employer Health Tax

The Ontario Health Insurance Plan is partially funded by an employer health tax. Employers who have permanent establishments in Ontario are required to pay the tax at a graduated tax rate ranging from 0.98% to 1.95% per year, depending on the total amount of remuneration paid in the year by the employer to its employees. Employers in Ontario with annual payrolls of less than \$5 million are exempt from employer health tax on the first \$450,000 of Ontario payroll.

Under *An Act respecting the Régie de l'assurance-maladie du Québec*, except for a few employers, every employer in Québec must pay to the Minister of Revenue a contribution ranging from 2.7% to 4.26% of the wages paid to its employees in the province to finance the health plan.

➔ Termination of Employees

In the absence of just cause for termination (which is generally construed narrowly by courts and tribunals in Canada), all employees whether unionized or not are entitled to notice of termination. The notice may be by way of "working notice" or pay in lieu of such notice. The amount of notice is, at a minimum, the statutory requirements as set out in the relevant employment standards legislation, or the requirements of the applicable collective agreement, for unionized employees. Because minimum statutory employment standards for notice of termination cannot be contracted out of or waived, terms in an employment agreement that provide for "termination at will", or for notice of less than the statutory minimum, will not be enforceable. Otherwise, a notice period for termination stipulated in an employment agreement will, in most cases, be enforceable. However, Canadian courts are often reluctant to enforce

employment agreements that appear to have been imposed on employees by an employer, with little opportunity for employees to negotiate the terms.

If a non-unionized employee is employed for an indefinite term, and no specific period of notice of termination has been stipulated in an employment agreement, upon the employee's termination, in addition to the employee's right to the statutory minimum notice or payment in lieu of notice, the employee is entitled to sue in court for damages if the notice of termination has not been "reasonable".

A court's determination of what is "reasonable" will depend on the individual circumstances of the employee, primarily length of service, age, character of employment (*i.e.*, level in the corporate hierarchy), remuneration, availability of similar alternative employment in the geographic locale and whether the employee has been enticed away from previous secure employment. The conduct of the employer at the time of the termination may also be a factor in determining compensation.

"Reasonable" notice of termination, as construed by a court, will usually exceed the minimum statutory requirements. While statutory notice of termination generally will not exceed eight weeks, a court may award a long-service employee notice of 16 months or more.

Workforce Training

Québec's *Act to promote workforce skills development and recognition* requires most employers with a payroll in excess of \$1 million to spend an amount representing at least 1% of their total payroll on eligible training expenditures. Employers who do not spend the minimum amount fixed by law are required to pay to the Minister of Revenue the difference between the statutory amount and the amount actually spent.

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Retirement, Employee Benefits and Savings Plans

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Retirement, Employee Benefits and Savings Plans



➔ Retirement Plans

Canadians typically receive retirement income from three sources: government-administered pension programs, employer-sponsored retirement savings programs and personal savings.

GOVERNMENT PENSION PROGRAMS

Canada has many government-administered pension, benefit and welfare programs that provide a certain degree of social security. Old Age Security (“OAS”) provides pensions payable from age 65, subject to residence requirements. Pensioners with high individual net incomes must repay part or all of the maximum OAS pension amount. For those with low incomes, a Guaranteed Income Supplement and an Allowance (paid to spouses and common-law partners of pensioners) may also be payable. These benefits are financed out of general tax revenues.

The Canada Pension Plan (“CPP”) is a compulsory, contributory, earnings-related plan for employees that provides basic retirement, survivor, death and long-term disability benefits. For individuals employed or resident in Québec, the Québec Pension Plan (“QPP”) is applicable and is substantially similar to CPP. The employee’s contribution under CPP or QPP is a percentage of earnings, which is matched by the employer’s contribution.

CPP provides several possible types of benefits for employees who made a minimum contribution towards the Plan:

- retirement pensions to contributors who have reached 65 years of age (or are between 60 and 64 years of age, subject to meeting certain requirements);
- benefits to a surviving spouse and/or surviving dependent child of the contributor; and
- disability benefits to a contributor who is no longer able to secure substantially gainful employment.

The employee’s and employer’s contributions for 2014 are each 4.95% of pensionable earnings over \$3,500, up to a maximum of \$52,500 (therefore, the maximum contribution payable in 2014 by each of the employee and the employer is \$2,425.50).

EMPLOYER-SPONSORED RETIREMENT SAVINGS PROGRAMS

Many employers voluntarily offer private pension plans. These may be specific to a single employer, or multi-employer pension plans that are administered

“The Canada Pension Plan (‘CPP’) is a compulsory, contributory, earnings-related plan for employees that provides basic retirement, survivor, death and long-term disability benefits”

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Retirement, Employee Benefits and Savings Plans

by boards of trustees. Generally, pension plans are defined benefit, defined contribution or hybrid plans. Defined benefit plans are becoming less and less common in the private sector. They, like employment and labour matters generally, are governed by federal or provincial legislation depending on the nature of the particular business or undertaking. To qualify for preferential tax treatment, pension plans must also be registered under the federal *Income Tax Act* and comply with the requirements of that Act.

Federal and provincial pension benefits standards legislation sets out minimum standards applicable to pension plans and specifies rules relating to many aspects of the pension arrangement, including:

- funding;
- eligibility;
- pension formula;
- pensionable service;
- contribution requirements;
- vesting and locking-in;
- early, normal and postponed retirement;
- accrual of benefits and forms of pension;
- investing and withdrawing pension fund assets;
- transfers of pension fund assets; and
- amendments or discontinuance of a pension plan.

Employers with operations in more than one province or territory may operate one pension plan that is registered where the plurality of members work. The pension plan also provides pension benefits with respect to members employed in the other provinces or territories.

Where an employer provides a registered pension plan to employees, the level of benefits that can be provided from the plan is limited by the registration rules of the *Income Tax Act*. A supplementary arrangement is needed if the pension income that the employer wishes to provide is in excess of that limit.

Supplementary pension arrangements are commonly known as Supplementary Executive Retirement Plans ("SERPS"), top-up or top-hat plans. These plans may take a variety of forms and may be formal, informal, funded or unfunded.

Employers can also offer other retirement savings programs such as group registered retirement savings plans and deferred profit sharing plans. Registered retirement savings plans and deferred profit sharing plans permit employees to save for retirement on a tax-sheltered basis. Pursuant to the *Income Tax Act*,

“Employers can also offer other retirement savings programs such as group registered retirement savings plans and deferred profit sharing plans”

these plans are subject to specified contribution limits and qualified investment restrictions.

The federal government has introduced the additional option of a pooled registered pension plan (“PRPP”). The PRPP is intended to provide a low-cost retirement savings option for employers who currently do not provide retirement plans. To date only the federal government and Québec have fully implemented PRPPs (Alberta, British Columbia and Saskatchewan each have enacted PRPP legislation but not yet brought it into force). Provincial enabling legislation will need to be enacted in all provinces for the PRPP framework to become fully operational across Canada.

→ Employee Benefits

Every province and territory provides a health insurance program. Generally, these programs cover hospital and medical care. Public programs are funded by general tax revenues and, in some provinces, premiums or payroll taxes. The employment insurance and workers’ compensation programs are described in the Employment Law section of this Guide. Employee benefits provided by employers evolved largely to supplement the basic protection offered by government programs.

Employee benefit plans may include a wide range of life insurance benefits, accidental death and dismemberment coverage, long-term and short-term disability benefits and medical, drug and dental coverage. These plans are often complex, in order to manage the financial and other risks of providing the benefits and to ensure tax-effectiveness.

Some employers also provide for employee benefits after an employee retires; however, due to the increased costs, the recent trend has been to reduce or terminate benefits or require retirees to pay premiums.

→ Equity-Based Incentive and Savings Plans

Equity-based incentive and savings plans are useful tools in building effective compensation structures. These plans are very commonly used for executives in order to reward and retain them for the medium- to long-term.

There are a myriad of possible plan designs available including: share purchase plans, phantom share plans, share appreciation rights plans, deferred share unit plans, share option plans, performance share unit plans and restricted share unit plans.

“Employee benefit plans may include a wide range of life insurance benefits, accidental death and dismemberment coverage, long-term and short-term disability benefits and medical, drug and dental coverage”

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Retirement, Employee Benefits and Savings Plans

In order to ensure that unintended legal consequences do not arise when implementing these types of plans, the requirements of the *Income Tax Act* and provincial securities legislation must be considered.

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Temporary Entry and Permanent Residence

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Temporary Entry and Permanent Residence



Anyone other than a citizen of Canada who wishes to work lawfully in Canada has two options: temporary entry or permanent residence. Every applicant for admission to Canada must meet Canadian federal government requirements. However, if it is contemplated that an applicant will be employed in or will reside permanently in Québec, an applicant must satisfy Québec immigration criteria as well. In recent years, other provinces of Canada have negotiated so-called “Provincial Nominee Programs” with the federal government. These programs enable provinces to streamline the federal government’s processing of the applications of workers and permanent residents if provincial authorities are persuaded that a local employer’s need for an applicant or an applicant’s professional qualifications will yield economic benefit.

The following discussion is intended primarily to outline in general terms the rules facilitating the admission of business persons to Canada, as well as cross-border movement in North America under NAFTA, and among WTO member nations under the *General Agreement on Trade in Services* (“GATS”). All applicants for admission to Canada (and any dependants accompanying them) are subject to general security and health restrictions, which are not discussed in this summary.

→ Temporary Entry

GENERAL

An employer in most cases must assist employees who are neither permanent residents of Canada nor Canadian citizens to obtain employment authorizations before they can be lawfully employed in Canada. In most cases, this is done by obtaining a job offer validation from an Employment and Social Development Canada (“ESDC”) office. In some cases, it will not be necessary to obtain a job offer validation from ESDC. For example, senior management can be admitted to Canada under the intra-corporate transfer policy, which does not require that the company obtain a job offer validation in respect of such personnel.

To obtain a validation of an employment offer, the employer in most cases would be required to satisfy Canadian authorities that employment opportunities for Canadians will not be adversely affected if it employs the non-resident. This will entail convincing Canadian authorities that the employer has attempted to hire Canadians for that position and either no Canadian fulfilled the job requirements or no Canadian responded.

With a few exceptions described in the next paragraph, all persons who have obtained permission to work temporarily in Canada will be issued an employment authorization document, commonly called a work permit, at a port

“ An employer in most cases must assist employees who are neither permanent residents of Canada nor Canadian citizens to obtain employment authorizations before they can be lawfully employed in Canada”

“ Employment authorizations may be issued for an initial period of six months to one year but may be extended for several years following the initial date of entry”

of entry upon their arrival in Canada. Employment authorizations may be issued for an initial period of six months to one year but may be extended for several years following the initial date of entry.

Some people need not obtain an employment authorization: for example, “head office” employees who visit a Canadian affiliate for less than 90 days for the purpose of internal consultations, diplomats and business or government representatives who come to Canada to purchase or sell goods for that business or government for less than 90 days provided they do not sell directly to the general public.

INTERNATIONAL AGREEMENTS

Canada is a party to several international agreements relating to trade and commerce in general. These agreements supplement Canada’s immigration legislation and policies, which have for the past several years increasingly been designed to facilitate the objectives of Canadian business interests.

NAFTA provides a streamlined procedure under which certain North American business persons who are citizens of the United States or Mexico may enter Canada to work temporarily. GATS provides similar rules for more restricted categories of citizens of WTO member nations. The procedures under GATS are similar to NAFTA and therefore only major differences will be noted.

Under NAFTA, there are four categories of business persons who qualify for the streamlined process:

- business visitors;
- traders and investors;
- professionals; and
- intra-company transferees.

A “business visitor” is a business person who is seeking temporary entry into Canada for one of a series of specific purposes listed in NAFTA and therefore cannot be seeking to join the Canadian labour market. Persons who so qualify need not apply for a work permit and may be admitted to Canada at a port of entry.

A “trader” is a business person who seeks temporary entry to carry on substantial trade in goods and services and who will be employed in a supervisory or executive capacity.

An “investor” is a business person who seeks entry to develop and direct operations of a business in which he or she has invested or will invest a substantial amount of capital.

A “professional” is a business person who will engage in a specified profession while in Canada temporarily. The minimum requirements, generally speaking, are a bachelor’s degree, sometimes combined with practical experience. Under GATS, the three-month period for which a professional may be admitted cannot be extended. NAFTA has no such restriction. NAFTA has a much longer list of specified professions than GATS.

An “intra-company transferee” is a person who has been employed by the employer, or its affiliate, for at least one year within the three-year period immediately before the date of the application (or, under GATS, for at least one year immediately preceding the application) and who is coming to Canada to work temporarily for the same employer, or an affiliate, in a capacity that is executive, managerial or involves specialized knowledge.

Traders, investors, professionals and intra-company transferees who are U.S. or Mexican citizens coming into Canada temporarily must obtain work permits. They need not comply with the prior approval procedures, petitions, labour certification tests and other similar procedures generally required to obtain a work permit.

Permanent Residence

GENERAL

A person who wants to settle permanently in Canada can be admitted under one of three main classes of immigrants: the family class, the refugee class (which will not be discussed) or the economic classes.

To be admitted under the family class, an applicant must be sponsored by a close family member who is a Canadian citizen or a permanent resident. The family class includes a spouse, a common-law partner, a conjugal partner, a dependent child, a parent or grandparent, or, in some cases, another close relative. There is a yearly limit to the number of permanent resident applications which will be considered for the sponsorship of a parent or grandparent. However, qualified persons may apply for a “Parent and Grandparent Super Visa”, which is a multiple-entry visa which will allow an applicant to remain in Canada for up to 24 months at a time without the need for renewal and which will be valid for up to 10 years.

The economic classes are outlined in more detail below.

THE BUSINESS IMMIGRATION PROGRAM

The Business Immigration Program is a special program designed to facilitate immigration for qualified business persons or persons who will contribute

“ The ‘Start-up Visa’ pilot program seeks to link immigrant entrepreneurs with Canadian private sector funders and mentors”

significantly to Canada’s cultural or athletic spheres. It applies to two categories of immigrants, “self-employed persons” and those who qualify under the “Start-up Visa” program.

“Self-employed persons” are those with relevant experience who have the intention and ability to become economically established in Canada and who have participated at a world-class level in cultural activities or athletics, or who have experience in farm management.

The “Start-up Visa” pilot program seeks to link immigrant entrepreneurs with Canadian private sector funders and mentors. The program is intended to foster innovation, job creation, and the establishment of companies that will be able to compete globally. It is anticipated that the immigrant entrepreneurs will benefit from assistance in navigating the Canadian business environment and that Canadian private sector firms will benefit from the influx of talented innovators from around the world.

In order to qualify under the Start-up Visa program, an applicant must secure a minimum investment of \$200,000 from a designated Canadian venture capital fund. Alternatively, the applicant must secure a minimum investment of \$75,000 from a designated Canadian “angel investor” group. The applicant must demonstrate competence in either English or French by submitting the results of language testing by an approved agency and must have completed at least one year of post-secondary education. Applicants must demonstrate that upon entry to Canada they will have sufficient funds to support themselves and any dependants accompanying them. At present, the minimum funds required range from \$11,824 for a single applicant to \$31,291 for a family of seven or more persons. These amounts are updated annually.

QUÉBEC

If an immigrant’s destination is Québec, a permanent resident visa will be issued if federal officials are satisfied that the immigrant meets the Canadian health and security criteria and a Québec officer has determined that, if the applicant is an economic immigrant, he or she meets the Québec selection criteria, or, if the applicant is an immigrant in another class, he or she meets the Canadian selection criteria or the joint Québec and Canadian selection criteria.

PROVINCIAL NOMINEE PROGRAMS

The Government of Canada has entered into provincial nominee agreements with Newfoundland and Labrador, Nova Scotia, New Brunswick, Prince Edward Island, Ontario, Manitoba, British Columbia, Alberta, Saskatchewan and the Yukon. Such agreements allow the provinces to select immigrants to fulfill specific economic needs, or create and expand employment and business

opportunities. The federal government retains the responsibility for issuing immigrant visas to provincial nominees and their accompanying dependants after they have met all federal legislative requirements, including those related to health, absence of a criminal record and security.

Provincial nominee programs are primarily directed at selecting skilled workers whose qualifications are particularly suited to the needs of a particular provincial economy, although some provinces are also interested in nominated business applicants as well. Applications are made initially to provincial authorities. Each province has its own selection criteria, but in most instances a pre-arranged job offer will be essential. A major advantage of such programs is that they may offer successful applicants expedited visa processing.

SKILLED WORKERS

Through recent initiatives, Canada has signalled that its immigration programs should select as permanent residents individuals with professional, managerial and technical expertise that is valued by Canadian employers. Persons who have worked or studied in Canada in prescribed circumstances are recognized as desirable immigrants who have shown the ability to adapt to Canadian economic realities.

Canadian Experience Class

The Canadian Experience Class (“CEC”) enables certain applicants to seek permanent residence under a streamlined procedure. CEC applicants must be in a province other than Québec and must be either a temporary foreign worker with at least two years of full-time skilled work experience in Canada, or a foreign graduate from a Canadian post-secondary institution with at least one year of skilled work experience in Canada. Skilled work experience contemplates occupations which are classified as managerial, professional or technical, as well as the skilled trades.

A temporary foreign worker will be assessed on only two selection criteria: work experience and ability in English or French. A foreign graduate of a Canadian post-secondary institution will also be assessed on the basis of his or her education. Starting May 1, 2014, there is a cap of 8,000 CEC applications pending a transition in January 2015 to the new proposed Express Entry Program (“EEP”), discussed below.

Federal Skilled Worker Program

Under the Federal Skilled Worker Program (“FSWP”), an applicant must have secured either a valid arranged offer of employment from a Canadian employer, or must demonstrate that he or she has at least one year of continuous and paid work experience within the last 10 years in one of 25 designated skilled

“ Provincial nominee programs are primarily directed at selecting skilled workers whose qualifications are particularly suited to the needs of a particular provincial economy ...”

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Temporary Entry and Permanent Residence

occupations. The FSWP uses a point system weighted to reflect that competence in English or French and youth are critical predictors of an applicant's success in the Canadian labour market. A maximum of 12 points are awarded to persons between the ages of 18 and 35. One point is deducted for each year thereafter, such that an applicant 47 years old or more will receive no points for the age factor. In addition an applicant must submit to a test of English or French language skills from a designated agency and satisfy criteria with respect to education and adaptability.

As of May 1, 2014, there is an overall cap of 25,500 in respect of new FSWP applications. These applications will be the last accepted under the current system before the EEP is launched. The 25,500 overall cap includes a cap of 500 applications from PhD students. However, for those applicants with a qualifying job offer there is no cap imposed.

International PhD students are eligible to apply under the FSWP if they are enrolled in a PhD program at a provincially or territorially recognized private or public post-secondary educational institution in Canada, have completed at least two years of study towards a PhD and are in good academic standing at the time they apply, or who have graduated from a PhD program no more than 12 months before the date that the application is received. However, an international PhD student will not qualify if the student is in receipt of an award requiring the student to return to his or her home country to apply the knowledge and skills acquired in Canada and has not yet satisfied the terms of the award.

Federal Skilled Trades Program

Under the Federal Skilled Trades Program ("FSTP"), those who are qualified in a skilled trade may apply for permanent resident status. Applicants must satisfy criteria with respect to English or French language skills, training and work experience. Applicants must have either an offer of full-time employment for a total period of at least one year or a certificate of qualification in that skilled trade issued by a provincial or territorial body. Like the FSWP, the FSTP will be superseded by the EEP in 2015. Commencing May 1, 2014, the FSTP will process no more than 5,000 of these applications.

New Express Entry Program

On January 1, 2015, Canada will implement a new "Express Entry" program, whereby prospective immigrants would apply to express their interest in coming to Canada. In doing so, they would answer a series of questions about their professional skills, their education, languages spoken, and other criteria which have not yet been finalized. Those applicants would then see their skills matched with labour needs identified by the provinces and territories, as well as employers. In those instances where a match has been identified, the EEP

“ On January 1, 2015, Canada will implement a new ‘Express Entry’ program...”

would be available to anyone who has made an application through one of the FSWP, the FSTP or the CEC. In addition, having a valid job offer, or a provincial or territorial nomination would qualify EEP candidates to receive an invitation to apply for permanent residence.

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Civil Litigation

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Civil Litigation

→ Introduction to the Canadian Judicial System

Canada is a federation made up of 10 provinces and three territories, which have primary constitutional jurisdiction over the administration of justice, although there is also a Federal Court which deals with matters under federal jurisdiction. The courts of the Canadian judicial system are organized in a hierarchy, in which the trial courts are subordinate to appellate courts. The lowest level consists of provincial and territorial courts whose judges are appointed by the provincial and territorial governments. The next level is made up of each of the provinces' and territories' superior courts, which are of general jurisdiction. The judges of these courts are appointed by the federal government, although these courts remain the administrative responsibility of the provincial and territorial governments. The next level is made up of appellate courts: the provincial and territorial Courts of Appeal, as well as the Federal Court of Appeal. Finally, at the apex of the judicial system is the Supreme Court of Canada, which hears appeals from the provincial and territorial Courts of Appeal, as well as from the Federal Court of Appeal. All Federal Court and Federal Court of Appeal judges, as well as the judges of the Supreme Court, are appointed by the federal government.

The Federal Court has jurisdiction over claims against the government of Canada and civil actions in federally regulated areas such as admiralty, intellectual property and aeronautics, as well as challenges to decisions of federal administrative tribunals. The Federal Court has no general civil jurisdiction, unlike provincial and territorial superior courts. In Canada, there is a presumption that the provincial superior courts have jurisdiction to administer both federal and provincial law. As a result, some disputes fall within both provincial and federal judicial jurisdiction.

With the exception of the province of Québec, all of the provinces and territories are common law jurisdictions. Québec, however, is a civil law jurisdiction that modelled its first civil code after the French Napoleonic Code. While there are some differences, the rules and procedures governing legal proceedings in each of the provinces and territories are similar. This overview focuses on the rules applicable in the provinces of Ontario (a common law jurisdiction) and Québec (Canada's only civil law jurisdiction). (The comments in this section concerning litigation in Québec are based on the rules of civil procedure in effect as at June 2014. A new Québec *Code of Civil Procedure*, which will result in substantial changes, is scheduled to come into force in autumn 2015).

“...at the apex of the judicial system is the Supreme Court of Canada, which hears appeals from the provincial and territorial Courts of Appeal, as well as from the Federal Court of Appeal”

PROCEEDINGS IN ONTARIO AND QUÉBEC

Ontario and Québec's superior courts are of general jurisdiction and can hear any matters within the province that are not specifically excluded by the applicable rules of procedure or statute, including both criminal and civil matters. Proceedings in the superior courts of Ontario and Québec are heard by a single judge. The role of the judge in Québec (in contrast to some other civil law jurisdictions) is limited to adjudicator, as is the case in common law jurisdictions like Ontario. The judge plays no role in investigating the facts of the proceeding before him or her.

In Québec, there are no jury trials in civil matters. All cases at first instance are heard by a single judge. In Ontario, a plaintiff has the right to have its case heard by a jury in all matters. In practice, jury trials are common in personal injury litigation, but rarely invoked in commercial disputes. There are no civil proceedings that must be tried by a jury. The court retains discretion to strike out a jury notice and require a trial by judge alone. A jury notice can be struck out based on the complexity of the case.

The official languages of Canada are English and French and a party to a legal proceeding in Canada, including in Ontario and Québec, is generally entitled to have the matter tried in either English or French.

Initiating and Responding to Legal Proceedings in Canada

STEPS REQUIRED BEFORE INITIATING LEGAL PROCEEDINGS

Generally speaking, a party is not required to do anything before instituting proceedings by filing the appropriate document with the court. However, there are exceptions to this rule. For example, when the constitutionality of a law is challenged or the government (federal or provincial) is otherwise involved, special advance notice to the government may be required before or at the time of instituting proceedings.

It is nonetheless common practice for a party contemplating litigation to send a demand letter to the opposing party before instituting proceedings, when to do so will not result in any prejudice to its claim. In fact, it is often advisable to send such a demand, as it may determine when interest will begin to run on the claim.

Each province prescribes its own time periods within which a proceeding must be commenced. In Ontario, the general limitation period for most civil claims, such as breach of contract and negligence, is two years. In Québec, the general

limitation period for most civil claims is three years. However, the limitation period may vary in certain circumstances. In addition to limitation periods, in the common law provinces and territories a claim can be barred for delay by equitable doctrines such as laches or acquiescence. Anyone contemplating litigation should seek legal advice as soon as they become aware that they may have a claim, to protect against the expiry of any potential limitation period.

COMMENCING LEGAL PROCEEDINGS

In Ontario, court proceedings can be brought in two ways: actions and applications.

An action is usually commenced by issuing a statement of claim. However, where there is insufficient time to prepare a statement of claim, an action may be commenced by the issuing of a notice of action, which contains a short statement of the nature of the claim. A statement of claim must then be filed within 30 days of the issuing of the notice of action. An action requires the exchange of pleadings, mutual disclosure of evidence and a full trial.

An application is commenced by issuing a notice of application and, in contrast to an action, is a more summary proceeding. A proceeding may be brought by application only where a statute or the rules of civil procedure so authorize. Applications are available when there are no material facts in dispute and when it is possible to argue the issues in dispute on the basis of a paper record (with evidence given by affidavit rather than live testimony from witnesses).

In Québec, all proceedings are instituted by a motion to institute proceedings, which is a concise written statement of the facts on which the action is based and the remedies being sought. The motion is accompanied by a notice calling upon the defendant to formally appear in the record and advising of the court date for the motion to institute proceedings before a judge for consideration, which barring exceptional circumstances, cannot be less than 30 days from service.

RESPONDING TO LEGAL PROCEEDINGS

In both Ontario and Québec, once served with the originating process (whether a motion in Québec or a statement of claim or notice of an action in Ontario), the defendant has a prescribed period of time in which to respond. Both an action and a motion are responded to with a statement of defence. A party responds to an application by serving a notice of appearance. In Québec, the defendant is required to file a formal appearance in the court record within 10 days of service of the originating motion, failing which the plaintiff may proceed against the defendant by default.

“ Anyone contemplating litigation should seek legal advice as soon as they become aware that they may have a claim, to protect against the expiry of any potential limitation period”

“ In Ontario, every party to an action is required to produce to the opposing parties all relevant documents within its power, possession or control, except for documents protected by privilege”

In an action or a motion, a defendant may also file a counterclaim, if it wishes to make a claim against the plaintiff and, at the same time, it may also join another defendant or a third party to the proceeding. The defendant may also make a third-party claim (referred to as an action in warranty in Québec), if it wishes to make a claim, related to the original action, against a third party. Where there are multiple defendants, any defendant may also bring a cross-claim against one or more of the other defendants. Finally, at any time before judgment, a party who is interested in an action to which it is not already a party, may seek permission from the court to intervene in the proceeding, either as a full party or as a friend of the court.

DISCOVERY PROCESS

In civil proceedings in Canada, the nature and scope of a dispute is defined by the pleadings delivered by the parties. The pleadings consist primarily of the documents referred to above (statement of claim, notice of application, notice of motion and statement of defence). The pleadings are concise statements that set out (or plead) all of the material facts to a dispute. The pleadings are intended to define the facts and issues that are relevant to the trial.

(a) Documentary Discovery

In Ontario, every party to an action is required to produce to the opposing parties all relevant documents within its power, possession or control, except for documents protected by privilege. The documents are accompanied by an affidavit of documents sworn by the party. The affidavit encloses a list of all relevant documents and states that, after a diligent search of that party's files and records, those are the only relevant documents to be produced. The definition of “documents” includes paper documents, e-mails, computer files, tape recordings, videos and electronic media. The definition of “relevance” is also broad.

The opposing party is entitled to receive a copy of every document listed in the affidavit of documents that is not privileged. Privileged documents are generally those that are created for the purpose of giving or receiving legal advice. Where legal advice of any kind is sought from a professional legal advisor in his or her capacity as such, the confidential communications relating to the giving or receiving of such advice are permanently protected from disclosure by the client or by the legal advisor, unless the client waives the protection. Documents that are created for the dominant purpose of actual or reasonably contemplated litigation are also protected by a form of privilege.

In Québec, there is no obligation to list or produce relevant documents for the other parties. Instead, each party must make specific requests to the other to produce specific and identified relevant documents either by subpoena or during

oral examinations. Subject to privilege and the rules of admissibility of evidence, the parties are required to provide copies of the documents requested.

In both Ontario and Québec, the court may order third parties to produce relevant documents before trial, if it is in the interests of justice to do so.

(b) Oral Discovery

In both Québec and Ontario, a party is allowed, prior to trial, to ask the other party questions out of court, and to have the questions and answers officially recorded by a court stenographer. The official transcripts of these “examinations” may later be put into the trial record, or used to impeach a witness on cross-examination at trial. A party is normally entitled to examine only one representative of the opposing party, but leave from the court may be granted in exceptional circumstances to examine multiple representatives.

Objections based on the rules of evidence may be made by the parties during oral discovery. Such objections are then submitted to a judge for adjudication.

In both Ontario and Québec, written interrogatories (whereby questions are asked and answered in writing) are available in place of oral discovery, but very rarely used.

(c) Deemed/Implied Undertaking Rule

Under both documentary and oral discovery, with certain limited exceptions, the parties to an action are not permitted to use the evidence or information obtained from the other party for any purposes other than those of the court proceeding.

“ In both Québec and Ontario, a party is allowed, prior to trial, to ask the other party questions out of court, and to have the questions and answers officially recorded by a court stenographer”

→ Motions and Other Interlocutory Proceedings

PRE-TRIAL MOTIONS

In both Ontario and Québec, motions may be made to the court at any time, either before or during trials. Other than in circumstances of exceptional urgency, the purpose of the motions (and usually the motions themselves) must be disclosed in writing with advance notice given to the other parties.

“ In Ontario, the court may dismiss an action at a preliminary stage by way of summary judgment if it can be demonstrated by the defendant that there is no genuine issue requiring a trial”

MOTIONS FOR SUMMARY JUDGMENT OR TO DISMISS PROCEEDINGS

In Ontario, the court may dismiss an action at a preliminary stage by way of summary judgment if it can be demonstrated by the defendant that there is no genuine issue requiring a trial. Québec does not have such a summary judgment procedure. Québec does, however, allow the court to impose a wide variety of sanctions for “improper use of procedure”, including the dismissal of a proceeding on its merits if it is clearly unfounded, frivolous or dilatory. The court in Québec also has the discretion to sanction in a variety of ways a party’s conduct that is vexatious, quarrelsome, in bad faith or excessive, which is intended (among other things) to sanction proceedings that are commonly referred to as “SLAPP” or “strategic lawsuits against public participation” cases. In Québec, the burden of proof on a party seeking the dismissal of an action at a preliminary stage on any grounds is very high.

INJUNCTIONS

In both Ontario and Québec, a party may ask the court for an injunction, which is an order either preventing a person from engaging in certain conduct, or requiring a person to perform a particular act. Injunctions may be permanent and awarded by final judgment, or may be granted on an interim basis, pending a final judgment. An interim injunction will generally be granted only if the moving party can establish that it will suffer irreparable harm (harm that cannot be compensated in monetary damages) in the absence of the injunction, and that the balance of convenience favours granting the injunction. While in fact more common in Ontario than in Québec, the general rule in both provinces is that the party seeking the injunction must give an undertaking or deposit security to pay for any damages suffered by the other party as a consequence of the interim injunction, if the court later determines that the injunction should not have been issued.

Special Cases: Mareva Injunctions, Anton Piller Orders and Norwich Orders

A “Mareva injunction” is named after the English case of *Mareva Compania Naviera SA v. International Bulkcarriers SA*. Its purpose is to enjoin a party from disposing of or transferring assets in fraud of the rights of its creditors. That party may be enjoined from disposing of assets, both in the jurisdiction of the court issuing the injunction and in other jurisdictions worldwide if the circumstances so warrant.

An “Anton Piller order” is named after the English case of *Anton Piller KG v. Manufacturing Processes Ltd*. Its purpose is to allow a plaintiff to preserve evidence that may be destroyed or concealed once the defendant learns of the

action. It authorizes a plaintiff to enter the premises of the defendant to seize and preserve evidence to further its claim in a civil action. These orders are only granted when the plaintiff has a strong case against the defendant and can demonstrate on the facts that, absent such an order, there is a real possibility that relevant evidence will be destroyed or otherwise disappear.

A “Norwich order” is named after the English case of *Norwich Pharmacal Co. v. Customs and Excise Commissioners*. Such orders allow a party to obtain information from a third party (against whom the applicant has no cause of action) before the litigation has been commenced. To obtain such an order, in addition to establishing a valid claim against the defendant, the plaintiff must establish (among other things) that the third party against whom discovery is sought is both more than a mere witness to the alleged wrongdoing and is the only practical source of information available. The plaintiff will be expected to pay a reasonable fee to such third party and to reimburse any expenses incurred by the third party as a result of the Norwich order.

Mareva injunctions, Anton Piller orders and Norwich orders are available throughout Canada, including in Ontario and Québec. These types of orders are generally granted without notice to the defendant.

“ Mareva injunctions, Anton Piller orders and Norwich orders are available throughout Canada, including in Ontario and Québec”

PRE-JUDGMENT ATTACHMENT ORDERS AND SEIZURES

In Ontario, if the proceedings concern a claim to an interest in land, the plaintiff can, with the authorization of the court (which may be sought without notice to the defendant), register a “certificate of pending litigation” against the title to the property. Such registration will not limit the disposition of the property, but it will put third parties on notice of the claims of the plaintiff that can lead to an eventual charge on the property.

In Québec, at any time before judgment, a plaintiff may apply to a judge for authorization to seize the defendant's property before judgment, if there is a reason to believe that without this remedy the plaintiff may be unable to recover its debt. The property is seized by a court officer and then entrusted to a guardian designated by the court, unless the plaintiff authorizes the defendant to remain in possession of the seized property. The property seized before judgment will not be handed over to the plaintiff until there is a final judgment in its favour on the merits. A plaintiff may also seize, before judgment and without the authorization of a judge, the defendant's property in certain exceptional cases specifically provided for by law, including when the property is movable (chattel) property that a plaintiff has a legal right to revendicate.

➔ Trial Practice in Canada

PRE-TRIAL PRACTICE

In Ontario, once the documentary and oral discovery has been completed, a pre-trial conference is held where the court, if it appears that the case will not be settled, will try to find ways to simplify the case by seeking admissions and otherwise limiting the issues in dispute. In Québec, such pre-trial conferences only take place in some cases. In both provinces, a party has the right to seek, from the other party, admissions of evidence in advance of trial.

WITNESSES

In both Ontario and Québec, the parties may call any witnesses and introduce any evidence into the record that they believe might support their positions, subject to the rules of evidence. A witness, once duly sworn, will first be examined by the party that called him or her, before being cross-examined by the other party.

If a witness refuses to attend to give evidence voluntarily before a court in Ontario, the witness may be compelled to attend by court summons, provided that they are resident in Canada. In Québec proceedings, only witnesses residing in Québec and Ontario may be compelled to attend by court summons. In either Ontario or Québec, where there is no right to compel a witness to attend a trial, the evidence can only be obtained through the issuance of letters of request (also known as letters rogatory), in which case the court issues an order seeking the assistance of a foreign court (including, in the case of Québec, a court of another province of Canada) to order that a witness in the foreign jurisdiction submit to an examination before a stenographer.

DOCUMENTARY EVIDENCE

All documentary evidence at trial must generally be introduced by the oral testimony of a witness who has personal knowledge of the documents concerned, unless its admission is consented to by all parties. It is common for the parties to agree on the admission of certain documents into evidence, but generally the contents of a document will need to be established through oral testimony.

EXPERT REPORTS

The usual practice in Ontario and Québec is for the parties to appoint their own experts when necessary, although the court can also, on its own motion, appoint an independent expert to opine on an issue in certain circumstances. The report

of a court-appointed expert may be questioned or rejected by a party, and the court-appointed expert may be cross-examined. Subject to such objections by the parties, the report of a court-appointed expert will form a part of the evidence at trial.

When a party appoints its own expert or a joint expert is named by the parties, the expert must produce a written report that must be communicated to the other parties and filed in the court record within a stipulated period of time, failing which the expert's testimony may not be heard at trial. In Ontario, the number of expert reports that can be filed without leave of the court is limited to three. In Québec, there is no such limit.

In Québec, when the parties deliver contradictory expert reports, the court has the power to order the experts to meet to reconcile their opinions, identify the points that divide them and to report to the court and the parties about the outcome of the meeting.

JUDGMENTS, ORDERS AND APPEALS

Judgments and Orders

Following trial, the court will issue a final judgment on the merits of the parties' dispute. Judgments are rendered either by being read out in open court or by depositing a written judgment with the office of the court. In Ontario, while the court decides the matter and may issue reasons for judgment, it is generally the parties who draft the formal order and submit it to the court for approval and signature. In Québec, the judgment is drafted and issued by the court and signed by the presiding judge.

In both Ontario and Québec, final judgments may be amended, set aside or varied, but only in very limited circumstances. In Ontario, an order may be set aside or varied where it is established that the order was obtained by fraud, or that new facts have been discovered that were not available at the time of trial and would very likely have affected the outcome. Similarly, in Québec an order may be varied or set aside where there was a defect in the procedure; where the judge went beyond the conclusions sought or failed to rule on one of the essential grounds of the suit; where judgment was rendered upon documents that were only subsequently discovered to be false or following fraud of the adverse party; or where decisive documents were discovered since the judgment was rendered, the production of which had been prevented by a circumstance of irresistible force or by an act of the adverse party.

Appeals

Normally, the only option available to a party following a final judgment is an appeal to a higher court, which is available in most instances. In both Ontario

“ Normally, the only option available to a party following a final judgment is an appeal to a higher court...”

“ A class action is a proceeding instituted by one or more persons who seek to represent the interests of a ‘class’ of persons with similar claims against the same defendant or defendants ”

and Québec, a judge will not hear an appeal from his or her own decision, nor participate on a panel hearing any such appeal. Further, in both provinces, an appellate court has broad discretion to make any order it considers just on the appeal, including setting aside the decision below and substituting its own judgment, referring the matter back to the same or a new judge for a subsequent hearing or determination or dismissing the appeal altogether.

Generally, an appeal court will give significant deference to findings of fact made by the trial judge or a jury, and will only overturn such a finding when it is plainly wrong and constitutes a palpable and overriding error. Pure findings of law are afforded less deference and generally will be overturned if they are found to be incorrect. Findings of mixed law and fact are typically entitled to the same level of deference accorded to findings of fact.

Default Judgments

In both Ontario and Québec, when a defendant, after being served with the originating process, fails to file a defence (or in the case of Québec, an appearance) with the court, the plaintiff can obtain a default judgment against the defendant. A default judgment can be set aside in certain circumstances. In Québec, a party seeking to set aside a default judgment must establish that it was prevented from filing a defence by surprise, fraud or for some other sufficient reason so as to justify its failure to defend the proceeding. In Ontario, a court will set aside a default judgment where the defendant can establish that its failure to file a defence was not wilful or deliberate, it moved promptly to set aside the default judgment, and there is some merit to its defence.

Consent Judgments

In both Ontario and Québec, a defendant can, at any stage of a proceeding, consent in whole or in part to the plaintiff's claim. Where the defendant has consented to only a portion of the plaintiff's claim, a judgment may be immediately obtained for that portion of the claim, while the proceedings will continue for the balance of the claim.

➔ Special Proceedings

CLASS ACTIONS

A class action is a proceeding instituted by one or more persons who seek to represent the interests of a “class” of persons with similar claims against the same defendant or defendants. In both Ontario and Québec, a person seeking to represent a class, generally referred to as a “representative plaintiff”, must bring a motion or application seeking approval of the court to proceed with the action

as a class proceeding. The tests that must be satisfied in Ontario and Québec before the court will authorize an action to proceed as a class action are similar. In general, the court will assess whether there is sufficient commonality between the claims of the proposed representative plaintiff and the members of the class such that it would be appropriate and in the interest of justice to permit the case to proceed as a class action.

If a class action is authorized, the class action will proceed to a “common issues” trial (unless the parties agree to settle it before trial). Such a trial is intended to decide all of the issues common to the members of the class. Once resolved, a protocol will usually be established to address any outstanding individual issues that could not be determined on a class-wide basis.

If a class action is not authorized, the action may continue as an individual action. In practice, however, this rarely occurs.

SIMPLIFIED PROCEDURES

A number of provinces have simplified procedures that can be used to resolve disputes of lower monetary value. For example, in Ontario, claims for \$100,000 or less in respect of money, real property or personal property must be brought pursuant to a simplified procedure. This procedure provides for a faster and less expensive determination of disputes. Similarly, in Ontario, cases involving \$25,000 or less can be brought before the Small Claims Court, which requires less formal procedures than the Superior Court. In Québec, as long as the plaintiff is not an entity with more than five employees, if the amount of the claim is \$7,000 or less (under the changes proposed by the Québec government, this limit would increase to \$15,000), the case must generally proceed before Small Claims Court, where representation by lawyers is only very exceptionally permitted.

“A number of provinces have simplified procedures that can be used to resolve disputes of lower monetary value”

COMPETITION TRIBUNAL PROCEEDINGS

Proceedings may be commenced for alleged violations of the *Competition Act* before the Competition Tribunal. The *Competition Act* governs matters such as mergers, misleading advertising and restrictive trade practices: see the Competition Law section of this Guide. The tribunal is a strictly adjudicative body that operates independently of any government department. The tribunal is composed of experts in economics, business and law.

SECURITIES COMMISSION PROCEEDINGS

Each of Canada’s provinces has a securities regulator that oversees the capital markets, including equities, fixed income securities and derivatives: see the Financing a Business Operation section of this Guide. In Ontario, the Ontario

“ In Canada, disputes can be resolved by agreement of the parties through various alternative dispute resolution (‘ADR’) mechanisms, including arbitration and/or mediation ”

Securities Commission (“OSC”) is a self-funded Crown corporation accountable to the Ontario legislature. The OSC has broad powers to enforce the Ontario *Securities Act* and investigate allegations of misconduct in the capital markets.

Proceedings before the OSC include allegations against individuals or companies suspected of violating securities law or acting contrary to the public interest. In addition, the OSC conducts hearings on regulatory matters such as takeover bids and reviews decisions from certain self-regulatory organizations, stock exchanges and clearing agencies. Proceedings before the OSC are heard by a panel of commissioners with expertise in matters of law and finance. The OSC has its own rules and procedures. Decisions of the OSC may be appealed to a court, but Ontario courts generally show deference to the expertise of the OSC.

In Québec, the *Autorité des marchés financiers* (the “AMF”) has the mandate to administer all the laws governing the supervision of Québec’s financial sector, including the securities sector. Québec’s independent *Bureau de décision et de révision en valeurs mobilières* (the “Bureau”) functions as an administrative tribunal charged with exercising certain powers provided for in the Québec *Securities Act*. The Bureau can, for example, make an order regarding a takeover bid or issuer bid, order the cessation of an activity in respect of a transaction in securities or derivatives, or make an order prohibiting a person from acting as a director or senior executive. The Bureau can also review decisions of the AMF. Once filed with the Superior Court, a decision of the Bureau becomes executory in the same way as a decision of the Superior Court. The Bureau has its own rules of procedure. Appeals of a final decision of the Bureau may be made to the Court of Québec (Québec’s provincial court), whose decisions are in turn subject to appeal to the Court of Appeal, with leave of a judge of the Court of Appeal.

Alternative Dispute Resolution

In Canada, disputes can be resolved by agreement of the parties through various alternative dispute resolution (“ADR”) mechanisms, including arbitration and/or mediation.

MEDIATION

Mediation involves a neutral “mediator” who assesses the dispute between the parties and attempts to facilitate a settlement. Mediation is generally non-binding in nature and can result in a resolution of a dispute only if all of the parties to the dispute agree to terms of a settlement.

In Ontario, certain types of proceedings commenced in the Superior Court are subject to mandatory mediation. Otherwise, parties are not required to participate in mediation.

The Québec courts also provide the option, at any stage of the proceedings, of settlement conferences that are conducted by a judge in private, confidentially, without prejudice and at no cost to the parties. Parties to litigation in Québec may also agree to appoint a private mediator to hold a settlement mediation. If the amendments currently proposed in Québec are passed, consideration of alternative modes of settlement before instituting legal proceedings will be required by law.

ARBITRATION

Parties are free to agree to resolve a dispute through arbitration, another ADR mechanism. The procedure and parameters of the arbitration can generally be agreed to by the parties in an arbitration agreement. There are, however, various arbitration statutes that apply to arbitrations conducted in Ontario and Québec.

In Québec, arbitration agreements are a recognized (nominate) contract under the *Civil Code of Québec* and do not require formal recognition to be enforceable. Arbitrators have the power to decide matters relating to their own competence (or jurisdiction). Where an action is taken before a court and there is an existing arbitration agreement between the parties regarding the subject matter of the dispute, the court may refer the case to arbitration if so requested by one party before the case is set down for trial, if that party has not submitted to the jurisdiction of the court. A judge cannot interfere with the arbitration process except where specifically authorized by the *Civil Code of Québec*, but may grant provisional measures to assist the arbitration process on a motion of a party. The procedure of an arbitration conducted in Québec is governed by the contract or, failing that, by the rules contained in the *Civil Code of Québec*.

In Ontario, an arbitration will be subject to either the *International Commercial Arbitration Act* or the *Arbitration Act, 1991*. The *International Commercial Arbitration Act* is applicable to commercial disputes where the parties have places of business in different countries. The *International Commercial Arbitration Act* provides for arbitration based on the UNCITRAL Model Law adopted by the United Nations Commission on International Trade Law. This model is procedurally flexible, allowing the parties involved to design the procedure that best suits them within the framework provided by the *International Commercial Arbitration Act*.

If the *International Commercial Arbitration Act* does not apply, the *Arbitration Act, 1991*, will apply to all non-labour domestic arbitrations where the parties have agreed, whether in writing or orally, to submit a dispute to arbitration. Similar to the provisions of the *Civil Code of Québec*, pursuant to the *Arbitration Act, 1991*, an arbitrator may rule on his or her own jurisdiction. Where a proceeding is commenced in an Ontario court in respect of a matter that is subject to arbitration, the court, on application by one of the parties, will

stay the court proceeding in favour of arbitration except in certain limited circumstances. An Ontario court may, however, make various orders to assist the arbitration process.

➔ Costs and Recovery of Litigation Expenses

“ Costs are normally awarded to the successful party, but the court has the discretion not to award costs, or even to award them to the losing party”

In both Ontario and Québec, a portion of a party's litigation expenses may be recovered through an award of costs. Costs are normally awarded to the successful party, but the court has the discretion not to award costs, or even to award them to the losing party. The court will exercise its discretion in light of a number of factors, including the complexity of the proceeding, and the conduct of any party that tended to unnecessarily prolong the proceeding or that was improper, vexatious or unnecessary. The costs awarded by the court, however, usually do not cover the full legal expenses incurred by the party.

In Ontario, costs are awarded on either a “partial indemnity” basis or a “substantial indemnity” basis. An award of substantial indemnity costs is significantly higher than an award of partial indemnity costs and is generally only made to sanction improper conduct of one of the parties. Ontario courts will also consider an offer to settle made in writing by one party before trial when evaluating the conduct of the parties and deciding on the appropriate award of costs.

In Québec, costs are limited to administrative fees charged to file proceedings, certain amounts (normally much less than the actual fees) awarded by tariff for court proceedings and certain expenses, such as transcript fees, expert fees, etc. For cases where the amount in dispute exceeds \$100,000, an additional amount of 1% of the amount in excess of \$100,000 is awarded. The court also has the discretion to award a “special fee” in addition to all other costs in an “important” case. However, awards of a special fee are extremely rare.

In both Ontario and Québec, costs may also (though very exceptionally) be awarded against the lawyer for a party, rather than the party itself, if there has been an abuse of process by the lawyer.

Enforcement of Foreign Awards and Orders

ENFORCEMENT OF FOREIGN AWARDS AND ORDERS

Because Canada is a federal state in which the provinces have constitutional jurisdiction over the administration of justice, a judgment of a civil court in one province or territory is not automatically enforceable in another province or territory. In this respect, it is no different from a judgment rendered by a court in a foreign country. However, in Ontario and the other common law provinces and territories of Canada, there are well-established common law principles and statutory procedures enabling a judgment ordering the payment of money rendered by either a court in another province of Canada or a court in a foreign country to be enforced, without re-litigating the case on its merits.

In Ontario, it is most common for a judgment from outside Ontario to be enforced by bringing an action on the judgment in an Ontario court. The judgment will be enforced in Ontario if the defendant submitted to the jurisdiction of the court that gave the judgment, either by agreement or by participating in the proceeding, or if the claim had a “real and substantial connection” to the jurisdiction in which the judgment was rendered. Only a few defences may be raised against the enforcement of a foreign judgment, such as that it was obtained by fraud or in a manner contrary to natural justice. These defences are rarely successful. An Ontario court will not re-examine the merits of the claim. The fact that the laws of a foreign jurisdiction are different in both substance and procedure from those in Canada and that the defendant might have had some defence in a Canadian action that was not available in the foreign proceeding is not a barrier to enforcement of a foreign judgment.

Ontario also has legislation providing for reciprocal enforcement of judgments from other provinces and territories of Canada and the United Kingdom, but the statutory procedure is not commonly used, because it is not significantly more advantageous than enforcement under common law principles, and the criteria applied and the defences available are substantially the same.

In Québec, any judgment from another jurisdiction is similarly considered a foreign judgment. In deciding whether to enforce a foreign judgment, the court will not engage in an examination of the merits of a decision, but may refuse to recognize a foreign judgment if the court determines that (i) the foreign court had no jurisdiction to render the judgment, (ii) the foreign judgment was rendered in contravention of fundamental principles and procedure, (iii) a dispute between the same parties, based on the same facts and having the same object has given rise to a judgment rendered in Québec or is pending

“...a plaintiff can usually readily enforce a judgment for the payment of money that was rendered by a court in another province or territory in Canada, or by a court in any other developed country”

before a Québec court, or has been decided in another jurisdiction and the latter judgment meets the necessary conditions for recognition in Québec, (iv) the outcome of the judgment is manifestly inconsistent with public order as understood in international relations or (v) the decision enforces obligations arising from the taxation laws of the foreign country (unless that country has agreed to enforce obligations arising from the taxation laws of Québec). Furthermore, a foreign judgment rendered by default will not be recognized by a Québec court unless the plaintiff demonstrates that the document initiating the foreign proceeding was duly served on the defaulting party under the laws of the foreign jurisdiction.

Therefore, in practice, a plaintiff can usually readily enforce a judgment for the payment of money that was rendered by a court in another province or territory in Canada, or by a court in any other developed country. However, an Ontario court will only enforce a non-monetary order of a court in another jurisdiction, such as an injunction, if it considers in its discretion that to do so would be just in all the circumstances of the case.

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Bankruptcy and Insolvency Proceedings

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Bankruptcy and Insolvency Proceedings



Bankruptcy and insolvency proceedings in Canada are governed by a combination of statute and jurisprudence. Although bankruptcy and insolvency are under federal constitutional jurisdiction, other aspects of creditors' rights are governed by provincial laws.

The *Bankruptcy and Insolvency Act* (the "BIA") and the *Companies' Creditors Arrangement Act* (the "CCAA") are the most frequently used Canadian insolvency statutes. The BIA and the CCAA allow an insolvent debtor to undertake a restructuring process. The BIA also provides for a bankruptcy liquidation procedure.

As a general rule, non-Canadian creditors will have the same rights as Canadian creditors in Canadian insolvency proceedings.

→ Types of Canadian Insolvency Proceedings

There are five principal insolvency proceedings in Canada:

- (a) bankruptcy;
- (b) proposal under the BIA;
- (c) receivership (court appointed and private);
- (d) proceedings under the CCAA; and
- (e) liquidation under the *Winding-up and Restructuring Act* (the "WURA").

Each of these (other than private receivership) provides for the debtor to obtain a stay of proceedings preventing stakeholders from taking any enforcement steps. In bankruptcy or proposal proceedings under the BIA, the stay is automatic and its scope is mandated by statute, although a bankruptcy does not stay secured creditor remedies. In a court-appointed receivership or CCAA or WURA proceeding, the stay is imposed by court order and the scope is discretionary. As a result, while a bankruptcy or insolvency proceeding is pending, generally creditors (including secured creditors) cannot exercise the rights and remedies that they would otherwise have against the debtor and its assets, but must assert their claims through the procedures established under the applicable bankruptcy or insolvency legislation or court order.

Generally, a stay of proceedings has no effect on the ability of holders of the insolvent debtor's securities to trade those securities (although, as a practical matter, the value or marketability of the securities will be adversely affected by the insolvency). In fact, such trading is common in the course of insolvency. A stay also does not affect the right to terminate and net obligations under

“ Generally, a stay of proceedings has no effect on the ability of holders of the insolvent debtor's securities to trade those securities...”

“ In Canada, certain wage, pension and government remittance claims are treated differently than other creditor claims ... Defined benefit pension plans in particular may be a concern”

“eligible financial contracts” to which the debtor is a counter-party (or realize upon related financial collateral posted as security in relation to an eligible financial contract) if such rights are contained in the eligible financial contract. “Eligible financial contracts” are defined to include derivatives agreements, futures, options, securities lending transactions, repurchase agreements for securities or commodities and various other transactions.

In Canada, certain wage, pension and government remittance claims are treated differently than other creditor claims. The BIA grants super-priority lien status or deemed trust status over assets of the insolvent debtor for such claims. Defined benefit pension plans in particular may be a concern. The Supreme Court of Canada has recently held that the statutory deemed trust applies to any deficit in a pension plan that is already in wind-up, which expands the scope of the trust beyond what was previously thought to be the case. The Court also commented that directors of an insolvent corporation cannot treat their duties as administrator of the pension plan as separate from their duties to the corporation, as many had hitherto believed. Directors will be in a conflict of interest if there is a “substantial risk” that satisfying their duties as administrator will be “materially and adversely affected” by their decision to take insolvency proceedings in the best interests of the corporation.

Also, the Canadian government has implemented a program to assist and compensate workers who are unpaid when an employer goes bankrupt. However, in general, government claims, including environmental remediation obligations, do not have priority over other creditors. A recent Supreme Court of Canada decision has highlighted that there will often be uncertainty whether remediation obligations give rise to creditor claims in an insolvency proceeding, so that dealing with a debtor’s contaminated property may create difficult issues.

BANKRUPTCY

Bankruptcy results in the liquidation of an insolvent entity either voluntarily or involuntarily and can be initiated either by the debtor or by its creditors. Upon an assignment into bankruptcy or the issuance of a bankruptcy order, all of the property, assets and undertaking of the bankrupt vest in a bankruptcy trustee for the general benefit of creditors (subject to the interests of secured creditors).

Thereafter, the bankruptcy trustee will realize against unsecured assets. The proceeds will be distributed, in accordance with the detailed rules set out in the BIA, to the unsecured creditors that have proven claims on a *pro rata* basis, subject to the payment of trust claims, certain government claims, secured claims and statutorily mandated preferred claims. Other than statutory rights of redemption by the bankruptcy trustee, bankruptcy does not affect the rights of secured creditors or involve secured assets. Banks, insurance companies, loan

companies, trust companies and authorized foreign banks cannot be put into bankruptcy: see “WURA Proceedings” below.

BIA PROPOSAL

An insolvent debtor may choose to restructure its affairs through the consensual compromise of creditors’ claims. This is referred to as a proposal.

A BIA proposal is generally commenced by filing a notice of intention to make a proposal, which triggers an automatic stay of proceedings. From the initial filing until the end of the proposal process, a licensed trustee must act in connection with the proposal. The BIA specifies that a proposal must be filed within six months of the beginning of the process. A proposal under the BIA may be made to creditors generally, or the creditors may be separated into classes, based on commonality of interest. A BIA proposal may also be made to secured creditors. In addition, the BIA requires that certain payments, such as outstanding wages and government remittances, must be paid in full and cannot be compromised in a proposal. A BIA proposal is only deemed to be accepted if all classes of creditors vote in favour by a majority in number and two-thirds in value of the creditors voting in each class. The proposal is also subject to the court’s approval. Failure of a debtor to obtain the requisite approval of creditors, or the court’s refusal to approve the proposal, will result in automatic bankruptcy.

However, because of the strict statutory code and time-frame governing proposals in the BIA, the most significant and complex Canadian insolvency restructurings are not carried out as proposals. If the restructuring requires a sophisticated remedy that is not available under the BIA, for instance, if the debtor needs to maintain uninterrupted supply from critical suppliers who have no contracts with the debtor, or if the restructuring process will take longer than six months, the CCAA is typically used. Banks, insurance companies, loan companies, trust companies and authorized foreign banks cannot make BIA proposals.

RECEIVERSHIP

Receivers may be appointed privately or by a court. Receivers (who must be licensed trustees) will realize against the property, assets and undertaking of the debtor and will distribute the proceeds in accordance with the relative priorities of the debtor’s creditors. A receiver may be appointed as receiver and manager with the authority to operate the debtor’s business as a going concern, or simply as a supervisor.

A secured creditor may appoint a private receiver over the property, assets and undertaking of a defaulting debtor pursuant to a contractual power granted by the debtor to the creditor in security documents or under statutory authority.

“ Banks, insurance companies, loan companies, trust companies and authorized foreign banks cannot be put into bankruptcy”

“The primary purpose of the CCAA is to facilitate a compromise or arrangement between an insolvent debtor company and its creditors so that the company can continue in business”

The secured creditor must give a statutory notice of intention to enforce its security to the debtor at least 10 days prior to the receiver's appointment. There is no stay of proceedings available in a private receivership.

A court-appointed receiver is not an agent of the debtor or of any creditors. As an officer of the court, it has statutory duties and obligations, in addition to those specified in the appointment order. The BIA also gives the court the power to appoint a receiver on a national basis. There are no statutory criteria establishing which entities may be subject to receivership proceedings. As a result, the terms of the appointment of a receiver are largely a function of the court's discretion.

CCAA PROCEEDINGS

Large insolvent entities generally restructure under the CCAA because of its flexibility, which allows the insolvent debtor to design its restructuring plan to fit its particular circumstances. The CCAA permits debtors to make compromises or arrangements with their stakeholders, including both secured and unsecured creditors. A debtor can also sell its business or liquidate under the CCAA.

The CCAA is available to any company incorporated in Canada (or with assets or business activities in Canada) that is insolvent or has committed an act of bankruptcy and whose total creditor claims exceed \$5 million (alone or as part of a corporate group). Like the BIA, the CCAA does not apply to banks, insurance companies, loan companies, trust companies and authorized foreign banks.

The primary purpose of the CCAA is to facilitate a compromise or arrangement between an insolvent debtor company and its creditors so that the company can continue in business. Increasingly, the CCAA has also been used for complex liquidations.

A proposed restructuring under the CCAA is commenced by a court application for an order staying proceedings against the debtor company and granting other relief in the discretion of the court. The court is required by the CCAA to appoint a monitor, who cannot be the debtor's auditor and must be a licensed trustee, to oversee the business and financial affairs of the company and its dealings with creditors while the stay order remains in effect. Because of the broad discretion given to the supervising court in a CCAA restructuring, there is no fixed form of stay order prescribed by the CCAA, although in some provinces (including Ontario and Québec) template model orders have been endorsed. The CCAA outlines the process which must be followed in connection with certain aspects of the restructuring, including the disclaimer or resiliation of contracts, the availability and terms of any super-priority debtor-in-possession financing, the sale of assets out of the ordinary course of business and the assignment of contracts without consent.

Under the CCAA, the debtor company files a plan of compromise or arrangement. The plan is submitted for creditors' approval at a meeting of each class of creditors. The creditors' approval required is the same as for a BIA proposal: a majority of the number of creditors voting and two-thirds of the value of the claims of the creditors voting. Once the creditors have voted in favour of the plan, the court must sanction the plan, if the court finds it to be fair and reasonable under the circumstances. If the creditors or the court refuse to approve the plan, there is no automatic bankruptcy. Equity claims (which include third-party indemnity claims arising in relation to equity) may not be paid until all creditors are satisfied.

WURA PROCEEDINGS

Although it is also possible for most insolvent corporations to be liquidated under the WURA (but not corporations incorporated under the *Canada Business Corporations Act*), in practice this statute is used almost exclusively for the winding-up of insolvent regulated financial institutions under the supervision of their regulators, in conjunction with the *Canada Deposit Insurance Corporation Act* (the "CDIC Act") and the *Bank Act*.

Under the CDIC Act, an order can be made vesting all the shares and subordinated debt issued by a bank in the Canada Deposit Insurance Corporation or appointing the latter as a receiver. The *Bank Act* includes provisions allowing the Superintendent of Financial Institutions to take control of the assets of a bank and manage the winding-up process. In practice, these steps are combined with WURA proceedings as it provides the statutory framework for dealing with creditors' claims.

“ The creditors’ approval required is the same as for a BIA proposal: a majority of the number of creditors voting and two-thirds of the value of the claims of the creditors voting”

International Bankruptcy

ASSETS LOCATED IN FOREIGN JURISDICTION

Orders of Canadian courts are usually effective only in Canada. Therefore, in order for the assets of a Canadian insolvent debtor located in a foreign jurisdiction to be subject to the stay of proceedings in a Canadian insolvency, it would be necessary for the Canadian court to request a court in the jurisdiction of the assets to issue a parallel stay order or a parallel insolvency proceeding to facilitate the Canadian proceedings. While it is fairly common for such parallel proceedings to be initiated, the great majority of such parallel proceedings have involved Canada and the United States. Canada has now adopted the *Cape Town Convention* in respect of “aircraft objects”.

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Bankruptcy and Insolvency Proceedings

CANADIAN COURT RECOGNITION OF FOREIGN PROCEEDINGS

Canadian insolvency legislation gives Canadian courts the jurisdiction and discretion to recognize foreign insolvency proceedings. Canada has adopted the UNCITRAL Model Law on Cross-Border Insolvency in this regard. However, the approach differs from that of other countries, and there are some important differences that are unique to Canada.

The recognition of foreign proceedings does not deprive the Canadian court of jurisdiction in the event that there is a fairness or equity issue. As a result, even to the extent that a Canadian court recognizes a foreign proceeding, that foreign proceeding must treat Canadian creditors and assets in a manner substantially consistent with Canadian legal standards.

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Foreign Anti-Corruption Measures

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Foreign Anti-Corruption Measures



Canada has recently moved to strengthen the enforcement of its *Corruption of Foreign Public Officials Act* (“CFPOA”) in response to international criticism of its record. The CFPOA is Canada’s principal legislation combatting bribery of foreign public officials in connection with international business transactions. It is similar to some of the measures found in the United States’ *Foreign Corrupt Practices Act* and the United Kingdom’s *Bribery Act*.

→ Anti-Corruption Offence and Exceptions

Under the CFPOA, it is a criminal offence to (i) in the course of business, (ii) give, offer or agree to give or offer, (iii) directly or indirectly, (iv) a loan, reward, advantage or benefit of any kind (v) to a foreign public official or to any person for the benefit of a foreign public official:

- as consideration for an act or omission by the official in connection with the performance of his or her duties or functions; or
- to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

Giving even relatively small benefits, such as token gifts, can constitute an offence under the CFPOA, although it may be difficult to characterize a trivial benefit as being given as consideration for an act or omission. Given the limited contested proceedings under the CFPOA to date, Canadian courts have yet to rule on the scope of prohibited advantages or benefits. It is clear that the offence can apply to non-monetary benefits, such as free or subsidized housing or tuition, for example.

The prohibition applies to offering or giving benefits not only to legislators or judges, for example, but also to anyone holding an administrative position with a foreign state and to employees of state boards, commissions or corporations who are performing duties on behalf of a foreign state. (“Foreign state” includes both foreign countries and their political subdivisions, such as cities or provinces, and agencies.) However, the prohibition applies only in respect of persons currently holding such a position, and not former or anticipated public office holders.

The CFPOA contains saving provisions, which allow for the payment of certain types of benefits. For example, benefits that are permitted or required under the laws of the foreign state or public international organization for which a foreign public official performs duties or functions do not violate the anti-corruption offence. The CFPOA also does not prohibit payment of reasonable expenses

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incurred in good faith by or on behalf of a foreign public official that are directly related to the execution of a contract with the foreign state for which the official performs duties or functions.

The CFPOA also currently provides an exception for “facilitation payments”, which are payments made to expedite or secure the performance by a foreign public official of a routine act that is part of the official’s duties or functions. However, an amendment repealing this exemption has been passed by Parliament and could be proclaimed in force at any time.

➔ Books and Records Offence

The CFPOA also includes a separate offence prohibiting certain deceptive bookkeeping practices “for the purposes of bribing a foreign public official” for a business advantage, or to hide such bribery. Examples include keeping separate accounts that do not appear in official records, not recording transactions, recording non-existent expenditures, falsely describing entries, and early destruction of records.

It remains to be seen whether Canadian courts will interpret the concept of “bribery” in this records offence as coinciding with the general CFPOA prohibition on giving certain benefits to foreign public officials, in which case this offence may not add much to the anti-corruption offence. In any event, this records offence is narrower than a similar offence under the U.S. *Foreign Corrupt Practices Act*, which imposes a general obligation on securities issuers to keep accurate records and does not require that any inaccuracy be for the purpose of bribery.

Offences in the *Canadian Criminal Code* and *Income Tax Act* prohibiting forgery or falsification of documents may also cover some of the same conduct as the CFPOA books and records offence.

➔ Scope of Application of the CFPOA

The CFPOA expressly applies to conduct outside Canada by Canadian citizens and Canadian corporations. Canadian courts have also generally applied Canadian criminal sanctions to conduct that has a real and substantial connection to Canada, whether or not the offenders are Canadian. However, in a recent decision, an Ontario court held that the CFPOA did not give the Canadian government the right to prosecute a foreign citizen accused of having received unlawful payments. The accused had never been in Canada and all of his alleged conduct in violation of the CFPOA took place outside Canada. However, the individual could be charged if and when he enters, or is extradited to, Canada.

“ The CFPOA expressly applies to conduct outside Canada by Canadian citizens and Canadian corporations ”

→ Penalties and Sanctions

A violation of the CFPOA is punishable by a fine at the discretion of the court and imprisonment for up to 14 years. CFPOA offences are not subject to any limitation period.

The largest CFPOA fine to date is \$10.35 million, imposed on a corporation. In May 2014, an individual was sentenced to a three-year prison term for agreeing to offer bribes to foreign officials to secure a security contract from a foreign airline. At the time the offence was committed, the maximum sentence was five years. It may be expected that the government will seek more severe sentences under the current CFPOA and where a payment was actually made or a contract was awarded as a result. Other cases are pending, and the CFPOA is a federal government enforcement priority to demonstrate compliance with Canada's international treaty obligations.

Resolutions of charges against corporations have included ongoing probation and audits. Property obtained or derived from a CFPOA offence may in some circumstances be forfeited. Civil actions for economic torts based on unlawful acts, such as unlawful interference with economic relations, are also possible.

→ Liability for Conduct of Affiliates

As the principal CFPOA offence prohibits anyone from directly or indirectly giving, offering or agreeing to a prohibited type of benefit, in certain cases, a parent company may be considered to indirectly give a prohibited benefit actually paid by its subsidiary.

Individual persons who hold positions with more than one affiliate may also incur multiple liability in respect of the same conduct. A parent company might also be liable for aiding and abetting or counselling a CFPOA offence committed by a subsidiary.

→ Risk Assessment, Due Diligence and Compliance Measures

CFPOA issues should be considered by a purchaser contemplating a merger or acquisition in Canada. Breaches of the CFPOA by the target may result in significant fines, damage claims and investigation and other costs that arise only after closing. Identification of a possible CFPOA liability prior to closing may affect the price the purchaser is willing to pay for the target.

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Anti-corruption due diligence may include reviewing the target's anti-corruption policies and procedures, interviewing key personnel, and, in particularly sensitive cases, background checks and e-mail review. When undertaking CFPOA due diligence, consideration should be given to whether the target (i) operates in countries or businesses known for a high degree of corrupt behavior, (ii) sells or distributes in high-risk countries, (iii) sells to government entities, including state-owned or state-financed corporations, (iv) has joint ventures with government or quasi-governmental entities, (v) requires significant government approvals and licences to operate in high-risk countries, (vi) deals frequently with customs authorities in high-risk countries, or (vii) relies on relationships with third-party agents or consultants who interact with foreign officials on the target's behalf. Payments in cash, unusual scholarships or charitable contributions as well as lavish gifts, unexplained introductions of third parties into transactions, agent relationships with government officials, payments made in a country other than where the relevant business is conducted, transactions lacking an apparent economic purpose, and excessive compensation or commission percentages in relation to the services provided, may all constitute red flags that warrant investigation.

International businesses should also adopt a comprehensive compliance and monitoring program to educate employees and minimize the risk of illegal conduct by their employees, including communicating a clearly articulated code of conduct and policy, consistently applying disciplinary processes for violations of the code, implementing a system of internal controls, maintaining accurate books and records, establishing a reporting system and helpline, and conducting independent audits. A similar approach should be taken with third parties such as agents and partners, for example, by including "compliance with law" and "right to audit" clauses in agency contracts.

Proposed Transparency Measures for the Extractive Sector

In March 2014, the Canadian government launched a consultation on proposed mandatory reporting measures, to come into effect by April 2015, to require Canadian extractive businesses (such as oil, gas and mining companies) to disclose payments made to domestic or foreign governments. If implemented, these measures would require the disclosure of all payments, including taxes, licence fees and other receipts, made by Canadian extractive businesses to all levels of governments, both domestically and internationally.

Implementation of such measures is expected to be consistent with existing international standards for payment reporting requirements, such as the criteria

of the Extractive Industries Transparency Initiative (the "EITI"). The EITI's reporting criteria include the regular publication to a wide audience in a publicly accessible manner of all material payments to governments.

The EITI's reporting criteria have been adopted by a number of resource-rich countries in Africa, the Middle East and Asia. The United States and the European Union have also implemented similar measures. The Canadian proposals differ from U.S. laws, but are consistent with EU laws, in proposing to impose disclosure requirements on closely-held companies as well as public companies. Unlike both the U.S. and the EU, however, the current Canadian proposals would require reporting of certain types of payments to "Aboriginal entities" as well as payments to government entities.

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