



BLG
Borden Ladner Gervais

Doing Business in Canada

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

About this Guide

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

Each chapter is updated annually by our team of lawyers. Look for the Practical Advice section in each chapter for our tips on what you should consider when doing business in Canada in each of the major areas of law explained in this guide.

About BLG

Canada's Law Firm

With a global clientele, Canadian expertise and a strong national presence, BLG is an independent Canadian firm that offers international clients comprehensive industry knowledge and insights into what it takes to successfully do business in Canada.

BLG provides strategic business law guidance, intellectual property solutions and dispute resolution services to clients from around the world in virtually every area of law across all business sectors.

BLG has represented clients in:

- international banking transactions;
- international joint ventures, reorganizations and acquisitions;
- international insolvencies, liquidations and restructurings;
- commercial contracts; and
- international and multi-jurisdictional disputes.

We regularly advise non-Canadian clients in their business dealings in Canada and advise Canadian clients in their business and financial dealings with foreign partners and investors. Working with BLG gives you access to a wealth of cross-border experience, innovative solutions, service excellence, legal expertise and practical solutions.

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This publication is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication.

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1

The Canadian Legal System

Canada's legal system is based on English common law, applied in nine provinces and three territories; and French civil law, applied in the province of Québec. Both legal systems are subject to the Constitution of Canada.

1.1 The Governments

Constitutionally, Canada is a federal state, with some powers assigned to the federal government and others to the provincial and territorial governments.

For most businesses, provincial laws have a greater impact than federal laws. This is because the provincial governments have authority over “property and civil rights”, including contract law, labour relations, occupational health and safety, consumer protection, real estate transactions, land use, municipal law, securities law and regulation of professionals. Municipalities derive their power from provincial statutes.

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

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

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

Federal, provincial and territorial levels of government all impose personal and corporate income taxes and transaction taxes, though in many cases there are administrative arrangements under which the federal government administers both taxes. For example, except in Québec, where there is a provincial equivalent of employment insurance (QPIP) and government pensions (QPP), payroll deductions for employment insurance, government pensions and income tax are paid only to the federal government, but are credited to the employee’s tax obligations at both levels. Similarly, in all provinces except Alberta and Québec, the federal government collects provincial corporate tax under a single tax return.

1.2 The Judiciary

The Canadian court system consists of three divisions:

- **The Federal Court** (with both trial and appellate levels), which has jurisdiction over subject matter that generally has limited relevance in the commercial context. This includes admiralty, air and rail transport, copyright, Aboriginal and tax law.
- **Provincial Superior Courts**, which are administered by the provincial governments but with judges appointed by the federal government. These courts generally handle commercial disputes.
- **Provincial Courts**, which have jurisdiction over child welfare, small claims and criminal matters of a minor nature. Provincial Court judges are appointed by the provincial governments.

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

1.3 World Perspective

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

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

Practical Advice

It is important to note that the Supreme Court of Canada consists of nine judges, three of whom must be from the province of Québec. The judges of the Supreme Court, the Federal Court and certain provincial courts are appointed by the Governor General on the advice of the Prime Minister and the Cabinet.

2

Foreign Investment Regulation

Generally, there are few restrictions on foreign investment in Canada. However, foreign investment in Canada has been subject to some type of screening or review for nearly 40 years, and some sectors are subject to restriction at the federal and/or provincial levels. Such review generally occurs pursuant to the *Investment Canada Act*, which is a federal law that generally applies to every foreign acquisition of a Canadian business and any investment to establish a new business in Canada. Although initially intended to provide a mechanism for the federal government to review only significant investments in Canada, recent amendments to the *Investment Canada Act* have expanded its scope to also provide for the review of any foreign investment in Canada that may raise national security concerns. The *Investment Canada Act* applies to all “non-Canadians”, including any person who is not a Canadian citizen or permanent resident of Canada, as well as any entity that is not controlled or beneficially owned by Canadians.

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

2.1 Net Benefit to Canada Test

In all cases of a proposed investment in Canada by a non-Canadian seeking to establish a new business or acquire control of an existing Canadian business, the non-Canadian must file either:

- a straightforward “Notification” of the investment; or
- a much more detailed “Application for Review”.

The obligation to file a Notification or an Application for Review under the *Investment Canada Act* falls solely on the non-Canadian making the investment. The Canadian business or vendor involved has no filing obligations, although commonly it will assist the investor by providing information necessary to complete the required filing. There is no filing fee associated with either a Notification or an Application for Review.

Whether an investment is reviewable or notifiable depends on how the investment is structured and its value.

A Notification must be filed each time a non-Canadian commences a new business activity in Canada or acquires control of an existing “Canadian business”, unless the establishment or acquisition of control is reviewable.

A “Canadian business” is defined as a business carried on in Canada that has:

- a place of business in Canada;
- an individual or individuals employed or self-employed in connection with the business; and
- assets in Canada used in carrying on the business.

Current ownership or control of the business is not relevant in this determination. Therefore, foreign-owned entities operating in Canada will still be considered “Canadian businesses”. If only a Notification is required, the non-Canadian making the investment must file the Notification at any time before the investment is made or within 30 days thereafter. However, if the investment is subject to a “net benefit to Canada” review and an Application for Review must be filed, in most cases, this Application filing and review process must be completed before the investment can be implemented.

2.2 Applicable Thresholds for a “Net Benefit to Canada” Review

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

- C\$1.5 billion¹ in “enterprise value”² if the investor is a “trade agreement investor”³ and not a state enterprise, or the investor is not a trade agreement investor and not a state enterprise but the Canadian business being acquired is controlled by a trade agreement investor;

- C\$1 billion⁴ in “enterprise value” if the investor is not a trade agreement investor or a state enterprise but is a “WTO investor”⁵, or if the investor is a non-WTO investor and not a state enterprise and the Canadian business being acquired is controlled by a WTO investor. (Note: this applies only to direct acquisitions. Indirect acquisitions by any WTO investor, including state enterprises, are not reviewable under the *Investment Canada Act*, but are subject to notification. This exception does not apply to non-WTO investors or to acquisitions of cultural businesses.);
- C\$398 million⁶ in assets if the investor is a WTO investor *and* a state enterprise or if the investor is a non-WTO investor *and* a state enterprise, but the Canadian business being acquired is controlled by a WTO investor;
- C\$5 million in asset value for direct acquisitions and C\$50 million in asset value for indirect acquisitions⁷ in those rare cases where the investor is not a WTO investor *and* the Canadian business is not controlled by a WTO investor;
- C\$5 million in asset value for direct acquisitions and C\$50 million in asset value for indirect acquisitions for any acquisition of a cultural business (including the publishing, distribution or sale of books, magazines, newspapers, films or music); and
- In addition to and notwithstanding any of the above, any investment that is usually only notifiable (including the establishment of a new Canadian business) and that relates to Canadian cultural heritage or national identity may be reviewable at the discretion of the Minister of Canadian Heritage.

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

¹ Starting January 1, 2019, this threshold will be adjusted annually based on growth in the nominal gross domestic product.

² The calculation of a Canadian business’ “enterprise value” will depend on whether that business is private or publicly traded and whether the transaction involves the acquisition of shares or assets. Generally, if publicly traded, the entity’s enterprise value is calculated based on market capitalization, plus liabilities, minus cash and cash equivalents. If private, the enterprise value is calculated based on the total acquisition value, plus liabilities, minus cash and cash equivalents.

³ “Trade agreement investors” are entities or persons whose country of ultimate control is party to one of Canada’s trade agreements, namely: (1) Canada-European Union Comprehensive Economic and Trade Agreement; (2) North American Free Trade Agreement; (3) Canada-Chile Free Trade Agreement; (4) Canada-Peru Free Trade Agreement; (5) Canada-Columbia Free Trade Agreement; (6) Canada-Panama Free Trade Agreement; (7) Canada-Honduras Free Trade Agreement; or (8) Canada-Korea Free Trade Agreement.

⁴ Starting January 1, 2021, this threshold will be adjusted annually, based on growth in the nominal gross domestic product.

⁵ In basic terms, a “WTO investor” is a government of a WTO (World Trade Organization) member country, a permanent resident of a WTO member country, or an entity that is controlled by one or more WTO investors.

⁶ Based on the book value of the business’s assets, as shown on its last audited annual financial statements. This is the threshold for 2018. This value is adjusted annually based on inflation.

⁷ Based on the book value of the business’s assets, as shown on its last audited annual financial statements.

2.3 The Review of “Net Benefit”

The Minister of Innovation, Science and Economic Development (the Minister) has 45 days from the filing of a complete Application for Review to make a determination as to whether the proposed investment will be of “net benefit” to Canada.⁸ The Minister may unilaterally extend this initial review period by a further 30 days, and commonly does, if the Minister believes additional time is necessary to complete the review. Any further extensions are only permitted with the investor’s consent. The “net benefit” review period will also be extended automatically, if the investment is, or may be, subjected to a national security review (discussed in Section 3.5 (National Security Review)). Generally, once an Application for Review has been filed, the investor cannot make the proposed investment until after the Minister has made a positive determination that the investment will be of “net benefit” to Canada.

2.4 The “Net Benefit” Factors

The *Investment Canada Act* sets out the specific factors that the Minister must consider in making a “net benefit” determination. The Minister has also issued special guidelines (*Guidelines Investment by State-Owned Enterprises Net Benefit Assessment*) concerning the application of these factors to investors that are state-owned enterprises. In particular, the Minister’s guidelines provide that the governance structure and the commercial orientation of the state-owned enterprise are factors that the Minister will specifically consider in conducting a “net benefit” review.⁹

As of September 2018, only a few significant proposed investments in Canada have ever been blocked following a “net benefit” review.

Certain commitments concerning the future operation of the Canadian business concerned, known as “undertakings”, are often required from the investor, as a condition of ministerial approval. Such undertakings are negotiated between the Minister and the investor, and the terms of such undertakings are normally kept confidential. The precise scope and term of these undertakings vary, depending on the specific transaction involved and the investor’s future plans for the business, as set out in its Application for Review. Once agreed to as part of an approved Application for Review, such undertakings then become enforceable against the investor and, post implementation, the investor is normally required to report to the Minister regularly concerning the investor’s progress in meeting its undertakings.

⁸ In situations involving cultural businesses, the Minister of Heritage makes the “net benefit” to Canada decision on the recommendation of the Investment Review Division of Heritage Canada.

⁹ Note, under a policy relating to foreign investment in Canada’s oil sands, any future proposed investment by a foreign state-owned enterprise to acquire control of a Canadian oil sands business exceeding the review threshold will be found to be of “net benefit” to Canada only in exceptional circumstances. Non-controlling minority interests in Canadian oil sands businesses and joint ventures are not subject to this policy.

2.5 National Security Review

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

2.6 The National Security Review Process

The national security review process applies to any investment, implemented or proposed, by a non-Canadian to establish a new Canadian business, acquire control of a Canadian business, or acquire, in whole or in part, or establish, an entity to carry on all or any part of its operations in Canada. In general, it is expected that the Minister will become aware of potential national security concerns raised by particular transactions through the “net benefit” review process. The national security review process also applies to transactions that are not notifiable or reviewable under the “net benefit” process, including minority investments.

If the Minister has reasonable grounds to believe that a proposed or implemented investment by a non-Canadian could pose a national security risk, he may send the investor a notice that an order for a review of the investment may be made. Generally, the Minister may issue such a notice at any time within 45 days of being made aware of the investment. The notice is not an order for review, but rather is optional, at the Minister’s discretion and provides the investor with an “early warning” that the transaction raises potential national security concerns. If the investor has not yet implemented the investment, receipt of an “early warning” notice bars the investor from implementing the investment until the investor is formally advised either that there will be no review or that the investment is permitted following a review.

If an “early warning” notice is issued, the Minister then has a further 45 days from the date of that notice to consider whether a full national security review is warranted. In circumstances where no “early warning” notice has been issued, the time period for considering whether a full national security review is warranted is at least 45 days from the date the investment was implemented. The Minister may require the investor and any other person or entity involved in the transaction to provide such information as the Minister considers necessary.

In conducting the review, the Minister must consult with the federal Minister of Public Safety and Emergency Preparedness. The Minister also is expected to consult with numerous other federal departments and agencies as part of the review, including the Canadian Security Intelligence Service, the Royal Canadian Mounted Police, the Canada Border Services Agency and the Departments of Justice, National Defence, Transport, Health, Finance and Immigration, Refugees and Citizenship Canada.

The federal Cabinet may order a full review on the recommendation of the Minister based on the Minister's determination that the investment presents a national security risk. As with an "early warning" notice, if the investor has not implemented the investment before receiving such a notice of review, receipt of that notice bars it from implementing the investment until it receives authorization to proceed.

Once a full national security review is ordered, the Minister has 45 days, or such longer period as may be agreed to between the Minister and the investor, to complete the review. (This period can be unilaterally extended by a further 45 days.) The Minister may gather additional information during his review and the investor must be given a reasonable opportunity to make representations. Upon completing the review, the Minister must either allow the investment to proceed or refer the investment to the federal Cabinet for further consideration. If the matter is referred to Cabinet, within 20 days of the referral, the Cabinet must issue an order either:

- authorizing the investment, with or without conditions;
- directing that the investment not be implemented; or
- if already implemented, requiring divestiture.

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

Practical Advice

It is a good idea to take the *Investment Canada Act* into consideration early in the planning process for establishment of a new Canadian business or acquisition of a Canadian business. The statutory waiting period, if a review is required, or the undertakings given to the federal government, is a material advance consideration for acquisitions in particular. The breadth of the separate national security review and the possibility of a block or required mitigation means that proposed investments of either kind should also be analysed in advance for any such issues.

2.7 Corporate Ownership Restrictions

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

- **Financial Institutions:** Generally, without ministerial approval, a foreign bank cannot own more than 10 per cent of any class of shares in any Canadian bank, including a Canadian bank subsidiary. There are various exceptions to this general rule.
- **Broadcasting:** In an effort to promote the ownership or control of broadcasting entities by Canadians, Parliament has enacted a general rule that broadcasting licences may not be issued to non-Canadians or to companies that are effectively controlled, directly or indirectly, by non-Canadians.
- **Telecommunications:** In an effort to promote the ownership and control of telecommunications common carriers by Canadians, Parliament has enacted a general rule limiting eligibility to operate a telecommunications common carrier in Canada to carriers that are Canadian-owned and controlled corporation, incorporated or continued under the laws of Canada or a province.
- **Air Transportation:** Generally, a licence to operate a domestic airline service will only be issued to a corporation if the corporation is controlled in fact by Canadians and if at least 51 per cent of the voting interests in the corporation are owned and controlled by Canadians. Licences for international airline service may be issued to a non-Canadian if the non-Canadian applicant satisfies certain eligibility requirements.

2.8 Directors' Residency Requirements

The federal *Canada Business Corporations Act* (the CBCA) requires that at least one quarter of the directors of most federal corporations be resident Canadians. See Section 3.2(e) (Residency of Directors) for further details.

3

Business Formation

One of the threshold issues for a foreign entity to consider when seeking to establish a business in Canada is what form the business should take. The form selected should reflect both operational and tax considerations. The foreign entity will need to determine whether that business should be carried on directly, as a branch of the foreign entity, or should be created as a separate Canadian business organization, such as a subsidiary corporation (with either limited liability or, in some provinces, unlimited liability). Still other business forms include a proprietorship, a partnership (which may be a general partnership or limited partnership, or possibly a limited liability partnership), and various forms of joint venture. Additionally, the foreign entity can acquire an existing Canadian business or an interest in such a business. Generally speaking, a foreign entity may carry on business directly in Canada through a branch, but will be subject to the same sort of federal and provincial registration requirements that would apply to a corporation.

Practical Advice

No matter the form of entity, any foreign company seeking to do business in Canada will need to register in every jurisdiction in which it will carry on business. Depending on its type, the business may be subject to further registration, licensing and reporting obligations.

3.1 Branch or Subsidiary

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

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

Many foreign investors prefer to carry on business in Canada through a Canadian subsidiary. A subsidiary is more convenient for administrative purposes and can make the process of contracting in Canada simpler.

Operating through a Canadian subsidiary generally limits the liability of the foreign parent corporation to its capital investment in the Canadian subsidiary. A foreign parent corporation conducting business through a branch office is directly responsible for liabilities of the Canadian operation.

For a discussion of the tax issues that should be considered in determining whether to carry on business in Canada through a branch or subsidiary, see Section 11.8 (Branch Tax).

3.2 Corporations

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

Corporate income is taxed at a combined federal and provincial flat corporate rate rather than at the marginal individual rates. For more on the taxation of corporations, see Chapter 11 (Taxation).

a) Federal or Provincial Incorporation

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

In most Canadian jurisdictions, governing legislation permits corporations to adopt a unanimous shareholders' agreement. Such agreements have the effect of transferring certain of the directors' powers to the shareholders. To the extent that these powers are transferred to the shareholders, the directors are generally relieved of liability and the shareholders are then subject to the duties and liabilities normally attributed to the corporate directors.

This arrangement can be useful in the case of a foreign corporation that wishes to limit the powers of the Canadian subsidiary's directors over subsidiary operations, especially where the subsidiary and the foreign parent have different directors.

b) Public and Closely Held or Private Corporations

Canadian law distinguishes between public corporations, which distribute their securities to the public, and closely held or private corporations, which have a limited number of shareholders and restrict the transferability of their securities in some manner. Although public corporations are subject to more stringent requirements concerning public disclosure and to potentially differing income tax rules, the most fundamental principles of corporate law, including limited liability of shareholders, apply to all limited liability corporations.

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

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

A ULC can be formed under the laws of Alberta, British Columbia or Nova Scotia. The corporate legislation in each provincial jurisdiction is different, so creating a ULC requires an assessment of the advantages and disadvantages of each jurisdiction before the ULC is formed. Additionally, the possibility of shareholder liability under a ULC should also be carefully assessed and mitigated.

The viability of forming as an ULC must also be considered from a tax perspective. For U.S. tax purposes, a ULC is generally regarded as a flow-through entity. The U.S. Internal Revenue Service generally treats a ULC as a branch, if there is only one shareholder, or as a partnership, if there is more than one shareholder. However, in either case, the ULC will generally be "looked through" for U.S. tax purposes so that shareholders will be responsible for taxes. This is different from the position in Canada, where a ULC is taxed like any other corporation. The end result is that a ULC is generally a hybrid entity – a corporation for Canadian tax purposes and a flow-through entity for U.S. tax purposes.

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

d) Capital Structure

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

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

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

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

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

■ Practical Advice

The tax rules governing the capitalization of non-resident controlled corporations are complex so it is advisable to obtain professional advice before establishing and capitalizing an enterprise.

e) Residency of Directors

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

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

■ Practical Advice

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

f) Corporate and Trade Names

Whether operating as a branch office or as a subsidiary, corporations must register in each province and territory in which they will be conducting business. Corporations are registered in Canadian jurisdictions under their corporate names. Some provinces and territories impose approval requirements on corporate names. That registration does not, in and of itself, give the corporation any proprietary interest in the corporate name. It does, however, provide the corporation with some practical protection for its name since the corporate registrars in certain jurisdictions will typically refuse to register a corporation under a name that is the same as, or substantially similar to, that of an existing corporation in that jurisdiction.

To better protect a corporation's name that is used in association with its goods or services, the name can also be registered as a trademark under the federal *Trademarks Act*. Registration gives the owner of the trademark the exclusive right to use the trademark in association with its goods and services throughout Canada. Trademarks are discussed in Section 19.3 (Trademarks).

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

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

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

■ Practical Advice

It is advisable to conduct a Nuans search and trademark searches generally to determine whether there are any confusingly similar registered or applied for corporate names, trade names or trademarks. Trade names and trademarks should be registered to prevent those coming later from selecting a confusingly similar name or mark. Corporations doing business in Québec are required to have a bilingual or French name unless the name is trademark protected.

3.3 Proprietorships

The simplest form of business organization, a proprietorship, is a sole owner business that is not incorporated. At law, there is no distinction between the proprietorship and the owner so that the proprietorship’s income, tax liability and other liabilities are regarded as those of the owner. Income of the proprietorship is included in the calculation of the owner’s taxable income. While there are few requisite formalities for creating a proprietorship, in some cases there may be licensing and registration requirements. Also, if the owner wishes to carry on business using a name that is different from his or her own individual name, that name may first need to be registered with the applicable provincial government.

3.4 Partnerships

a) Generally

A partnership generally exists when two or more individuals or entities carry on business together with a view to making profit without incorporating. In an ordinary partnership, the partnership is not a separate legal entity and all the liabilities of the partnership are personal liabilities of the partners. An exception exists in Québec, where (although not recognized as a legal person distinct from that of its partners) a partnership possesses some of the characteristics of a legal person, such as a partnership name, a partnership head office and legal standing in court. The assets and liabilities of a Québec partnership are also considered to be distinct from those of its partners, and creditors must first take recourse against partnership assets before calling on the personal liability of the partners for any shortfall. A number of provinces and territories recognize a second type of partnership: the limited partnership, where the liability of at least one partner (the general partner) is unlimited and the liability of any other partner(s) (limited partner(s)) is limited to the amount the individual limited partner contributed to the business.

Generally, partnership income is not taxed at the partnership level, but rather is taxed in the hands of the individual partners. Each partner will be taxed on his or her proportionate share of the partnership income and on any capital gain realized when the partner disposes of his or her interest in the partnership. See Chapter 11 (Taxation).

■ Practical Advice

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

b) Limited Partnerships

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

c) Limited Liability Partnerships

Some provinces allow professional firms such as law firms and accounting firms to carry on business as limited liability partnerships, and in British Columbia, a limited liability partnership may be used for any type of business venture. The benefit of a limited liability partnership is that a partner is generally only liable for the partner's own negligent or wrongful acts or omissions or for the negligent or wrongful acts or omissions of another partner or an employee of the partnership, if the partner knew of such acts or omissions and failed to take the actions that a reasonable person would take to prevent them.

Practical Advice

There can be differences in the specific liability regime in each province. Professional advice should be obtained before forming a limited liability partnership.

3.5 Joint Ventures

There is no precise legal definition of the term "joint venture" in Canada. It generally refers to any means whereby two or more economic entities share in a common venture. It can refer to joint venture corporations, to partnerships of corporations or, most commonly, to a structure (usually referred to as a contractual joint venture) under which separate corporations own certain assets in common with the expectation that the venture does not constitute a partnership, at least for tax purposes.

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

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

Practical Advice

Determining which is the best form of entity for a particular business will depend on a host of business and operations considerations, tax implications and liability concerns.



4

Directors and Officers Liability

Directors and officers of a corporation are subject to certain duties that arise under the statute governing the corporation, under various federal and provincial statutes that apply generally to carrying on business, and under common law. In a number of instances, a director or an officer can be held personally liable for failing to fulfill these duties.

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

4.1 Duties and Liabilities of Directors

a) Fiduciary Duty

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

b) Duty of Care

Directors also owe a duty of care to the corporation. For corporations incorporated under the federal *Canada Business Corporations Act* and most provincially incorporated corporations, this duty of care is set out in the relevant corporate statute as a duty to exercise the

care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. This means that a director must apply his or her knowledge, experience, skills and best judgment when exercising powers, performing functions and making decisions as a director. As such, the duty of care is an objective standard and the courts will apply that standard in determining whether a breach of the duty has occurred.

The competence expected of a particular director may vary based on the professional experience of that director. Those who possess greater knowledge or skill may be expected to meet a higher standard of care. A director will not be relieved from liability simply because he or she was absent from the directors' meeting at which the decision was made unless the director properly registered his or her dissent to the decision.

c) Other Duties

Other directors' duties arising from federal and provincial legislation include:

- **Duties relating to wages and pensions:** Under the various federal and provincial statutes governing employment standards, directors can be held liable to the corporation's employees for unpaid wages and vacation pay earned by the employees during the individual's directorship. Moreover, where a corporation commits an offence under provincial pension benefits legislation, a director may be held personally liable if the director participated in the offence.
- **Tax-related duties:** A director may be liable for employee source deductions, non-resident withholding taxes, excise taxes, and certain other provincial taxes that the corporation has failed to withhold, deduct or remit, as required. In addition, directors can be personally liable where a corporation commits an offence under federal or provincial tax legislation.
- **Duties arising from environmental legislation:** Directors can be held liable where the corporation commits certain environmental offences. This liability can arise even where the director was not actively involved in committing the offence since directors are deemed to have control of the corporation and its employees. Directors may be fined, imprisoned or found liable for damages for the corporation's offences.
- **Duties relating to publicly traded corporations:** Directors of publicly traded corporations are subject to additional duties and potential liabilities. A director of a publicly traded corporation must ensure that the corporation has complied with the various filing, disclosure and reporting requirements, and restrictions arising from relevant provincial securities statutes. Failing to do so can give rise to serious penalties, including fines or imprisonment, or both.
- **Other duties:** Depending on the nature of the activities of the corporation, directors may be subject to a number of other duties and liabilities, including those arising from

bankruptcy and insolvency legislation, pension benefits legislation and legislation governing financial institutions. The penalties for breaching these duties may consist of fines, imprisonment or liability for payment of damages.

4.2 Duties and Liabilities of Officers

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

4.3 Protections and Defences for Directors and Officers

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

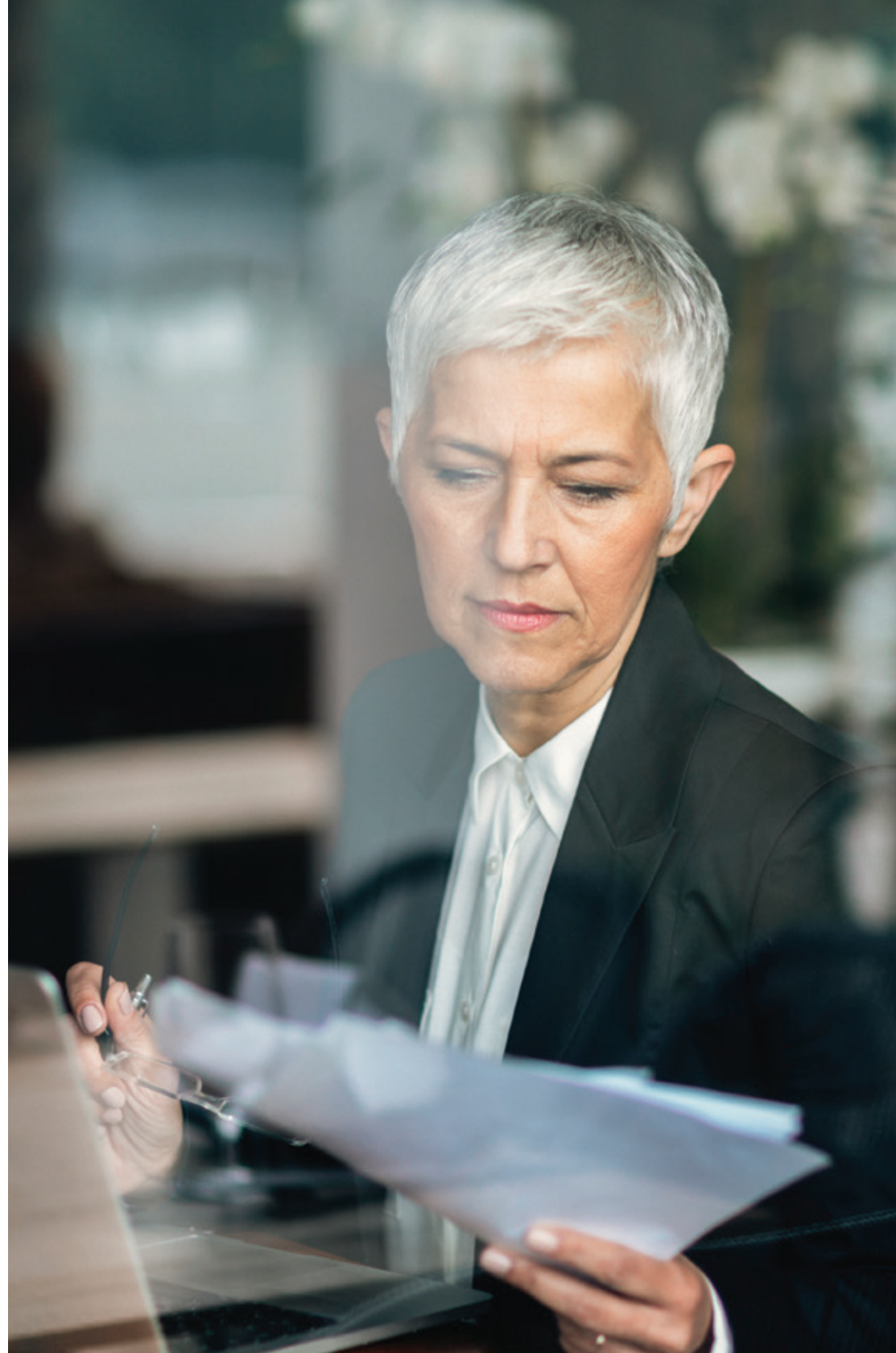
- **Corporate Indemnity:** In certain circumstances, corporations may indemnify their directors and officers for actions taken on the corporation's behalf. However, this indemnity is unavailable if the director has breached his or her fiduciary duty, if the corporation is insolvent or if a court finds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

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

Practical Advice

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

- holding the interests of the corporation paramount;
- disclosing personal interests that are in conflict with the corporation's interests;
- abstaining from voting on matters in which they have conflicting interests;
- obtaining shareholder approval of transactions in which they are personally interested;
- diligently asking questions and obtaining full answers from management about corporate affairs;
- participating meaningfully at all board meetings;
- before relying on the advice of an independent adviser or expert, verifying that the person is qualified to give such advice, giving the person access to all relevant information in the corporation's possession, and exercising common sense;
- ensuring compliance with applicable legislation and policies;
- becoming familiar with applicable statutory and common law duties and obligations arising from the corporation's constituting documents; and
- keeping the affairs of the corporation confidential.



5

Financing Canadian Operations

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

Internally sourced funds can be advanced or contributed in a combination of debt and equity, usually dictated by the thin capitalization rules contained in the federal *Income Tax Act*, as discussed in Section 3.2(d) (Capital Structure).

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

5.1 External Financing

a) Debt Financing

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

banks are not permitted to accept deposits at all). This restricts the ability of Schedule III banks to carry on retail banking business in Canada.

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

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

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

Term loans are the other kind of loans banks make. They are most often made to finance the acquisition of fixed assets by the borrower and are generally repayable over a fixed period of time pursuant to an agreed schedule. Usually, banks can only accelerate term loans if a specified event of default occurs, although some banks make term loans payable on demand in certain circumstances.

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

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

Often a company can acquire capital assets from the manufacturer on a conditional sale basis or through a conditional sale or a leasing arrangement. Such accommodation by the manufacturer eliminates the need for a substantial sum of upfront cash and allows the company to pay for the assets over their useful life from the company's cash flow. Lease finance companies can also help a company to acquire assets by buying the assets it chooses and then leasing those assets to the company.

In some situations, a company may also use a factoring company to improve its cash flow. A factoring company will purchase or lend against a business's accounts receivable at a discount (normally smaller than the discount used in a borrowing base calculation described above) and will then attempt to collect the receivables directly from the account debtor. The factoring company may or may not have recourse back to the company for non-payment by account debtors associated with credit risk. The company will normally be liable to the factoring company if non-payment is because of product quality issues.

b) Equity Financing

Funds may also be raised through a public offering. In such instances, a prospectus is prepared and the offering is made through investment dealers. Because the costs incurred in pursuing this type of financing are substantial, this route is only suitable if large sums of money need to be raised. For a new company starting out, a public offering is generally not appropriate. See the discussion of securities regulation in Chapter 6 (Securities Regulation).

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

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

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

5.2 Government Assistance Programs

Federal and provincial governments in Canada have established a number of government assistance programs. The requirements to qualify for these government assistance programs vary, depending on the size and location of the proposed business, the nature of the market in which the business sells its product and the inclination of the government concerned to make such assistance available.

The programs discussed below are designed to assist persons engaged in the establishment or expansion of a business in Canada.

a) Federal Assistance – The Business Development Bank of Canada

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

b) Federal Assistance – Regional Development Programs

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

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

c) Federal Assistance – Canada Small Business Financing Program

The Canada Small Business Financing Program (the CSBF Program) is devoted to the credit needs of small businesses. Under the CSBF Program, the federal government guarantees loans made by conventional lenders to small business enterprises in a broad spectrum of industrial sectors, including manufacturing, transportation, wholesaling and retailing. Farming

businesses, charitable and religious organizations, and businesses not operating for gain or profit are ineligible under the program, however. In the case of an existing business, a small business is defined as a business carried on in Canada for profit or gain, with estimated gross annual revenues (in the case of an existing business) not exceeding C\$5 million for the fiscal year in which the CSBF Program loan is approved. In the case of a new business, a small business is defined as one whose estimated gross annual revenues are not expected to exceed C\$5 million during the first 52 weeks of operation, at the time the CSBF Program loan is approved.

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

The loan must be secured and all participants are required to pay a two per cent registration fee to the lender.

d) Provincial Assistance

Individual provinces administer many of their own government assistance programs. Even if a Canadian corporation's operations are based in one particular province, if the corporation intends to market nationally through branch operations, assistance may be obtainable from more than one province.

Practical Advice

Although Canada does not impose a minimum capitalization requirement on subsidiaries and branch offices, determining capitalization needs early on, evaluating available funding sources and terms, liabilities and tax implications of the various options will prove critical.



6

Securities Regulation

6.1 General

Unlike the United States, Canada does not have a single federal securities regulator. Instead, each province and territory has enacted its own securities legislation and has established a regulatory authority to administer it. As a result, national securities transactions require compliance with several regulatory regimes administered by different authorities. However, the laws are generally very similar (and in many cases uniform) and the regulatory authorities have implemented procedures to reduce the difficulties of dealing with multiple regulators. The federal government, five provinces and one territory are pushing ahead with the establishment of a single securities regulation system (to be operated jointly by the federal and provincial governments), notwithstanding the historical opposition by a number of provinces to the establishment of a single regulator.

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

6.2 Registration of Dealers

Generally, persons or companies engaged in the business of trading in securities are required to be registered as dealers in the provinces or territories in which they do business. Depending on their activities, they may also be required to join the Investment Industry Regulatory Organization of Canada. These dealers have to satisfy certain

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

6.3 Registration of Advisers

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

6.4 Registration of Investment Fund Managers

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

6.5 Issuing Securities in Canada

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

An issuer that offers securities by way of a prospectus (or, in some jurisdictions, one that merges with a reporting issuer that offers securities in a securities exchange takeover bid for a reporting issuer or that lists its securities on a recognized Canadian stock exchange) becomes a “reporting issuer”. Reporting issuers are subject to certain continuous and timely reporting obligations. For example, they must file and send to securityholders unaudited

quarterly financial reports, audited annual financial statements, management’s discussion and analysis, and information circulars in connection with meetings of securityholders. They must also make prompt announcements and filings in connection with material changes in their business, operations or capital.

Issuers can also offer or issue their securities in a manner that is exempt from the prospectus requirements. For example, an exemption would be available for sales to those defined as “accredited investors” or those who spend at least C\$150,000 to purchase the securities. In these cases, there are filing requirements and there may also be specific disclosure obligations. Exemptions are also available for certain sales to family and friends, sales to employees and sales made under a prescribed form of offering memorandum. Exemptions are discussed further in Section 5.1(b) (Equity Financing).

6.6 Listing Requirements

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

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

6.7 Takeover Bids

A person who offers to acquire voting or equity securities that, if acquired, would cause the offeror’s securities holdings to exceed 20 per cent of the outstanding securities of that class is considered to be making a “takeover bid”. Unless it can avail itself of one of the exemptions, a takeover bidder must comply with certain rules. This includes a requirement that it sends a takeover bid circular with specified disclosure to all holders in Canada of securities of the class concerned and an offering to buy their securities.

Generally, a formal takeover bid must be outstanding for at least 105 days, subject to abridgement by the target company to 35 days. Where a mandatory 50 per cent minimum tender condition has been achieved, and all other terms and conditions of the bid have been complied with or waived, the bid must be extended for an additional 10 days to permit other shareholders a further opportunity to tender to the bid.

6.8 Issuer Bids

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

6.9 Investors, Directors and Senior Officers

Certain securityholders of Canadian reporting issuers have obligations under Canadian securities laws. For example “reporting insiders” (which include directors, senior officers and 10 per cent or greater shareholders) are required to report their trades. Those who acquire at least 10 per cent of the outstanding voting or equity securities of a particular class (5 per cent if a formal takeover bid has been made) are required to report and, in some cases, to make an announcement concerning such trades and to wait before making further purchases. Dispositions of securities may trigger similar reporting requirements. There are exceptions to these reporting requirements for certain classes of institutional investors, such as pension funds and investment fund managers, which may be eligible to provide monthly reports regarding their ownership of securities.

Those “persons in a special relationship” with an issuer, such as directors, certain officers and significant stakeholders, are prohibited from trading in securities of the issuer while in possession of material undisclosed information relating to the issuer and from “tipping” others as to that information.

Practical Advice

The existing exempt offering regimes in Canada’s various jurisdictions have been consolidated in National Instrument 45-106 *Prospectus Exemptions*, which is designed to harmonize the prospectus and registration exemptions contained in provincial statutes and instruments.



7

Insolvency and Restructuring

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

The most common forms of insolvency proceedings are:

- BIA liquidation (bankruptcy);
- BIA reorganization;
- CCAA reorganization; and
- private or court-supervised receivership.

7.1 BIA Liquidation (Bankruptcy)

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

- **Voluntary Assignment into Bankruptcy by Debtor:** A person who resides, carries on business, or owns property in Canada, is indebted to creditors for at least C\$1,000, and is insolvent on a balance sheet test or has ceased to meet liabilities as they fall due (such person being an "insolvent person" for purposes of the BIA) may make a voluntary assignment into bankruptcy.

- **Proposal Under the BIA Rejected by Creditors:** An insolvent person may attempt a reorganization by filing a proposal under the BIA. If the person's creditors reject the proposal, the person is deemed to have assigned itself into bankruptcy, and once bankrupt, all unsecured creditors of the bankrupt are stayed from commencing or continuing any proceedings against the bankrupt or its assets.
- **Involuntary Assignment into Bankruptcy by Creditor:** A debtor who resides or carries on a business in Canada, is indebted to creditors for at least C\$1,000, and has committed an act of bankruptcy within six months preceding the filing of the application may be subject to an involuntary assignment into bankruptcy by a creditor, which, if successful, results in bankruptcy. The existence of unpaid creditors alone is not enough in and of itself to satisfy the "act of bankruptcy" requirement.

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

7.2 BIA Reorganization

Reorganization under the BIA takes place in the form of a proposal. A proposal is a contract between the debtor and the creditors to allow for a restructuring of debts so that the claims of creditors can be satisfied without the debtor proceeding to a liquidation of assets through bankruptcy. Proposals can be made by an insolvent person, a bankrupt, a trustee of a bankrupt's estate, a liquidator of an insolvent person's property or a receiver of an insolvent person. Once the debtor files a Notice of Intention to Make a Proposal or after the proposal is filed, a stay of proceedings prevents both secured and unsecured creditors from commencing or continuing proceedings against the insolvent person. A proposal trustee monitors the reorganization, but the insolvent person remains in possession and control of its business and assets.

The BIA does not set out specific criteria for the proposal, but a successful proposal requires approval by a majority in number and by a two-thirds majority in dollar value of claims that are voted for each class of creditors, as well as court approval regarding the fairness of the proposal. If a class of secured creditors does not vote in favour of the proposal, then it is not binding on that class of secured creditors. However, if a class of unsecured creditors or the court rejects the proposal, then the debtor is deemed to have made an assignment into bankruptcy.

7.3 Reorganization Under the Companies' Creditors Arrangement Act

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

The plan of compromise or arrangement must be approved by a majority in number representing at least two thirds in dollar value of claims of the creditors, or the class of creditors, as the case may be. The court must also approve the plan of compromise or arrangement. The CCAA has relatively few procedural requirements. Accordingly, the court is given a great deal of discretion in a CCAA proceeding.

7.4 Receivership

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

Practical Advice

Insolvency and restructuring in Canada require personalized advice to achieve the best possible outcome. Please contact BLG to discuss your matter and receive tailored advice.

8

Litigation, Arbitration and Mediation

8.1 Civil Procedure

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

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

8.2 Class Proceedings

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

8.3 Damages

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

8.4 Mediation

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

8.5 Arbitration

a) Domestic Arbitration

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

Canadian courts generally defer to arbitral tribunals where the parties have selected arbitration. Arbitrations in the commercial context have steadily gained in popularity over recent years. Some consumer protection legislation prohibits arbitration in consumer contracts.

b) International Arbitrations

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

Practical Advice

There are many ways to resolve disputes in Canada, as outlined in this chapter. Please reach out to BLG to connect with a litigator, a mediator or an arbitrator who can help lead you to a successful resolution.



9

Canadian International Trade Regulation

The Canadian federal government is generally responsible for Canada's laws, as well as the negotiation and implementation of trade and investment agreements, including dispute settlement procedures.

9.1 Canadian Customs Laws

Canada's *Customs Act* imposes a general duty to report the importation of all goods into Canada. It also regulates the valuation of goods for duty purposes on importation to Canada, the basis for many tariff preferences from free trade agreements, exemptions from the payment of duty, and the authority of the Canada Border Services Agency (CBSA). The *Customs Tariff* implements the Harmonized System for the tariff classification of goods and specific rates of duty that apply on the importation of goods into Canada. It is also the legal basis for duty drawbacks, duty deferrals, duty remission and several types of import taxes, like some excise taxes and surtaxes.

Canada's customs laws are administered by the Canada Border Services Agency (CBSA). The *Customs Act* establishes the procedures for contesting CBSA's decisions regarding classification, origin, valuation and other customs issues relating to the importation of goods.

The Canadian International Trade Tribunal (CITT) hears appeals from CBSA decisions in customs matters.

9.2 Export and Import Controls

Global Affairs Canada administers Canada's export and import controls pursuant to the *Export and Import Permits Act* (EIPA). Exports of goods or technology listed on the Export Control List, including military and dual-use goods, require a permit from the Minister of Foreign Affairs. Similarly, goods listed on the Import Control List are regulated under the EIPA and are subject to permits, quotas or other requirements.

9.3 Economic Sanctions

Canada imposes economic sanctions on a number of countries. Sanctions giving effect to UN Security Council resolutions are imposed under the authority of the *United Nations Act*. Unilateral Canadian sanctions are imposed under the *Special Economic Measures Act*. Canadian economic sanctions are administered by Global Affairs Canada. The Minister of Foreign Affairs may, in certain circumstances, issue permits authorizing transactions otherwise prohibited by the sanctions.

9.4 Foreign Corrupt Practices

The *Corruption of Foreign Public Officials Act* (CFPOA) prohibits the payment of bribes to foreign public officials for the purpose of obtaining a business advantage. The CFPOA applies to all persons (including non-Canadians) with respect to activities taking place in Canada, and extraterritorially to all Canadian corporations and Canadian citizens for activities outside of Canada. Investigations under the CFPOA are conducted by Canada's federal police force, the Royal Canadian Mounted Police.

9.5 Canadian Trade Remedy Laws

Canada has legislation and regulations in place to control importation of dumped and subsidized goods if such imports cause injury to domestic production. The *Special Import Measures Act* provides for investigations into alleged dumping or subsidization and injury, conducted by the Canada Border Services Agency (CBSA) and the Canadian International Trade Tribunal (CITT). There are other trade remedy investigations such as emergency safeguards that are conducted under the authority of the Minister of Finance.

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

9.6 Canada's Trade and Investment Agreements

Canada is a member of the World Trade Organization (WTO) and also party to about 10 regional and bilateral free trade agreements. These agreements reduce barriers to trade in goods, such as tariffs. Some of them also address trade in services, investment, government procurement and temporary entry for business people. Canada is also party to more than 30 bilateral investment treaties, known as "foreign investment protection agreements". These

protect Canadian investment abroad and foreign investment in Canada against conduct such as unfair or discriminatory treatment or expropriation without adequate compensation, and include arbitration mechanisms under which investors can seek damages for breaches of the treaty protections by the host state.

Practical Advice

Trade is regulated by a variety of complex laws, regulations and international agreements which evolve over time. If you are looking to trade with Canadian businesses or individuals, reach out to a BLG professional for tailored legal advice.



10

Taxation

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

10.1 Residency

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

A corporation is deemed to be a resident of Canada for tax purposes if it was incorporated in Canada at any time after April 26, 1965. In addition, an entity incorporated in a foreign jurisdiction will be resident in Canada if the directors meet in Canada or if control over the corporation is exercised in Canada. If the foreign jurisdiction is a country with which Canada maintains a tax treaty, so-called "tiebreaker" rules may apply if an individual or corporation is found to be resident in more than one country; these tiebreaker rules would then assign residency to one of the countries involved.

10.2 Income Tax Rates

Federal taxes on personal income are marginal, increasing with the amount of income.

The federal marginal tax rates for individuals are:

- 15 per cent on the first C\$46,605 of taxable income;
- 20.5 per cent on the next C\$46,603 of taxable income;
- 26 per cent on the next C\$51,280 of taxable income;
- 29 per cent on the next C\$61,352 of taxable income; and
- 33 per cent of taxable income in excess of C\$205,843.

In addition to federal income tax, provincial or territorial taxes are also assessed on income.

The highest combined marginal income tax rate varies from 44.5 per cent (Territory of Nunavut) to 54 per cent (Nova Scotia).

The federal corporate tax rate is 15 per cent. A provincial corporate tax is also imposed on general corporate income and the rate varies by province or territory. The provincial corporate tax rate ranges from 11.5 per cent (Ontario and North West Territories) to 16 per cent (Nova Scotia and Prince Edward Island), for a combined corporate tax rate of between 26 per cent and 31 per cent. Preferential rates are available for all or a portion of the active business income earned in Canada by “Canadian-controlled private corporations” and, in some cases, for Canadian manufacturing and processing profits.

10.3 Filing and Reporting Requirements

Canadian residents are required to file an annual Canadian income tax return with the Canada Revenue Agency (CRA) and to report their worldwide income. Canadian residents are also required to file Information returns with respect to certain foreign property interests, as well as certain transactions with non-arm’s length non-residents or transactions with foreign trusts. Corporations must file a corporate income tax return within six months after the end of their taxation year.

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

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

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

10.4 Business Income

The imposition of Canadian tax on a non-resident’s business income is typically dependent on whether the business activity is sufficient to create a taxable presence in Canada.

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

10.5 Employment Income

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

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

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

10.6 Income from the Disposition of Certain Properties

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

Relief from taxation may be available under one of Canada's tax treaties. The general pattern of Canada's treaties is to restrict Canada's jurisdiction to tax only those capital gains realized by the non-resident on the sale or transfer of immovable (real) property or natural resources property situated in Canada, or property forming part of the business property of a Canadian permanent establishment or fixed base of that business. In selected cases, shares of a Canadian company whose value is primarily attributable to Canadian immovable property or natural resources property would also be taxable. In the case of gains arising from the sale or transfer of other types of property, Canada is generally precluded by virtue of its treaties from levying tax.

10.7 Withholding Taxes

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

10.8 Branch Tax

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

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

10.9 Canadian Taxation of Non-Resident Trusts

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

10.10 Capital Tax

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

10.11 Commodity and Sales Taxation

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

10.12 Value-Added Taxes

Canada imposes a multi-staged goods and services tax (GST) under the *Excise Tax Act* on the consumption of goods and services in Canada. While GST is collected by all registered businesses at each stage in the production or marketing of goods and services, the burden of the tax is borne by the ultimate consumer. Under this system, businesses collect tax on their sales and claim a credit, referred to as an input tax credit or “ITC”, for any tax paid on their purchases. While sales of most goods and services are subject to GST, some goods and services are exempt or zero-rated (taxable, but at a rate of zero per cent). GST is currently payable at a rate of five per cent.

Certain provinces have harmonized their provincial retail sales taxes with the federal GST, which has the effect of raising the overall tax rate in those provinces. There are five harmonized provinces that impose a combined “Harmonized Sales Tax” or “HST”: Ontario (at 13 per cent); and New Brunswick, Newfoundland and Labrador, Nova Scotia and Prince Edward Island (all at 15 per cent). The Province of Québec imposes a separate tax, the “Québec Sales Tax”, or “QST”, which is similar to the federal GST, at a combined GST and QST rate of 14.975 per cent.

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

10.13 Provincial Retail Sales Tax

The provinces of Saskatchewan, Manitoba and British Columbia impose retail sales taxes. These taxes are levied directly on the purchaser, consumer or lessee of taxable goods and services. They are generally levied on the sale or lease price of the goods or services being taxed. The tax rates range from six per cent (Saskatchewan) to seven per cent (British Columbia) and eight per cent (Manitoba). The GST in those three provinces would still apply, at a rate of five per cent, unless that particular good or service is exempt from GST. Both retail sales taxes and GST are calculated on the sale or lease price before consideration of these taxes.

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

10.14 Other Provincial Taxes

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

Certain provinces and municipalities also impose taxes on transfers of real property. In addition, British Columbia imposes a tax of 20 per cent on the sale price of residential real property in circumstances where that property is purchased by non-residents of Canada (as such term is specifically defined under the legislation) and the property is situated in specified regions of British Columbia. These specified regions are situated in the provincial capital region of Victoria, Greater Vancouver Regional District, Fraser Valley Regional District, Regional District of Central Okanagan and the Regional District of Nanaimo. Ontario imposes a similar 15 per cent tax on the sales of residential real property situated in Toronto and surrounding regions (*i.e.*, in the Greater Golden Horseshoe).

■ Practical Advice

Tax law in Canada is dependent on many variables. Please contact BLG for guidance before commencing Canadian business operations or selling any Canadian property.

11

Competition Law

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

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

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

11.1 Merger Review

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

- the extent of foreign competition faced by the parties to the merger;
- the likelihood of the business of one of the parties to the merger failing in the absence of the merger;
- the availability of substitute products for those supplied by the merging parties;
- the extent of barriers to entry into the market; and
- the extent of remaining post-merger competition.

Additionally, the Competition Tribunal will consider whether the merger is likely to bring about gains in efficiency that will be greater than, and will offset, any anti-competitive effects of the merger. If it determines that a merger is likely to substantially lessen competition, the Competition Tribunal may prohibit or dissolve the merger, in whole or in part, or may allow it to proceed under imposed conditions.

Significant merger transactions may also be subject to pre-merger notification requirements, depending on the size of the parties involved and the size of the transaction. For example, asset purchases require notification where:

- the parties to the transaction, together with their respective affiliates, have assets in Canada or gross revenues from sales in, from or into Canada in excess of C\$400 million; and
- the gross value of the assets being purchased or gross revenues from sales in or from Canada generated by those assets exceed C\$92 million¹⁰.

The same thresholds apply in the case of share acquisitions, amalgamations and combinations. If the applicable notification thresholds are met, the parties to the transaction must provide prescribed information to the Commissioner and pay the prescribed filing fee (currently C\$72,000).

Notifiable transactions are subject to a mandatory initial waiting period of 30 days and cannot be completed until either this waiting period has expired or the Commissioner has otherwise indicated that the transaction can proceed. This initial waiting period can be further extended if the Commissioner makes a supplementary information request of the parties.

Practical Advice

It is a good idea to take the *Competition Act* into consideration early in the planning process. The statutory waiting period, if a notification is required, and even substantive issues such as competitive overlap are material advance considerations in deal planning, since the Commissioner can also review a deal that is not notifiable.

11.2 Criminal Offences

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

The key criminal offence under the *Competition Act* is conspiracy, which involves any agreement or arrangement (formal or informal) between competitors or potential competitors:

- to fix, maintain, increase or control prices;
- to allocate sales, territories, customers or markets; or
- to fix, maintain, control, prevent, lessen or eliminate production or supply of a product.

Such agreements are *per se* illegal and parties to those agreements are subject to significant fines and/or prison sentences, regardless of any actual anti-competitive effect.

Practical Advice

Immunity and leniency programs are available in Canada. The Competition Bureau and the Public Prosecution Service of Canada jointly administer the programs, which grant full immunity from prosecution or reduced sanctions to those who have participated in a criminal offence under the *Competition Act*. Participation in these programs is only granted to parties who meet the programs' specific requirements for timing, eligibility and cooperation.

¹⁰ This is the threshold value for 2018. This value is adjusted annually based on changes in gross domestic product.

11.3 Misleading Advertising and Deceptive Marketing Practices

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

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

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

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





12

Employment Law

Canada's employment law governs the legal rights and obligations that regulate all aspects of the employer-employee relationship. The importance of employment relationships and employment law for any business cannot be over-emphasized.

While the principles of law governing employment in Canada are derived from the common law of contracts, certain aspects of labour and employment law, such as collective bargaining and employment standards, are regulated by statutes. Every province and the federal government have enacted labour and employment legislation and each business will either be federally or provincially regulated.

12.1 Constitutional Jurisdiction

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

12.2 Individual Contracts of Employment

There is extensive regulation of individual contracts of employment by both provincial and federal laws. These laws govern such matters as human rights, occupational health and safety, workers' compensation, employment insurance, pensions, minimum wages and other aspects of employment. Some provinces have as many as 25 different statutes that touch, to some degree, on employment conditions. Individual contracts of employment may be written or oral. The courts have therefore developed a series

of terms that are implied in every employment contract, unless the parties have expressly provided otherwise. In Canada, employees are considered to be hired for an indefinite period, unless there is a written or oral agreement that specifies the duration of the employment.

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

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

Employers can better protect their interests by having a written contract of employment that includes terms restricting or limiting certain employee conduct both during the term of employment and particularly after termination of employment. These terms are called “restrictive covenants”. There are three general types of restrictive covenants used in employment contracts:

- non-solicitation covenants, which restrict departing employees from soliciting clients, customers or other employees;
- non-competition covenants, which restrict departing employees from commencing employment with competitors or setting up competing businesses; and
- non-disclosure covenants, which restrict departing employees from disclosing confidential information. In the absence of a non-disclosure covenant, employees still have a common law duty not to disclose confidential information or trade secrets.

Restrictive covenants are viewed as a restraint of trade and courts will carefully scrutinize them. The enforceability of restrictive covenants largely depends on the reasonableness of their duration and geographic scope, the wording of the contract, the nature of the business and the legitimacy of the interests that the employer is seeking to protect. The law is clear that a restrictive covenant must go no further than is reasonably necessary to protect the employer’s legitimate interests.

In order to be enforceable, a termination provision must comply with employment standards and it must be clear and unambiguous.

In the absence of an express and enforceable agreement regarding the consequences of and entitlements of the employee on termination, employees who are dismissed without just cause are entitled to reasonable notice of termination, and they may recover damages if such notice is not given. In providing reasonable notice, the employer generally has two options:

- the employer may require the employee to continue to work through the notice period (otherwise known as working notice) or

- the employer may provide the employee with pay in lieu of working notice.

What constitutes reasonable notice under the common law is determined by the circumstances of each case. The courts have identified four major factors in determining reasonable notice under the common law, giving varying degrees of weight to each of the following, depending on the circumstances:

- the character of the employment;
- the length of service;
- the age of the employee; and
- the availability of similar employment, taking into consideration the employee’s compensation, experience, training and qualifications.

This common law reasonable notice entitlement encompasses any statutory notice entitlement provided by applicable employment standards legislation. The reasonable notice requirement directly contrasts with the widely held view in the U.S. that workers are employed at the will of the employer and that their employment may be terminated at any time, without cause and without notice.

Unlike the United States, Canada does not have an at-will employment regime. In Canada, an employee can only be summarily dismissed without any notice or pay in lieu of notice if just cause for termination exists.

Federally regulated employers, however, are not permitted to terminate employment of non-managerial employees under the *Canada Labour Code* unless there is just cause, even where notice or pay in lieu of notice is provided, or the termination is due to lack of work, with limited exceptions.

What constitutes just cause varies and requires a contextual analysis. Just cause is a very high standard to meet and asserting just cause for termination when the employer knows grounds for termination were not well founded may lead to a finding of bad faith, resulting in a larger damages award to the employee.

Employment laws do not apply to independent contractors, unless they are found by a court or an adjudicator to have been improperly classified. Employers must carefully consider whether an independent contractor relationship is appropriate and whether it is possible that the individual is, in reality, truly an employee, in order to avoid incurring employment-related liabilities. Among many other relevant factors, a court or an adjudicator will review any applicable agreement in considering whether an individual has been properly classified as an independent contractor. Therefore, care must be taken when structuring independent contractor agreements to ensure it is clear that independent contractor is not an employee. There are a number of specific terms that are recommended for inclusion in an independent contractor agreement and employers should seek legal advice when drafting those contracts.

There are many advantages to having a written contract of employment stipulating the terms and conditions of employment, and in particular, what happens on termination. It is strongly recommended that an employer receive legal advice on whether the termination provision in its offer letters and/or employment agreements is enforceable in order to limit exposure to common law reasonable notice liability.

12.3 Employment Conditions Imposed by Statute

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

Canada's *Criminal Code* expands an employer's duty to protect the health and safety of a worker. In particular, anyone who undertakes or has authority to direct how another person does work is under a legal duty to prevent bodily harm to that person, and any other person, arising from that work.

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

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

12.4 Workers' Compensation

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

Such compensation payments are largely funded through employer contributions.

12.5 Canada Pension Plan

The Canada Pension Plan is a contributory, earnings-related social insurance scheme established by the federal government. It insures against the loss of income due to retirement, disability and death. It applies to anyone working in Canada, outside of Québec. An employee must contribute to the plan 4.95 per cent of all employment earnings in excess of C\$3,500 up to a specified maximum of C\$2,593.80 per year (in 2018). The contribution percentage will increase in 2019. Employers are required to deduct employee contribution amounts from an employee's remuneration and remit it to the federal government. Employers are also required to match employee contributions. Self-employed persons must pay both portions. The Province of Québec has its own similar program, the Québec Pension Plan, which applies for those working in Québec.

Except in Québec, there is no legislative requirement that employers establish or fund an employer-sponsored retirement plan for its employees. If, however, an employer chooses to establish such a plan, it has to comply with the governing regulations. Private retirement plans include pension and other retirement savings arrangements.

12.6 Employment Insurance

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

12.7 Human Rights Legislation

Every provincial and federal jurisdiction has legislation designed to protect human rights. Among other things, this legislation is aimed at preventing and remedying discrimination in the workplace. Legislation differs across jurisdictions, so it is important for employers to familiarize themselves with the legislation in all jurisdictions where they will operate to ensure a clear understanding of what constitutes prohibited discrimination. Most jurisdictions prohibit discrimination on the basis of race, ancestry, nationality, ethnic or place of origin, political belief, colour, gender expression and/or identity, religion or creed, sex, sexual orientation, marital status, family status, age, physical or mental disability, or criminal records. Sexual harassment is considered discrimination on the basis of sex.

With respect to disability, employers have a duty to accommodate employees with a disability to the point of undue hardship.

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

12.8 Employment Governed by Collective Agreements

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

Provincial and federal labour legislation provides for the following:

- exclusive bargaining rights to certified trade unions;
- a postponement of the right to strike or lockout until after the expiry of a collective agreement and after a conciliation or mediation process;
- prohibition of unfair labour practices both by employers and trade unions;
- legal recognition and enforceability of collective agreements;
- resolution of disputes under collective agreements through a grievance procedure or arbitration, without resorting to strike; and

- establishment of administrative tribunals or regulatory bodies with investigative and remedial powers over the collective bargaining and organization process and other aspects of labour relations.

While the precise nature of these rights varies from jurisdiction to jurisdiction, these features are common to all Canadian jurisdictions.

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

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

Employers and employees have different rights and obligations under a collective agreement than under individual contracts of employment where there is no trade union. The collective agreement governs the terms and conditions of employment of unionized workers. Generally, employers cannot enter into individual contracts with unionized employees.

Collective agreements must provide for a private system of dispute resolution, typically in the form of arbitration. Employees who are dismissed or disciplined by their employer have the right to seek redress through arbitration. Arbitrators are given the power under the collective agreement (or by statute) to reinstate employees if they find that the employer acted with insufficient cause. They also have the right to substitute a penalty of less severity than that imposed by the employer. Although unionized employees do not have the common law right to notice, employment generally may only be terminated for just cause or because of a lack of work.

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

12.9 Whistleblower Protection

In Canada, it is a criminal offence for an employer to take disciplinary measures, or threaten or adversely affect the employment of an employee, with the intent to stop the employee from providing information to law enforcement officials regarding wrongful activity. Anti-reprisal

provisions that protect employees who report wrongful activity of their employers are also found in various provincial employment standards legislation, in human rights statutes and in workers' health and safety statutes.

■ Practical Advice

All employment standards statutes contain minimum periods for notice of termination and some provincial statutes require severance pay in certain circumstances. Employers cannot contract out of these minimum standards; however, they can include contractual terms limiting an employee's termination entitlements to those required by the applicable statute. An employer and employee may also agree on a termination provision that provides the employee with a greater benefit than that set forth in the applicable employment standards legislation.





13

Canadian Immigration Procedures for Businesspersons

13.1 Non-Immigrant or Temporary Entry

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

a) Business Visitors

A person may enter Canada as a business visitor without needing a work permit if the person seeks to engage in international business activities in Canada without directly entering the Canadian labour market. A person will not be considered to be directly entering the Canadian labour market if:

- the primary source of remuneration for his or her business activities is outside Canada and
- the principal place of business and accrual of profits of the employer remain predominantly outside Canada, and/or if
- the services rendered do not compete directly with those rendered by Canadian citizens or permanent residents of Canada.

In addition, a representative of a business outside Canada may work in Canada without a work permit if the purpose of his or her visit is to attend business meetings, to purchase Canadian goods or services, or to give or receive training within a Canadian parent or subsidiary company of his or her employer. Although this is not an exhaustive list of permissible activities, it does represent some of the most often-used exemptions to the requirement for a work permit.

b) Work Permits

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

- **Global Skills Strategy:** A new short-term work permit exemption was introduced on June 12, 2017 that exempts certain foreign nationals from the normal requirement to obtain a work permit where:
 - The foreign national is coming to perform work for:
 - 15 or fewer consecutive calendar days or and six months have passed since the first day of work under the previous use of this exemption (the 15-day exemption); *or*
 - 16 - 30 consecutive days and 12 months have passed since the first day of work under the previous use of this exemption (the 30-day exemption); *and*
 - The work being performed is considered highly skilled, falling within skill level O or A of the National Occupational Classification (NOC).

Immigration officials have been instructed by Immigration, Refugees and Citizenship Canada (IRCC) to document a “15-day (or 30-day) work permit exemption” in the case notes. The onus is on the foreign national to demonstrate that the required amount of time has passed since the first day of work under the previous use of this exemption. Note that such worker’s employment agreement must be consistent with the representations made in his or her work permit application.

- **Intra-Company Transferee:** An intra-company transferee exemption is one of the quickest and most convenient ways for certain categories of foreign businesspersons to work in Canada. The only ones eligible for an intra-company transferee exemption are persons in senior executive or managerial positions or in positions requiring specialized knowledge regarding the employer’s products, services or processes and procedures. Such persons must also have been employees of a branch, subsidiary or parent of the company located outside of Canada for at least one year, and must be seeking to enter Canada to work at a senior executive or managerial level or in a position that requires specialized knowledge for a temporary period in a related Canadian company.
- **Creating Significant Employment or Other Benefits in Canada:** The “significant benefit” exemption is available if a person’s employment will create or maintain significant employment or other benefits in Canada. This exemption may be used, for example, where an individual does not meet the requirements for the intra-company transferee exemption, but has knowledge concerning the financial, administrative or procedural affairs of a company that has an operation in Canada, and it can be shown that significant benefits will be generated from his or her employment. However, as immigration officers are generally unwilling to exercise their discretion to grant a work permit under this category except in unusual circumstances, obtaining a work permit under this category is likely only in extraordinary circumstances.

- **Entry Under Trade Agreements:** Certain international trade agreements to which Canada is a party, such as the North American Free Trade Agreement (NAFTA), the General Agreement on Trade in Services (GATS) and the Canada European Union Comprehensive Economic and Trade Agreement (CETA) facilitate the temporary entry of certain categories of workers who are nationals of one of the other member states. Three categories of work permits are generally granted under these agreements:
 - traders and investors;
 - professionals, including contractual service suppliers and independent professionals; and
 - intra-company transferees.

For these persons no Service Canada “Labour Market Impact Assessment” (see the Confirmed Job Offer discussion below) is required and entry procedures are generally streamlined.

- **Confirmed Job Offer:** Where the exemptions noted above do not apply and other exempt categories are not accessible to the foreign worker, a “Labour Market Impact Assessment” must be obtained from Service Canada, which is a federal institution that is part of Employment and Social Development Canada.

The criteria for assessing an offer of employment to a foreign worker vary from region to region in Canada, depending on employment levels, labour market conditions and the nature of the position at issue. The critical factor is that Service Canada must be satisfied that qualified Canadians or permanent residents are not available in Canada to perform the work at issue – that the hiring of a foreign worker will not have a negative impact on the Canadian labour market. Generally it is sufficient to provide evidence that the requisite specific recruiting/advertising in Canada has been done.

13.2 Dependants of Foreign Worker

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

Practical Advice

Businesses wanting to hire or transfer non-Canadian employees to their Canadian operations should seek legal advice to help them navigate the complex rules of business immigration.

14

Real Property Acquisitions in Canada

In Canada, different types of interests in land may be privately held and transferred. In all provinces governed by a common law system (i.e., all provinces other than Québec), freehold, leasehold, legal or beneficial interests are all permissible ways to hold an interest in property. In Québec, which is governed by a civil law system, the modalities of holding real property are set out in the Civil Code and include ownership, emphyteusis, and superficies. In order to confirm many of the foregoing interests, including registered ownership, and to facilitate the transfer of such interests, public land registration systems have been established in all of the provinces.

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

There are different land registration systems throughout Canada. However, the dominant land system is the land titles system. In Western Canada, including the provinces of British Columbia, Alberta, Saskatchewan and Manitoba, the “Torrens” system governs (see below). In Ontario, while there is both a land titles registration system (or land titles system) and a deed registration system (or registry system), substantially all of the lands not previously subject to the land titles system have been, or are being, converted from the registry system to the land titles system. The Atlantic provinces, which include Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland and Labrador, have either a deed system or a land titles system. In Québec, the deed registration system governs. As all the provinces have varying registration systems and requirements, it is prudent to obtain professional assistance in each respective jurisdiction when acquiring land in Canada.

In addition to the provincial land titles system, a registry of beneficial ownership is being established in British Columbia, which will operate in conjunction with the existing land title system. Any prospective purchaser of land in British Columbia should take into consideration that the identity of the beneficial owner of such land will likely need to be recorded in this registry once it comes into effect.

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

The registry system serves as a “depository” for documents affecting title. When land is acquired, one examines all of the documents in the registry system for a certain period (e.g., 40 years in Ontario; 40 years or longer in Québec) to determine if others hold an interest in the land being purchased and to confirm “good title” (that is, ownership). In the registry system, the provincial government does not guarantee the validity of any registered document or “good title”. An increasing percentage of purchasers are turning to title insurance as a means to protect against certain title defects and other issues, including fraud and forgery, whether the property is governed by the registry system or the land titles system.

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

When purchasing land in Canada, it is important to consider not only what is being acquired, but also the steps taken to acquire it. A purchaser should consider having a legal professional conduct a title review, which consists of a review of the existing encumbrances that may affect the title to the land because some such encumbrances may severely restrict the use that may be made of the land. Searches may be required to ascertain all of the encumbrances on the land, and a review of the documents that create the encumbrances may be quite complex. In addition to

a title review, a purchaser should consider conducting off-title due diligence, which may reveal issues that affect the marketability or use of the land or that expose the purchaser to liability. Such due diligence typically includes enquiries into municipal zoning and compliance, pre-existing tax liabilities, the condition of any buildings located on the land, existing environmental contamination, previous environmental remediation, existing Aboriginal claims, and potential archaeological concerns. These enquiries range from simple database queries to extensive on-site investigations, and the relevance of such searches depends on the nature of the property. Legal professionals and other specialized consultants will be able to provide practical guidance on the preferred approach to due diligence for a prospective property.

Investments in Canadian real estate can be held in a variety of ways including personally, as a general partnership or as a limited partnership, as a joint venture or in some other form of co-ownership, as a corporation or as a trust. If there is more than one purchaser, the purchasers should consider if they want to take title as joint tenants or tenants in common (in the common law system). How purchasers take title will affect each of their subsequent rights to deal with the land.

There are few restrictions on non-resident ownership of land in Canada. At the federal level, foreign investment in Canadian real estate, such as in apartment buildings, office complexes and shopping centres, is regulated by the *Investment Canada Act*. (See Chapter 2 (Foreign Investment Regulation) for a discussion on that Act.) At the provincial level, provinces such as Alberta, Saskatchewan, Manitoba, Prince Edward Island and Québec impose limitations on ownership by non-residents of Canada in accordance with the respective foreign ownership of land regulations depending on such things as the size and location of the land being acquired. In addition, all provinces require corporations that have been incorporated in other jurisdictions to be licensed or registered in the province if they carry on business in that province. The concept of “carrying on business” is a broad one, and in most cases includes holding an interest in real property. Many provinces impose substantive restrictions on foreign corporations.

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

Each province (and some municipalities) has the authority to impose transfer or registration taxes. Accordingly, the amount of such taxes varies from province to province and sometimes from municipality to municipality. Further, each province may establish guidelines for specific tax exemptions available to purchasers. Additional transfer taxes are imposed in some circumstances where the purchaser is a non-resident of Canada. British Columbia

has enacted an additional property transfer tax of 20 per cent that applies to the purchase by foreign non-residents of residential properties in a number of regions in the province, including in the Metro Vancouver Regional District, the Capital Regional District (which includes Victoria), the Regional District of Central Okanagan (which includes Kelowna), the Fraser Valley Regional District and the Regional District of Nanaimo. Similarly, Ontario has enacted a 15 per cent property transfer tax, which is levied against non-resident purchasers of properties containing one to six single-family residences in the Greater Golden Horseshoe Region (which includes Toronto).

Every transfer of an interest in land is subject to GST, unless a specific exemption is available. The most common exemptions are those available to purchasers of previously occupied residential property and non-commercial vacant land sold by an individual. GST is currently payable at a rate of five per cent. Certain provinces have harmonized their provincial retail sales taxes with the federal GST, which has the effect of raising the overall tax rate in those provinces. As of October 1, 2018, there are five harmonized provinces: New Brunswick, Newfoundland and Labrador, Nova Scotia and Prince Edward Island (all at 15 per cent), and Ontario (at 13 per cent). The Province of Québec imposes a separate tax at a rate of 9.975 per cent, which is similar to the federal GST and applies to transfers of land to which the GST applies. Additionally, Manitoba, Saskatchewan and British Columbia impose retail sales taxes that generally do not apply to real property but do apply to most chattels that form part of the acquisition.

Practical Advice

Choosing the right investment structure requires a consideration of business goals, tax implications, environmental concerns, Aboriginal rights (if applicable), risk of liability, and the application of the foreign investment rules and regulations.



15

Environmental Law

Canadians have a well-developed regulatory regime for environmental protection over which federal and provincial governments have shared jurisdiction. While the provinces have been most active in this area, the federal and local governments have also enacted environmental legislation.

The federal, provincial, territorial and local laws use a regulatory system to control (and, in some cases, eliminate) the adverse environmental effects resulting from industrial and commercial activities. The environmental laws apply to both new and existing businesses.

Public concern for the environment, greater regulatory oversight, Aboriginal rights, and the fact that environmental laws differ from jurisdiction to jurisdiction are just some of the issues that have increased business risks and exposure to litigation.

Practical Advice

When purchasing a property or investing in a business in Canada, ensure environmental risks are identified early with a thoroughly conducted due diligence. Seeking the advice of a lawyer, and an environmental specialist if appropriate, may help to reduce or avoid costly environmental liability, particularly if such professional advice is received early. An experienced lawyer can assist in navigating any permitting processes and in implementing relationship building strategies with Aboriginal communities that may be impacted by your operations.

15.1 Permits

The federal and provincial (and, to a lesser degree, territorial) laws require environmental permits to be obtained for many industrial and commercial activities. The permits are designed to restrict and control the discharge of pollutants into the environment. It is an offence under most of these laws to operate contrary to the terms of, or without having first obtained, an environmental permit. The monetary penalties for environmental offences are

designed to deter violations and thus can be very severe. Several jurisdictions are moving toward “codes of practice”, or similar regulatory mechanisms, replacing the requirement to obtain a waste discharge permit with requirements for registration and compliance with an industry-specific code of practice or regulation.

15.2 Contaminated Sites

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

15.3 Environmental Impact Assessments

The federal, provincial and territorial laws require environmental assessments of certain types of industrial and commercial projects and activities before they are undertaken. These assessments generally require one or more environmental studies and consideration of the effect of the project or activity on air and water quality, fisheries, wildlife, recreational land use and nearby communities.

The impact of the project or activity on First Nations is also a factor taken into consideration. The Crown may owe one or more Aboriginal communities the duty to consult, the procedural aspects of which the Crown may delegate to the project's proponent. The proponent may wish to negotiate a means of securing one or more Aboriginal communities' support for the project, which can positively affect an environmental assessment. Support may be secured through negotiation, the outcome of which is often a mutual benefits agreement or revenue-sharing arrangement.

The outcome of the environmental assessment may result in the regulators imposing conditions to limit or remediate the effect of the project or activity on the environment before work on the project or activity may proceed. The project or activity may also be prohibited from proceeding altogether. Investors contemplating a new venture, particularly in the manufacturing, processing or natural resource sectors, should consider carefully the applicable environmental legislation. Projects may trigger both provincial and federal environmental reviews. In such cases, the reviews can be conducted concurrently and then reviewed by a panel composed of representatives from both levels of government.

15.4 Species Protection

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

15.5 Transporting Hazardous Materials and Other Dangerous Goods

The movement of hazardous materials and other dangerous goods domestically and across international borders is another major focus of environmental regulation. Both federal and provincial laws prescribe standards of care, as well as the content, form and substance by which the importing and exporting of hazardous wastes and the local movement of hazardous goods are undertaken. Generally, transportation of dangerous goods laws apply to carriers, shippers and transportation intermediaries (including freight forwarders, warehouses and customs brokers), although other businesses may also be subject to regulatory requirements in certain circumstances. Movement across international boundaries of hazardous waste and movement of hazardous materials to be recycled require mandatory notification to the proposed importing country before shipment. Waste may only be imported into Canada if not prohibited by federal and applicable provincial laws.

15.6 Climate Change

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

After participating in a round of international climate change talks held from November 30 to December 11, 2015, Canada signed the resulting Paris Agreement on April 22, 2016. In June 2016, Canada also announced its commitment to the newly formed North American Climate, Clean Energy, and Environment Partnership with the U.S. and Mexico. The Partnership issued an action plan that includes a target to achieve 50 per cent clean power generation by 2025. Then, in October 2016, the federal government introduced a Pan-Canadian Carbon Plan. The Plan announced that Canada will implement a national price on carbon, becoming the first major hydrocarbon producer in the world to advance a carbon-pricing plan. The Canadian pricing plan will implement a tax of \$10 per tonne of greenhouse gas emissions (rising to \$50 in 2022) for those provinces that do not implement their own regime. The plan also will allow provinces to either implement a carbon tax or use a broad market-based mechanism, such as a cap-and-trade scheme.

Since 2016, many provinces introduced or updated their respective schemes, although some provinces have recently decided not to participate in the federal government's plan. Although the Ontario government previously implemented a number of climate-related statutes and regulations, the newly elected provincial government has announced that it is scrapping its cap and trade system, will not impose a price on carbon, and, with the support of Saskatchewan, will challenge the federal government's jurisdiction to implement its carbon pricing plan. Similarly, while Alberta passed its own *Climate Leadership Act* in June 2016, imposing a carbon levy in that province, it recently announced that it will not commit to ensuring its provincial plan will meet federal benchmarks. Québec and Nova Scotia have a cap and trade regime in place. British Columbia and New Brunswick have implemented a carbon tax, while Manitoba, Newfoundland and Labrador, and Prince Edward island are still considering whether and to what extent to participate in the federal program.

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

15.7 Water

The constitutional division of responsibility for water is complex. The provinces have primary responsibility for managing water. They do so through water laws that generally include a requirement to obtain a licence or other form of authorization for surface water and/or groundwater use, as well as the regulation of discharges into water, and the delegation of such regulatory powers to local governments. Drinking water quality is also of primary importance to legislators, particularly given several high-profile health incidents related to drinking water, and all provinces have enacted measures to protect drinking water quality and to regulate those constructing and operating drinking water systems.

The federal government has jurisdiction over some matters that bear on water management, including fisheries, navigation, international relations, federal lands and Aboriginal people. The *Canada Water Act* provides a framework for joint federal-provincial management of Canada's water resources. The *Canada Water Act* provides for cooperative agreements with the provinces to develop and implement plans for the management of water resources. The *International Boundary Waters Treaty Act* and related regulations prohibit the bulk removal of boundary waters from Canadian basins for any purpose, including export. All provinces also have in place legislation, regulations or policies prohibiting the bulk removal of water (defined as the removal and transfer of water out of its basin of origin by man-made diversions, tanker ships or trucks, or pipelines).

16

Health Industry

Demographic, technological and economic factors continue to challenge the Canadian health care system, and there has been a pan-Canadian focus on co-ordination, innovation and cost containment for some time. Estimated spending on health care in Canada was \$242 billion in 2017. Of this amount, an estimated 70 per cent was from public sources and 30 per cent was privately funded. Governments, businesses and health care providers alike are leading initiatives to provide novel, accessible, affordable and high-quality health care, products, and services. This chapter surveys the key areas of law that may be of interest to those looking to invest or do business in the health industry in Canada.

16.1 Health System Regulation

Canada is a federal state, with a constitution that divides legislative powers between the federal and provincial governments. While some powers are exclusive to one level of government, several powers are shared, including jurisdiction over health. Canada's legal system also includes two of the world's major legal traditions: English common law, applied in nine provinces and three territories; and French civil law, applied in the province of Québec. Some health care services are publicly funded, when determined "medically necessary" by a province, and may be provided by public and/or private providers. Other services are provided on a private-payer basis. Some health care products are publicly funded or subsidized, when available under drug plans or assistive devices programs. Others are purchased privately. The result is that health products, services and care are funded and regulated under a complex mosaic of rules, funders and regulators. Although we often refer to the "Canadian health care system", there are actually 14 single-payer, universal, public systems that comprise our "medicare", which provide universal access to "medically necessary" hospital and physician services on the basis of need (not means) through Canadian tax contributions.



16.2 The Federal/Provincial Divide

The federal government's authority over health derives primarily from its spending and criminal law powers. The spending power enabled Parliament to pass the *Canada Health Act*, which establishes the conditions and criteria that the provinces and territories must meet or risk losing federal cash contributions toward provincial health insurance costs. The Act forms the basis of the nation's universal health care system through its five principles: public administration, comprehensiveness, universality, portability and accessibility. The federal government's spending power also enables it to fund initiatives on health research, promotion, information, disease prevention and control, and pilot projects in health care.

The federal government's power to create criminal legislation on health matters is broad, and enables Parliament to enact legislation to protect the health and safety of Canadians, including the selling, distribution and marketing of drugs, medical devices, natural health products, foods and cosmetics. Generally, federal regulatory statutes are structured as criminal law in that they establish prohibitions and penalties, including imprisonment, but in practice, they operate as regulatory statutes intended to protect public health. The federal government also has power over patents of invention and discovery, which, combined with the federal criminal law power, gives Parliament the authority to regulate the pricing of patented medicines in Canada.

The provincial governments' authority over health arises from its powers relating to hospitals, property and civil rights, and local or private matters. The property and civil rights power is the provinces' most sweeping power, and provinces can essentially regulate most legal relationships between individuals and entities in their jurisdiction (*e.g.*, privacy, consent, rights of patients and workers, and certain aspects concerning the sale of drugs – formulary and insurance decisions – in the province). The courts have interpreted this power very broadly to encompass rights that individuals possess under the common law of tort (*e.g.*, the right to bodily integrity, which is at issue in medical negligence, assault and battery), contract law and property law. The provinces' power over matters of a local or private nature forms the basis of the provinces' health insurance regimes, as well as health protection and promotion at the local or municipal level. Broadly speaking, the provinces are primarily responsible for the delivery of health care and health insurance, and for the regulation of health professionals.

Given Canada's constitutional framework, both federal and provincial laws must be considered when dealing with matters relating to health.

16.3 Public versus Private Health Care

Canadian medicare covers “medically necessary” health care provided in hospitals and by physicians. Parliament did not define “medically necessary”, which is left for the provinces and territories to determine. What provincial/territorial health insurance will cover often

changes and is reduced by provinces and territories under pressure to contain costs, and there is significant variation from one jurisdiction to another.

Private insurance can be obtained to cover “enhanced” care or services that are not covered under provincial plans, and health care tourists can pay cash for care, but provincial statutes prohibit the use of private insurance to pay for medically necessary services. However, in 2005, the Supreme Court of Canada cast doubt on the constitutionality of such prohibitions with its *Chaoulli* decision. A divided court held that Québec's prohibition against private insurance violated the rights of patients, who otherwise were required to wait long periods to receive publicly funded care. A minority of the Court would have applied the same ruling to the country as a whole. For now, the decision applies only in Québec, but it may yet have important national effect.

Cost for enhanced health care, such as prescription drugs, home care and long-term care, are covered through a combination of out-of-pocket, private insurance and public financing. What is covered varies by province and territory. Some employers provide employees with private insurance plans. A number of clinics across Canada operate outside the public system to provide a wide variety of services, including surgical, diagnostic and therapeutic services. Clinics are free to provide non-medically necessary services, like elective cosmetic surgery, which is not covered under public health insurance plans.

In 2017, Canadians spent approximately \$72.6 billion on private health care.

16.4 Long-Term Care

Spending on long-term care facilities in Canada rose to an estimated 10.7 per cent of total spending in 2017, approximately 70 per cent of which was provided by the public sector. Long-term care facilities are licensed provincially, and many are privately owned and operated. These facilities may provide medical, nursing, social and related services.

16.5 Regulated Health Professionals

Nearly all regulated health professionals operate privately, rather than as government employees. Specialized provincial legislation governs regulated health professions in terms of licensing requirements, scope of practice, and professional misconduct, which includes advertising and conflict of interest rules. Advertising prohibitions often address the professionals' prohibited associations with suppliers of medical goods and services, and conflict of interest rules often address rebates, kick-backs and self-referrals. The provinces have recently been expanding the scope of practice for certain qualified regulated health professionals to address issues related to Canadians' access to care.

16.6 Marketing and Advertising

Federal and provincial legislation regulates the ways in which health care products and services can be marketed. Such legislation includes the federal *Food and Drugs Act* and *Competition Act*, and provincial consumer protection and health-related statutes. Various industry associations, including Innovative Medicines Canada and Canada's Medical Technology Companies (MEDEC), have undertaken self-regulatory initiatives, including publishing codes of marketing practices and conduct for their members. These provide guidelines on appropriate interactions between member companies that manufacture, design, develop and/or market medical products/services with health professionals. Health professionals generally include those individuals and entities that purchase, lease, recommend, use, arrange for the purchase or lease of, or prescribe medical products in Canada. All such codes have a view to promoting ethical business practices and socially responsible industry conduct to ensure health professionals exercise independent judgement and integrity when making product/service-related decisions. Advertising Standards Canada administers the *Canadian Code of Advertising Standards*, and Canadian Association of Medical Publishers has issued guidelines for all advertising appearing in publications directed to health professionals.

16.7 Procurement

When engaging public-sector organizations in the course of their business operations, health product manufacturers, importers and distributors should be aware of legislation and policies governing public procurement activities. In particular, there are rules that govern the procurement and payment processes of public sector organizations to ensure that they act, and are perceived to act, with integrity and professionalism.

16.8 Privacy

Federal and provincial privacy and data protection legislation and health privacy legislation establish controls over the collection, use and disclosure of personal information. Generally, Canadian privacy legislation is based on the same 10 privacy principles adopted worldwide.

16.9 Litigation

Personal injury claims and litigation are less common in Canada than in the United States. This is because the Supreme Court of Canada has capped damages that may be awarded for pain and suffering to approximately \$320,000 per person for the worst injuries. Punitive damages are rarely awarded and are usually modest. Other factors that make our population

less litigious include the general rule that the loser of a court case pays a substantial portion of the victor's legal costs, and cases are tried before a judge and not a jury. However, class action suits are becoming more common in Canada for some of the same reasons that individual claims are relatively less common. *Canadian Charter of Rights and Freedoms* claims might become more common because the Supreme Court of Canada has held that the Charter applies not just to government actions, but also to private entities (like hospitals) that "act in furtherance of a specific governmental program or policy".

16.10 Future Directions

Likely health care reform will focus on primary care (not the emergency room) as the first contact point within the health care system. We might see more investment in and use of technology, particularly information and communication technology. Changes to the compensation system and related labour contracts for health care professionals might create the right incentives and improve alignment with accountability. Building a more transparent, accountable health care system with respect to goals, management and performance remains at the forefront.

16.11 Conclusion

The legal framework of Canadian health care is marked by a jurisdictional divide of power between the federal and provincial governments, and interrelated legislation and regulation. Health law is constantly evolving. When doing business in Canada, at the outset, it is important to understand how to navigate the legal framework. It is also important to devise risk-management strategies and establish a system for periodic reviews to ensure compliance with all applicable regulatory, funding and policy requirements at every stage.

■ Practical Advice

Foreign businesses and investors will find that opportunities exist in private health care in Canada, but with an ever-evolving legal landscape that is regulated by a myriad of federal and provincial statutes, they should seek legal advice before embarking on a new venture.

17

Sale of Goods and Consumer Protection

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

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

17.1 Regulation of Advertising

The misleading advertising and deceptive marketing practices provisions of the *Competition Act* apply to any person promoting, either directly or indirectly, the supply or use of a product or service, or any business interest, by any means (including print, broadcast and internet advertisements, written and oral representations, and illustrations). Any materially misleading representations that affect the purchaser's decision to buy the product fall under the *Competition Act* and can result in penalties. Misleading advertising and unfair business practices are also the subject of various provincial consumer protection regulations.

17.2 Regulation of Labelling of Goods in Canada

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

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

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

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

The *Canada Consumer Product Safety Act* generally regulates manufacturers, importers and retailers of “consumer products” (which are defined broadly to include products, their parts, accessories and components, which may be reasonably expected to be obtained by an individual to be used for non-commercial purposes, and their packaging), as well as those persons who advertise, test, package or label consumer products and those who distribute promotional products for free. The purpose of the statute is to prevent the manufacturing, importation, advertising and selling of consumer products that pose a danger to human health or safety, such as the advertising or labelling of consumer products in a manner that is false, misleading or deceptive in respect of their safety. The federal government can require the recall of products pursuant to the *Canada Consumer Product Safety Act*.

The statute also requires corporations to report consumer product safety incidents and product defects, and to maintain records pertaining to the supply chain.

Other consumer protection legislation regulates the marketing and sale of certain specific products. For example:

- the *Textile Labelling Act* requires labels to be affixed to garments and upholstered household furnishings;
- the *Precious Metals Marking Act* sets out rules for the sale of goods made from precious metals;
- the *Agricultural Products Marketing Act* sets standards and grades for agricultural products and regulates the import, export and inter-provincial trade of agricultural products;
- the *Tobacco and Vaping Products Act* requires that the packaging of tobacco and vaping products display, amongst other information, the health hazards and health effects arising from the use of or emissions from such products;
- the *Cannabis Act* (effective October 17, 2018) includes strict product safety and quality requirements, labelling regulations, and restrictions on advertisement and promotion designed to protect public health; and
- the *Motor Vehicle Safety Act* regulates the safety standards for motor vehicles imported into and exported from Canada.

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

17.3 Product Liability Law

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

Contract law provides a remedy for parties who are injured when enforceable contractual promises are breached. Contracts for the sale of personal property are subject to provincial jurisdiction and are regulated by provincial sale of goods legislation, which generally implies into contracts certain conditions and warranties of fitness and quality of goods. Where goods are found to be defective or there is a breach of either an express or implied warranty, sellers, distributors and manufacturers may be held liable for breach of contract. The purchaser of the defective goods may choose to either reject the goods and rescind the contract, or treat the breach as a breach of warranty and sue for damages.

Proof of fault is not required for a breach of warranty action; contract law requires only that a warranty was breached and that the breach resulted in damage. An injured party can generally sue for breach of warranty only if the injured party has a contractual relationship with the party being sued.

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

■ Practical Advice

The best approach when launching a new product or service to Canadian consumers is to first determine the nature of the product, which provinces you will sell or offer the product in, and through what channels. It is often the case that distributors or importers will assist in meeting the requirements for labelling of products, but that is only a small piece of the puzzle.

It is important to engage counsel early in the process. Having the legal team engaged with the product development, marketing and labelling teams can save time and money for your product or service launch.



18

Franchising

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

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

Franchise agreements must be distinguished from agency and distribution contracts. In an agency relationship, the agent simply effects the sale of a product on behalf of the principal in return for a commission. The agent does not actually buy the product. Distributorships are businesses that purchase inventory for resale to other businesses.

The line between franchise and distributorship is not always clear and will usually depend on the degree of control exercised over the distributor or franchisee. The distinction between the two becomes especially important in determining whether a particular relationship falls within the scope of franchise legislation in effect in some provinces.

18.1 Franchise Structure

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

18.2 Foreign Franchisors

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

18.3 Compliance with Federal and Provincial Legislation

Although Canada has no comprehensive federal franchise legislation equivalent to the United States' Federal Trade Commission Franchise Rule, there are several federal statutes of general application that can affect franchise relationships. Of particular significance are the *Competition Act*, the *Trade-marks Act*, the *Investment Canada Act*, and the *Income Tax Act*, which govern, respectively, competition and trade practice matters, the registration and protection of trademarks, and investment and taxation rules to which foreign-based franchisors are subject.

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

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

a) Alberta

Alberta was the first province in Canada to enact franchise-specific legislation. The stated purpose of Alberta's *Franchises Act* is to assist prospective franchisees in making informed

investment decisions, to promote fair dealing in franchise relationships, and to provide civil remedies for breaches of the legislation. Important features of this statute include:

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

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

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

b) Ontario

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

c) Prince Edward Island, New Brunswick, Manitoba and British Columbia

Prince Edward Island's *Franchises Act* came into force on January 1, 2007, New Brunswick's *Franchises Act* came into force on February 1, 2011, Manitoba's *The Franchises Act* came into force on October 1, 2012, and British Columbia's *Franchises Act* came into force on February 1, 2017. In most respects, the franchise legislation of Prince Edward Island, New Brunswick, Manitoba and British Columbia is similar to Ontario's *Arthur Wishart Act (Franchise Disclosure)*, 2000, in that those four statutes impose requirements on a franchisor to provide a disclosure document to a prospective franchisee, provide a right of rescission if a disclosure document is not provided, require good faith and fair dealing between a franchisor and a franchisee, and protect franchisees' rights to associate. The information that a franchisor must include in a disclosure document with respect to a franchise in Prince Edward Island, New Brunswick, Manitoba or British Columbia is detailed in the regulations to each province's *Franchises Act* and is very similar, but not identical, to that which must be included in a disclosure document in Ontario.

d) Québec

Most franchise agreements will qualify as "contracts of adhesion" under the *Civil Code of Québec*, as they are drawn up by or on behalf of one party (the franchisor) and their terms are not negotiable by the other party (the franchisee). Under the *Civil Code of Québec*, a contract of adhesion must be couched in clear and understandable language. It may not refer to provisions in other contracts unless those provisions are expressly brought to the franchisee's attention. Any abusive or excessively onerous provisions may be found null and void or may otherwise be reduced in their effect. The contract as a whole will be interpreted in favour of the franchisee.

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

Practical Advice

Franchise law in Canada is complex and requires personalized advice. Please contact BLG for legal guidance tailored to your needs.





19

Strategic Value and Importance of Intellectual Property

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

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

19.1 Patents

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

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

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

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

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

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

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

19.2 Pharmaceutical Patents

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

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

Practical Advice

For more information on this topic, we invite you to download the latest edition of our book, titled *Life Sciences & Chemical Patent Practice in Canada*, available at blgbooks.com.

19.3 Trademarks

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

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

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

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

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

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

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

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

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

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

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

Practical Advice

For more information on trademarks, we invite you to download the latest editions of our books, titled *Trademark Practice in Canada* and *Trademark Opposition and Litigation in BRIC and NAFTA Countries*, both available at blgbooks.com.

19.4 Copyright

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

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

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

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

Copyright does not need to be registered in Canada. If the author qualifies and the work meets the necessary requirements, then that work will be protected by copyright in Canada.

Registration provides certain benefits, such as establishing the existence of the copyright, and creating a presumption of ownership that helps an owner enforce the copyright. There are no time limits to register a copyright.

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

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

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

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

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

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

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

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

19.5 Industrial Designs

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

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

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

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

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

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

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

19.6 Trade Secrets

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

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

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

19.7 Other Forms of Intellectual Property

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

19.8 Commercialization

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

Generally, all types of intellectual property can be licensed in Canada, and no one statute will govern such licensing. Rather, the general common law governing contracts normally applies. Licences for trademarks must comply with the control requirement described in Section 19.3 (Trademarks).

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

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

Although licences can be unlimited, they are often restricted in certain ways by the licensor, such as with respect to time, geography or use. A licence can be geographically limited so that the licensee is permitted to use or market the licensed IP rights only within a particular territory. A licence can be limited as to time so that the licence will be in effect only for a specified term (for example, one year, 10 years, etc.). A licence can be limited with respect to use in that licences can restrict the licensee's use of the licensed IP rights to only certain specified activities or fields.

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

■ Practical Advice

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

19.9 Intellectual Property Enforcement

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

■ Practical Advice

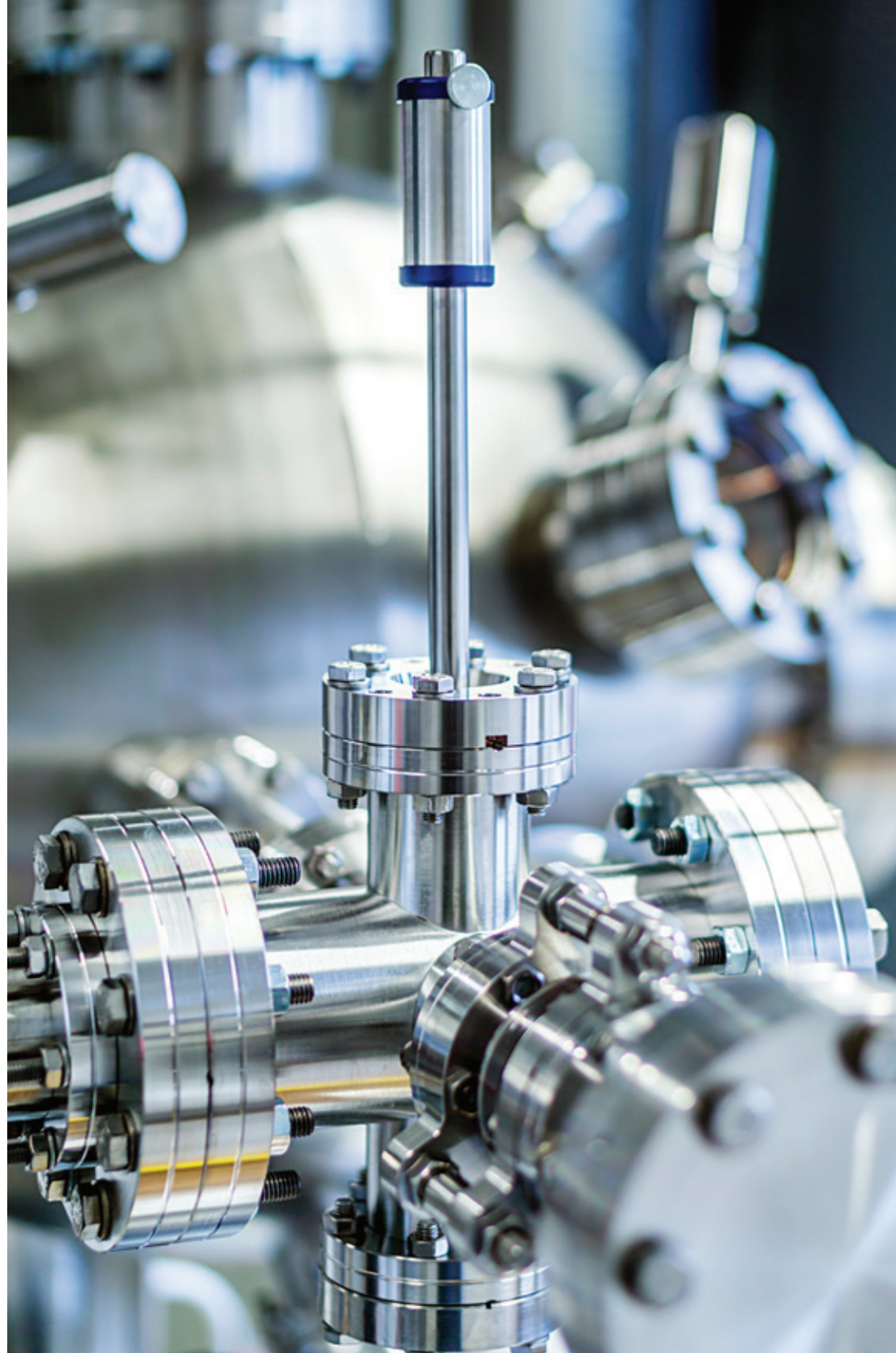
For more information on this topic, we invite you to download the latest edition of our book, titled *Trademark Opposition and Litigation in BRIC And NAFTA Countries*, available at blgbooks.com.

19.10 Intellectual Property Strategy

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

■ Practical Advice

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



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E-Commerce

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

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

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

20.1 E-Commerce Legislation in Canada

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

20.2 The Validity of Electronic Documents

Existing e-commerce legislation generally provides that:

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

Certain legal documents and contracts, such as wills and contracts that transfer interests in land, cannot be made electronically.

20.3 Contract Formation and Contract Enforceability

E-commerce legislation confirms that a valid contract can be formed electronically using electronic information or electronic documents and through actions that communicate the parties' intentions (such as clicking or touching an icon on a website). It also regulates the formation and enforceability of contracts made electronically. For example, absent a contrary agreement between the parties, an offer or acceptance, or any other matter that is material to a contract's formation or operation, may be expressed in electronic form.

A contract will not be invalid or unenforceable solely because an electronic record was used to form the contract.

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

20.4 Sending and Receiving Electronic Records

An electronic record is considered sent when it enters an information system that is outside the sender's control. If the sender and the addressee are in the same information system, the electronic record is deemed sent when the addressee can retrieve and process the record.

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

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

Practical Advice

As more and more business is conducted online, businesses must be vigilant to comply with a myriad of legal requirements, from rules regarding e-commerce, electronic documents, consumer protection, privacy, tax, commercial electronic messages and more.

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Privacy and Data Protection

Practical Advice

Canada's data protection framework varies slightly depending on the province in which the entity operates, whether it is federally or provincially regulated, and whether it is handling personal information of customers and/or employees. Recent developments include new breach notification requirements under the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) coming into force on November 1, 2018 and new guidelines issued by the federal Office of the Privacy Commissioner of Canada (OPC) and the Alberta and British Columbia respective offices of the information on obtaining valid consent, coming into force in January 2019. Amendments to PIPEDA are currently being considered and may be proposed and enacted in the next year or two, as Canada prepares for its evaluation for adequacy with the new European General Data Protection Regulation, which came into force on May 25, 2018. Finally, organizations transferring personal information outside Canada should keep in mind specific transparency requirements in this regard under Canadian law.

21.1 Personal Information Protection Legislation

Canada's privacy laws and data protection laws include rules regarding both private-sector and public-sector privacy rights and responsibilities, as well as specific rules regarding personal health-related information.

Canada's privacy rules regarding protection of personal information may apply to organizations collecting information about Canadian residents even if the organization is not physically located in Canada.

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

The federal PIPEDA applies to an entity if:

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

As of October 2018, Québec (*Act respecting the protection of personal information in the private sector*), Alberta (*Personal Information Protection Act*, Alberta PIPA) and British Columbia (*Personal Information Protection Act*, BC PIPA) have enacted personal information legislation that has been recognized as “substantially similar” to PIPEDA. Accordingly, PIPEDA does not apply to the collection, use or disclosure of personal information in those provinces, although it does continue to apply to inter-provincial or international transactions involving personal information, and to federal works, undertakings and businesses in those provinces.

Under all these statutes, “personal information” is broadly defined, generally as “information about an identifiable individual”, with a few exclusions. For example, PIPEDA does not apply to personal information used to communicate with an individual relating to his or her employment or business such as the individual’s name, title, work, work address, telephone number, work fax number or work electronic address, that the organization collects, uses or discloses solely for the purpose of communicating or facilitating communication with the individual in relation to his or her employment, business or profession. The Alberta PIPA and BC PIPA include similar provisions, and the BC PIPA excludes “work product” of employees from the definition of “personal information”.

Importantly, an entity falling within category (2) above (*i.e.*, a provincially regulated entity) is not subject to PIPEDA with respect to information about its own employees. This is because, under the Constitution, the federal government lacks jurisdiction to legislate on employment

relationships that are governed by provincial law. However, the province’s personal information legislation in Québec, Alberta and British Columbia does apply to employee information.

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

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

- **Accountability:** An organization is responsible for personal information under its control and must designate an individual or individuals who are accountable for its compliance with the legislation. Unlike the “data protection officer” under the GDPR, the individual exercising this role under Canadian law does not have to be independent.
- **Identifying Purposes:** The purposes for which personal information is collected must be identified by the organization at or before the time the information is collected.
- **Consent:** The knowledge and consent of the individual are generally required for the collection, use or disclosure of his or her personal information, unless an exception applies. Consent may be express or implied, depending upon the circumstances and the type of information. The federal OPC, the Alberta OIPC and the BC OIPC have recently published *Guidelines for obtaining meaningful consent*, which will come into force in January 2019.
- **Limiting Collection:** The collection of personal information must be limited to what is necessary for the purposes identified by the collecting organization.
- **Limiting Use, Disclosure and Retention:** Personal information must not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law. Personal information must be retained only so long as necessary to fulfill those purposes.
- **Accuracy:** Personal information must be as accurate, complete and up to date as is necessary for the purposes for which it is to be used.
- **Safeguarding:** Personal information must be protected by security safeguards appropriate to the sensitivity of the information (*i.e.*, physical, organizational and technological measures).
- **Openness:** An organization must make readily available to individuals specific information about its policies and practices relating to the management of personal information.

- **Individual Access:** On request, an individual must be informed of the existence, use and disclosure of his or her personal information and must be given access to that information. An individual must be able to challenge the accuracy and completeness of the information and have it amended, as appropriate.
- **Challenging Compliance:** Individuals must be able to address a challenge concerning compliance with the above principles to the designated individual or individuals accountable for the organization's compliance.

Of particular note, if a Canadian transfers personal information outside Canada (*e.g.*, to an international parent company or service provider outside Canada), the Canadian organization is expected to disclose those facts in its privacy policy in order to meet its obligations under the openness and safeguarding principles. While this has been held to be an implicit requirement in privacy legislation across Canada, it is made explicit in the Alberta PIPA and in the Québec *Act respecting the protection of personal information in the private sector*. Organizations must also have a contract in place with the foreign service provider detailing the security measures the service provider must have in place to ensure a comparable level of protection to the personal information of Canadians.

The Alberta PIPA imposes specific breach notification obligations on organizations and PIPEDA's amendments, which impose similar obligations, will come into force on November 1, 2018. In British Columbia and Québec, privacy regulators are recommending that organizations report breaches to the regulators and notify affected individuals.

21.2 Other Privacy Obligations

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

Québec's Civil Code, the Québec *Charter of human rights and freedoms*¹¹ and the Québec *Act to establish a legal framework for information technology*¹² provide additional privacy obligations, including a statutory tort for privacy violations. In Ontario, the privacy tort of intrusion upon seclusion was recognized in 2012.¹³

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

21.3 Canada's Anti-Spam Legislation (CASL)

CASL is a very stringent law that regulates more than spam. It applies to commercial electronic messages sent to customers and business partners and requires express consent from the recipients for the sending of such messages, except in specific and limited situations where consent is deemed to be implied. Contravention of CASL is subject to significant fines.

Canada's federal anti-spam legislation, which came into force in 2014, sets out a comprehensive set of rules that govern the sending of electronic messages in Canada or to recipients in Canada. It is likely the strictest and most comprehensive law addressing electronic communications in the world. Note that Canada also has adopted the *Unsolicited Telemarketing Rules*, which apply to telemarketing.

CASL prohibits sending commercial electronic messages (which includes emails and text messages) unless consent has been obtained from the recipient. CASL also requires certain prescribed content and an "unsubscribe" mechanism to be included in the message. Despite its name, the law goes well beyond spam communications, covering electronic messages to customers and between companies sent from *or* accessed from devices located in Canada. The law also contains provisions dealing with altering transmissions data in electronic messages and preventing the installation of computer programs on another person's computer in the course of a commercial activity, without the person's knowledge and consent. Unlike the U.S. law, which requires that consumers receive an opt-out option, CASL requires opt-*in* consent for the sending of an electronic messages for a commercial purpose (which is defined broadly), except in specific and limited situations where consent is deemed to be implied (for instance where there is an "existing business relationship").

Those who violate the rules can face substantial fines. There is a maximum of C\$1 million per violation in the case of an individual and up to C\$10 million per violation for organizations. Although the private right of action has recently been suspended, CASL contraventions remain subject to regulatory enforcement, which can involve time-consuming and costly regulatory investigations and enforcement proceedings. So far, there have been fines of up to C\$200,000.

¹¹ See Chapter C-12.

¹² See Chapter C-1.1.

¹³ Jones v. Tsige, 2012 ONCA 32 (Court of Appeals for Ontario 2012).

22

Language Considerations

English and French are the two most widely spoken languages in Canada, with Francophones primarily in Québec and Anglophones throughout the rest of Canada. French and English are also Canada's two official languages. Both languages now have equal status in the operation of, and services provided by, federal institutions. In areas of Canada designated as bilingual, citizens can seek and obtain federal government services in either official language.

The *Official Languages Act* (Canada) generally does not impose obligations on businesses operating in Canada. Language requirements applicable to businesses are found in other federal legislation and in some provincial legislation. At the federal level, for example, the *Consumer Packaging and Labelling Act* (Canada) requires that certain information set out on the packages and labels of consumer prepackaged products be provided in both French and English, notably the product name and the declaration of net quantity. Additional language requirements also apply to the labels of certain regulated products, such as drugs, medical devices and food.

Companies doing business in Québec are subject to stricter language requirements pursuant to the *Charter of the French Language* (Québec) (the Charter).

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

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

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

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

The Charter imposes fines for a first offence ranging from C\$600 to C\$6,000 for individuals and from C\$1,500 to C\$20,000 for corporations. Fines are doubled for a subsequent offence. A judge may also impose a further fine on the offender equal to the financial gain realized or derived from the offence, even if the maximum fine set out above has also been imposed. Moreover, a judge may order the removal or destruction of posters, signs, advertisements or billboards that do not comply with the Charter. Although generally enforcement is limited to individuals and companies that have a place of business in Québec, those engaged in marketing or selling non-compliant products are at risk of prosecution for violations of the Charter. These may include local resellers, distributors, marketing and advertising companies, and others.

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Practical Advice

We recommend that companies that decide to do business in Canada take into consideration that Canada is a bilingual country and that they ask questions early on regarding the language requirements that may apply to their operations, their products and/or services, as well as their contractual relationships. Doing so is essential if they intend to do business in Québec or with individuals or other companies in Québec.



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