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Doing business in Canada:

A practical guide from ‘Eh’ to ‘Zed’

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Canada is more than stunning landscapes and iconic expressions—it is a thriving, sophisticated market that offers real opportunities for international businesses looking to launch, expand or invest.

With a stable legal system, strategic trade relationships, innovation-driven industries and a reliable, business-friendly environment, Canada remains a prime destination for growth in North America.

International companies are drawn to Canada's steady economic fundamentals, deep talent pool, transparent regulatory environment and reputation for integrity. Whether you are entering the market for the first time or building on an existing presence, Canada offers a strong, predictable foundation for long-term success.

This guide—from Eh to Zed—offers practical business and legal advice to help you make informed decisions and move forward with confidence when doing business in Canada. Developed by a national team of legal professionals with deep sector experience, it is designed to help you understand what matters most—wherever you are in your Canadian journey.

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The Canadian legal system explained: What global companies need to know

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.

In Canada, the separation of federal and provincial powers is more clearly articulated than the separation of federal and state powers in the United States. For most businesses, provincial laws have a greater impact than federal laws. This is because 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 are established by and 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 telecommunications 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 which 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 which operate entirely within those provinces 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 with generally 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.

2

How to start a business in Canada: What structure should global companies choose?

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), a sole proprietorship, a partnership (which may be a general partnership or limited partnership, or possibly a limited liability partnership), or various forms of joint venture. Additionally, the foreign entity may choose to 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 likely be subject to federal and provincial registration requirements.

2.1 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 responsibility 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 8.8 (Branch Tax).

2.2 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.

a) Federal or provincial incorporation

Corporations may be created in Canada under either federal or provincial/territorial legislation. Accordingly, assuming a decision has been made to incorporate in Canada, a choice must then be made regarding the jurisdiction under which the entity should be incorporated. In most cases, the jurisdiction of incorporation does not affect 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/territorial legislation may carry on business anywhere in Canada as of right, but are required to comply with certain 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 corporations (other than unlimited liability companies as discussed below).

c) 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, Nova Scotia or Prince Edward Island. 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 example, for U.S. tax purposes, a ULC is generally regarded as a flow-through entity which means that shareholders will be responsible for taxes. Professional advice should be obtained to fully consider the tax implications of establishing a ULC.

d) Capital structure

Canadian federal or provincial/territorial 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.

e) Residency of directors

The federal *Canada Business Corporations Act* (the CBCA) requires that at least one quarter (25%) of the directors of most federal corporations be resident Canadians. For CBCA corporations doing business in certain industries, such as book publishing, film or video distribution, 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 resident in Canada, 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.

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.

If a corporation operates in Québec, it must comply with specific requirements with respect to its name. These requirements are discussed in Chapter 17 (Canadian language laws).

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.

2.3 Sole 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 and as a result 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.

2.4 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.

2.5 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 8 (Taxation in Canada).

b) Limited liability partnerships

Some provinces allow professional firms such as law firms and accounting firms to carry on business as limited liability partnerships. 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.

2.6 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.

3

Directors and officers liability in Canada: Guidance for global business leaders

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.

3.1 Duties and liabilities of directors

A corporation incorporated under the *Canada Business Corporations Act* (CBCA), and generally the other provincial/territorial corporate statutes, is a legal entity, separate and apart from its shareholders and directors. The shareholders elect directors to manage, or to supervise the management of, the business and affairs of the corporation. Practically speaking, directors will not be able to oversee all aspects of the business operations of the corporation. As a result, the role of directors is typically one of overseer as opposed to one of implementer.

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. Importantly, Canadian courts have held that the fiduciary duty is owed exclusively to the corporation itself and not to any particular shareholder(s), creditors or other stakeholders. Unlike in the United States, the beneficiary of the fiduciary duty does not shift in the context of a sale transaction or in the vicinity of insolvency. Notwithstanding that the duty is owed to the corporation, directors may look to the interests of stakeholders

to inform their decision-making process. The ability to consider a wide-range of stakeholders, including shareholders, creditors, consumers, employees, governments and the environment, was recently codified in the CBCA. However, it is important to remember that no single stakeholder's interests should prevail over any other.

The fiduciary duty includes a number of sub-duties. As part of fulfilling the 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 CBCA and most provincially/territorially 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) Business judgment rule

When assessing a board of directors' compliance with its duties, Canadian courts will generally apply the "business judgment rule" which presumes that the directors acted on an informed basis, in good faith and in the best interests of the corporation. Deference is given to business decisions made by the board of directors provided that it falls within a range of reasonable alternatives. The business judgment rule acknowledges that directors are generally best suited to make business decisions for the corporation and courts will not impose hindsight on such decisions.

d) Oppression

Under the CBCA and other provincial/territorial corporate statutes, shareholders whose interests have been harmed (or allegedly harmed) by a corporation's directors or officers may ask the Court to grant the "oppression remedy" against the corporation, the directors and/or the officers. The oppression remedy may also be available to certain other stakeholders in limited circumstances. Under the CBCA, "oppression" is broadly defined as acts that are "oppressive or unfairly prejudicial or that unfairly disregard the interests of any security holder, creditor, director or officer". Where conduct has been determined to be oppressive, the Court may make an order to rectify the complaint. Importantly, in order to seek the oppression remedy, the director or officer must be implicated in the oppressive conduct and the remedy sought must be appropriate for the circumstances. The oppression remedy is not intended to be punitive.

e) Other duties and liabilities

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.

3.2 Duties and liabilities of officers

Under the CBCA, the directors of the corporation may designate and appoint officers to manage the business and affairs of the corporation, with certain limitations. Like directors, a corporation's officers owe a fiduciary duty to the corporation and are generally 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.

3.3 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, and the corporate statute under which the corporation was formed, there may be other statutory and common law defences and protections available to a director or an officer.

4

Raising capital in Canada: Options and strategies for 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*.

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.

4.1 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*. 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 5 (Securities regulation in Canada).

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 to allow for investments by institutional investors or high net worth individuals (e.g., the accredited investor exemption), but there are also exemptions designed to facilitate capital raising from retail investors and others close to the business (e.g., the family and friends, employees and the offering memorandum exemptions). Private companies with very few shareholders can generally rely on an exemption from the prospectus requirement.

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.

4.2 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

Three of the federal government's more significant regional development initiatives are the Pacific Economic Development Canada (PacifiCan), Prairies Economic Development Canada (PrairiesCan) and the Atlantic Canada Opportunities Agency (ACOA).

PacifiCan focuses on innovation, business development and community economic development in British Columbia. PrairiesCan is focused on Alberta, Saskatchewan and Manitoba. 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 with gross revenues of C$10 million or less in a broad spectrum of industrial sectors, including manufacturing, transportation, wholesaling and retailing. Farming businesses are ineligible under the program.

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. For lines of credit, the maximum chargeable is the lender's prime lending rate plus five per cent.

The maximum loan amount a small business can access under the CSBF Program is C$1,150,000 as follows:

- Up to a maximum of C$1,000,000 for term loans for any one borrower, of which no more than C$500,000 can be used for purchasing leasehold improvements or improving leased property and purchasing or improving new or used equipment and of that amount, a maximum of C$150,000 can be used for intangible assets and working capital costs; and
- Up to a maximum of C$150,000 for lines of credit.

All participants are required to pay a two per cent registration fee to the lender. A 1.25% annual administration fee is applied to the end-of-month loan balance.

For real property and equipment, security must be taken on the assets financed. For leasehold improvements, intangible assets, working capital costs and when financing a line of credit, the lender must take security on other business assets. Lenders have the option to take an unsecured personal guarantee.

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.

5

Securities regulation in Canada: What international businesses need to know

5.1 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. However, the various securities regulatory authorities (collectively known as the Canadian Securities Administrators or CSA) have worked towards harmonizing securities laws, rules and regulations across the various jurisdictions. As a result, the laws are generally very similar (and in many cases uniform), with some procedural and substantive differences. Importantly, while national securities transactions require compliance with several regulatory regimes, the CSA have implemented procedures to reduce the difficulties of dealing with multiple regulators. Importantly, Canadian securities regulation is relevant to all businesses who issue securities to their shareholders, as well 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.

5.2 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 become members of the Canadian Investment Regulatory Organization (CIRO). 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.

5.3 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.

5.4 Registration of investment fund managers

Persons or companies that act as investment fund managers are generally 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.

5.5 Issuing securities in Canada

Absent the availability of an exemption, issuers of securities in Canada are generally required to file a prospectus with the securities regulatory authorities in the jurisdictions in which the securities will be distributed. The prospectus must contain prescribed 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, annual and quarterly 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 on a prospectus exempt basis, depending on the facts and circumstances of the offering. For example, an exemption is available for sales to those defined as “accredited investors” or non-individuals who spend at least C$150,000 to purchase the securities. Exemptions are also available for certain sales to family and friends, sales to employees and sales made under a prescribed form of offering memorandum. Each exemption will have its own conditions to be satisfied and may be subject to certain filing requirements and disclosure obligations.

5.6 Listing requirements

Issuers who wish to list their securities on stock exchanges, such as the Toronto Stock Exchange, the TSX Venture Exchange, CBOE Canada or the Canadian Securities 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 (including share exchange M&A 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 5.5 (Issuing Securities in Canada).

5.7 Takeover bids

A person who offers to acquire outstanding 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 an exemption, a takeover bidder must comply with certain rules, including a requirement that it prepares and sends a takeover bid circular with specified disclosure to all holders in Canada of securities of the class concerned and makes an offer 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 satisfied or waived, the bid must be extended for an additional 10 days to permit other shareholders a further opportunity to tender to the bid.

5.8 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.

5.9 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 also required to report and, in some cases, to make an announcement concerning such trades and to wait a business day 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.

6

Arbitration, mediation and litigation in Canada: Help for international companies

6.1 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 (similar to depositions but usually with much narrower boundaries for relevance) 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 commercial list is well-regarded for its efficiency and the expertise of its judges.

6.2 Class proceedings

Class actions are permitted, and have become common, across Canada. All provinces have now formally adopted class proceedings statutes that set forth procedural requirements associated with class proceedings in that jurisdiction. The three Canadian territories rely on the common law for the structure of their class proceedings regime and the Federal Court has its own class action procedures enshired in its Rules of Court.

Class actions are typically case-managed by a judge in the jurisdiction where the class action is issued. The fact that a claim is advanced as a proposed class proceeding does not alter the substantive law: plaintiffs must establish the same elements of a cause of action, and defendants can raise the same defences, as in an individual action. A class action simply permits multiple claims where there are issues common to the proposed class to be

"bundled" together into a single proceeding. The plaintiffs (or, more rarely defendants), must be certified as a "class" before the action can proceed to discovery and trial. Securities, mass torts, product liability, privacy, consumer protection and employment continue to be frequent subjects in class actions litigation. Class action trends often follow litigation patterns in the United States and many Canadian proceedings are "copy cats" of US litigation. Most common law provinces in Canada have a two-year limitation period from the date the claim was discovered, Québec has a three-year limitation period. Once a claim in a class action is issued, the limitation period which would govern the claims of individual class members is suspended and generally will not resume running unless and until the certification (or, in Québec, authorization) is denied.

A unique feature of Canadian class actions law is that the courts of each province or territory have the authority to independently certify a national class action. In addition, class actions can be brought in the Federal Court, if they are against entities of the federal government, or are brought under federal statutes, such as the *Competition Act*. It is not unusual to have overlapping class proceedings in different jurisdictions at the same time. Canada does not have an equivalent to the multidistrict litigation procedure that exists in the United States. Instead, the coordination of the overlapping proceedings depends on the individual judges managing them and initiatives created by the Canadian Bar Association to promote coordination. The test for certification (authorization in the Province of Québec) varies from province to province. Most notably, while most provinces do not require plaintiffs to establish that the common issues predominate over individual cases, amendments to the Ontario legislation in 2020 and more recently class proceedings legislation in Prince Edward Island (P.E.I.) have imposed a superiority and predominance test in those provinces. Plaintiffs in all jurisdictions must show that a class action would be the preferable procedure for resolving the claim. While this requirement has not been applied rigorously, the amendments in Ontario and the newly enacted legislation in P.E.I. will require the Courts to consider this issue with the more stringent consideration of superiority and predominance.

6.3 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, and most commonly in Québec. In common law jurisdictions, punitive damages can be awarded in any civil suit in which the plaintiff proves the defendant's conduct was "malicious, oppressive and high handed [such] that it offends the court's sense of decency", whereas in Québec, punitive damages are provided for in the province's civil code which permits courts to award punitive damages if they are "provided for by law" in which case they "may not exceed what is sufficient to fulfill their preventative purpose".

Because civil juries are used much less often in Canadian civil litigation than in the United States and damages for claims in Canada are often much less than in the United States, there is no "tort reform" debate in Canada, nor are jurisdictions usually labeled "plaintiff-friendly" (with the exception of perhaps Québec) or "defendant-friendly". To the extent that litigation risks may instruct corporate planning decisions, a more nuanced analysis is required. The sophistication of the "commercial list" in Ontario is often a persuasive factor for large clients. Québec's use of a civil code instead of the common law is often a persuasive factor for large clients to reduce potential exposure in Québec. Other factors include frequency of jury usage in civil cases, whether the province has compulsory government-owned auto insurance (such as in British Columbia, Manitoba, Saskatchewan and, with regard to personal injuries, Québec), and consumer protection laws.

6.4 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.

6.5 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 arbitration

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 (Model Law) on International Commercial Arbitration, as has the federal government, though different jurisdictions have amended the Model Law at different times. Canada has a reputation as being an arbitration-friendly jurisdiction and this is true for international arbitrations as well as domestic arbitrations. Canadian courts have consistently expressed their approval of the principle that there are narrow grounds for judicial intervention in international commercial disputes that are subject to arbitration agreements as expressed in the Model Law. Canadian courts have expressed broad deference to the decisions of arbitral tribunals and narrowly interpreting the grounds for setting aside arbitral awards. Some provinces have explicitly accepted that international arbitral awards are akin to foreign judgments, providing parties with jurisdictional advantages and longer limitation periods for enforcing their awards. Canadian courts have consistently emphasised the mandatory nature of the enforcement provisions in the Model Law.

7

The Regulation of “International Trade” in Canada

7.1 Overall context: Canadian federalism

Canadian federalism is as dynamic as it can appear bewildering; it is complex, though not complicated, underwritten by a small number of foundational principles; it is flexible and responsive; it accepts regional differences and local experimentation as a critical element of the Canadian national identity. Canadian federalism forces policymakers and politicians into a permanent state of engagement and interconnectedness; it demands compromise and consensus for effective governance.

None of this is optimal for business; but Canadian federalism can give rise to good business outcomes – for those entities that understand it and use it effectively. When it comes to international trade, Canadian federalism gives rise to three key considerations.

First, Parliament has exclusive authority over matters that, in substance, fall under “international trade and commerce”, such as the customs tariff (and other border measures). Parliament also has competence to enact legislation in matters of general concern for the welfare of Canada as a whole – much of Canada’s environmental, food and drug legislation, and competition framework is predicated on Parliament’s general authorities. Parliament exercises indirect ‘regulatory’ authority in at least one other way: taxation (for example, excise taxes on tobacco or alcohol).

Second, although the federal Executive has sole authority to enter into treaties – including multilateral, regional, and bilateral trade agreements – the *implementation* of treaties to which Canada becomes Party is a matter of domestic legislative competence. Parliament may implement free trade agreements by, for example, reducing tariffs (within its jurisdiction), but not in areas of provincial competence.

Third, provinces have exclusive authority over 'property and civil rights', matters of a local nature, and ownership of natural resources within the province. In practice, this covers a wide range of economic activity: contract law, most labour legislation, securities regulation, health care, and professional accreditation all fall within provincial jurisdiction and are largely insulated from federal legislative activity. This is particularly relevant for trade agreements that cover services or that require mutual recognition of professional credentials.

7.2 Canada's trade and investment agreements

Canada is a Member of the World Trade Organization (WTO) and Party to a large number of free trade agreements covering nearly half the globe. Trade agreements reduce barriers to trade in goods, such as tariffs and certain non-tariff barriers. Some also address trade in services, investment, government procurement, and temporary entry for businesspersons. The administration of the Canadian customs framework (see section 7.3) is governed by internationally agreed disciplines.

Canada is Party to more than 30 bilateral investment treaties, known as "foreign investment protection agreements" (FIPAs). FIPAs 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.

7.3 The Canadian customs framework

7.3.1 Customs tariffs

The *Customs Act* imposes a general duty to report the importation of all goods into Canada. It also sets out:

- rules for 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 remissions; 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.

7.3.2 Trade remedies

Where unfair trade practices such as dumping or subsidization causes material injury to Canadian manufacturers, additional duties may be imposed on injurious imports through Canada's trade remedy procedures.

Dumping is where the export price of a good is lower than its normal value, at the same level, in its domestic market. A product is **subsidized** where there is a financial contribution that confers a benefit, for example to its manufacturer, and that subsidy is specific to the firm or the sector.

The *Special Import Measures Act* provides for investigations into alleged dumping or subsidization, and injury they cause. The **CBSA** conducts an investigation into dumping or subsidization, and the **CITT** determines whether each practice causes material injury to Canadian producers. 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.

There are other trade remedy investigations such as **emergency safeguards** that are conducted under the authority of the Minister of Finance.

7.4 Export and import controls

Global Affairs Canada (GAC) 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.

7.5 Economic sanctions

GAC administers Canada's economic sanctions. Canada imposes economic sanctions on a number of countries, organizations, and individuals. 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* and *Justice for Victims of Corrupt Foreign Officials Act*. The Minister of Foreign Affairs may, in certain circumstances, issue permits authorizing transactions otherwise prohibited by the sanctions.

7.6 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) in regard to activities that have a "real and substantial connection" to Canada. In addition, it applies extraterritorially to all Canadian corporations and Canadian citizens in regard to activities conducted globally, whether connected to Canada or not. Investigations under the CFPOA are conducted by Canada's federal police force, the Royal Canadian Mounted Police.

7.7 Anti-slavery legislation

The *Fighting Against Forced Labour and Child Labour in Supply Chains Act* (Supply Chains Act) requires certain organizations and government institutions to report annually on the steps they are taking to address forced and child labour in its operations and supply chains.

The Supply Chains Act applies to "entities" that produce goods anywhere in the world or import goods into Canada, or control another entity that does one of those things. An "entity" a defined term under the Act, and mostly

covers Canadian listed public companies and organizations doing business in Canada who meet certain size thresholds. Each entity is required to provide a report detailing the steps it has taken in its last financial year to prevent and reduce the risk that forced or child labour is used "at any step of the production of goods" in its global operations and supply chains. The Supply Chains Act sets out criminal fines for noncompliance, which apply to both the entity and its directors and officers.

In addition to reporting legislation, Canada bans the importation of goods produced with forced or child labour and importers may be subject to additional enforcement measures under the Customs Act including seizure and forfeiture of goods.

7.8. Practical advice

Trade is regulated by a variety of complex domestic laws, regulations, and policies, and international agreements. Legal instruments, administrative practices, requirements, and defences evolve over time. If you are looking to engage in trade in Canada or with Canadian businesses or individuals, reach out to a BLG professional for tailored legal advice.

8

Taxation in Canada: Helping global companies be compliant and efficient

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.

8.1. 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. A trust is considered resident in the place where the central management and control of the trust takes place. The ITA may also deem a trust that is not factually resident in Canada to be resident in Canada in certain situations.

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.

8.2. Income tax rates

Federal taxes on personal income are marginal, increasing with the amount of income. As at July 1, 2025, the federal marginal tax rates for individuals were revised as follows:

- 14 per cent on the first C$57,375 of taxable income;
- 20.5 per cent on the next C$57,375 of taxable income;
- 26 per cent on the next C$63,132 of taxable income;
- 29 per cent on the next C$75,532 of taxable income; and
- 33 per cent of taxable income in excess of C$253,414.

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 54.8 per cent (Newfoundland and Labrador).

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 8 per cent (Alberta) to 16 per cent (Prince Edward Island), for a combined corporate tax rate of between 23 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.

8.3. 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.

8.4. 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.

8.5. 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.

8.6. 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.

8.7. 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.

8.8. 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 portion of the non-resident's Canadian source business profits remaining after corporate tax on those profits has been paid, 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.

8.9. Canadian taxation of non-resident trusts

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

8.10. Capital tax

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

8.11. 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.

8.12. Vacant / Underused housing tax

Canada's underused housing tax (UHT) is an annual 1% tax on certain vacant or underused residential property owned (directly or indirectly) by foreign nationals (individuals who are not Canadian citizens or permanent residents).

Certain provinces and municipalities also impose forms of vacant home taxes which can vary from region to region.

8.13. 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); Nova Scotia (at 14 per cent); and New Brunswick, Newfoundland and Labrador, 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.

8.14. 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 and on certain services. The tax rates range from six per cent (Saskatchewan) to seven per cent (British Columbia and 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.

8.15. 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.

8.16. Real estate transfers

Certain provinces and municipalities impose taxes on transfers of real property, including residential real property and industrial and commercial real property.

Until December 31, 2026, the *Prohibition on the Purchase of Residential Property by Non-Canadians Act* will prevent non-Canadians from buying residential property in Canada if the residential property is situated in a Census Metropolitan Area or a Census Agglomeration Area. A Census Metropolitan Areas must have a total population of at least 100,000, with 50,000 or more living in the core area. A Census Agglomeration must have a population of at least 10,000. For purposes of this legislation, residential property is defined as buildings with 3 dwelling units or less; this definition would include a purchase of a semi-detached house, a row house, and an individual condominium units. The legislation applies to non-Canadians, including corporations and entities not listed on a stock exchange in Canada, and controlled by non-Canadians. However, the legislation does not apply to Canadians, permanent residents, or temporary residents who meet the exception criteria outlined in the regulations to the legislation.

9

Employment law in Canada: Key considerations for international companies

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.

9.1. 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.

9.2. 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. Moreover, in December 2021, the Ontario government amended the province's *Employment Standards Act* to prohibit non-competition covenants altogether, with very few exceptions.

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. In the Province of Québec, where a civil law system applies, there are also a few differences regarding reasonable termination notice, as opposed to the common law system. The main differences being that employees in Québec cannot waive their right to a termination notice in advance and cannot be terminated after 2 years of service without just and sufficient cause and that what constitutes a reasonable notice is generally longer under the common law than the civil law system.

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.

9.3. 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. Recently, the federal government has legislated to ban wage-fixing and no-poaching agreements. Such agreements are now, since June 2023, criminal offences and in violation of the *Competition Act*.

9.4. 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. Compensation is generally payable to an employee who sustains personal injury arising out of an in the course of employment or who suffers from an occupational disease. 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.

9.5. 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$3,754.45 per year (in 2023). The contribution percentage will increase in 2024. 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.

9.6. 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.

9.7. 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.

9.8. 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:

a) exclusive bargaining rights to certified trade unions;

b) a postponement of the right to strike or lockout until after the expiry of a collective agreement and after a conciliation or mediation process;

c) prohibition of unfair labour practices both by employers and trade unions;

d) legal recognition and enforceability of collective agreements;

e) 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 dismissed 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 to judicial review from arbitration decisions.

9.9. 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.

9.10. Language of work

In June 2023, the federal government enacted the *Use of French in Federally Regulated Private Businesses Act*, which, among other things, provides for rights and duties respecting the use of French as a language of service and a language of work in relation to federally regulated private businesses in Québec and in regions with a strong francophone presence.

Similarly in Québec, on June 1, 2022, *An Act respecting French, the official and common language of Québec* received royal assent and became law. The Act imposes new French language obligations affecting the language of work, commerce and business, contracts, signs, communications between the Government and businesses, education, the courts, and more. It also paves the way for significant changes to Québec's Charter of the French Language and other provincial laws, such as the Civil Code of Québec and the *Consumer Protection Act*.

10

Business immigration to Canada: Pathways and processes

10.1. Non-immigrant or temporary entry

Generally, 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 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 permit exemptions under the Global Skills Strategy

A work permit is generally required if a foreign national is entering Canada for business purposes outside the scope of the business visitor provisions. On June 12, 2017, the Minister of Citizenship and Immigration established a public policy to facilitate the entry for certain high-skilled work of a short duration as part of the Global Skills Strategy. Two types of workers are exempt from the requirement to obtain a work permit under the Global Skills Strategy:

- **Highly skilled workers**: To qualify for the short-term work permit exemption as a highly skilled worker, the following requirements must be met:
  - The job to be performed must be classified under Training, Education, Experience and Responsibilities (TEER) category 0 or 1 in the National Occupational Classification (NOC); and
  - The work to be performed is for one of the following short periods of time:
    - up to 15 consecutive days once every six months; or
    - up to 30 consecutive days once every 12 months
- **Researchers**: The work to be performed by the foreign national must meet the following requirements:
  - The foreign national intends to perform work as a researcher at a publicly funded Canadian degree-granting institution or its affiliated research institution for a period of up to 120 consecutive days; and
  - The foreign national has a significant role to play or value to add to the research project.

Immigration officials have been instructed to document a "15-day (or 30-day) work permit exemption" in the case notes. The onus is on the foreign national to provide evidence to satisfy the examining officer that they are eligible for this exemption and to demonstrate that the required amount of time has passed since the first day of work under the previous use of the exemption if they wish to use it again.

c) Work permits

There are many categories under which a work permit can be obtained:

- **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 Canada-United States-Mexico Agreement (CUSMA, formerly the North American Free Trade Agreement (NAFTA)), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), 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.

Employers are not required to obtain Labour Market Impact Assessments (LMIA - see the Confirmed Job Offer discussion below) for foreign workers seeking work permits under these categories and entry procedures are generally streamlined.

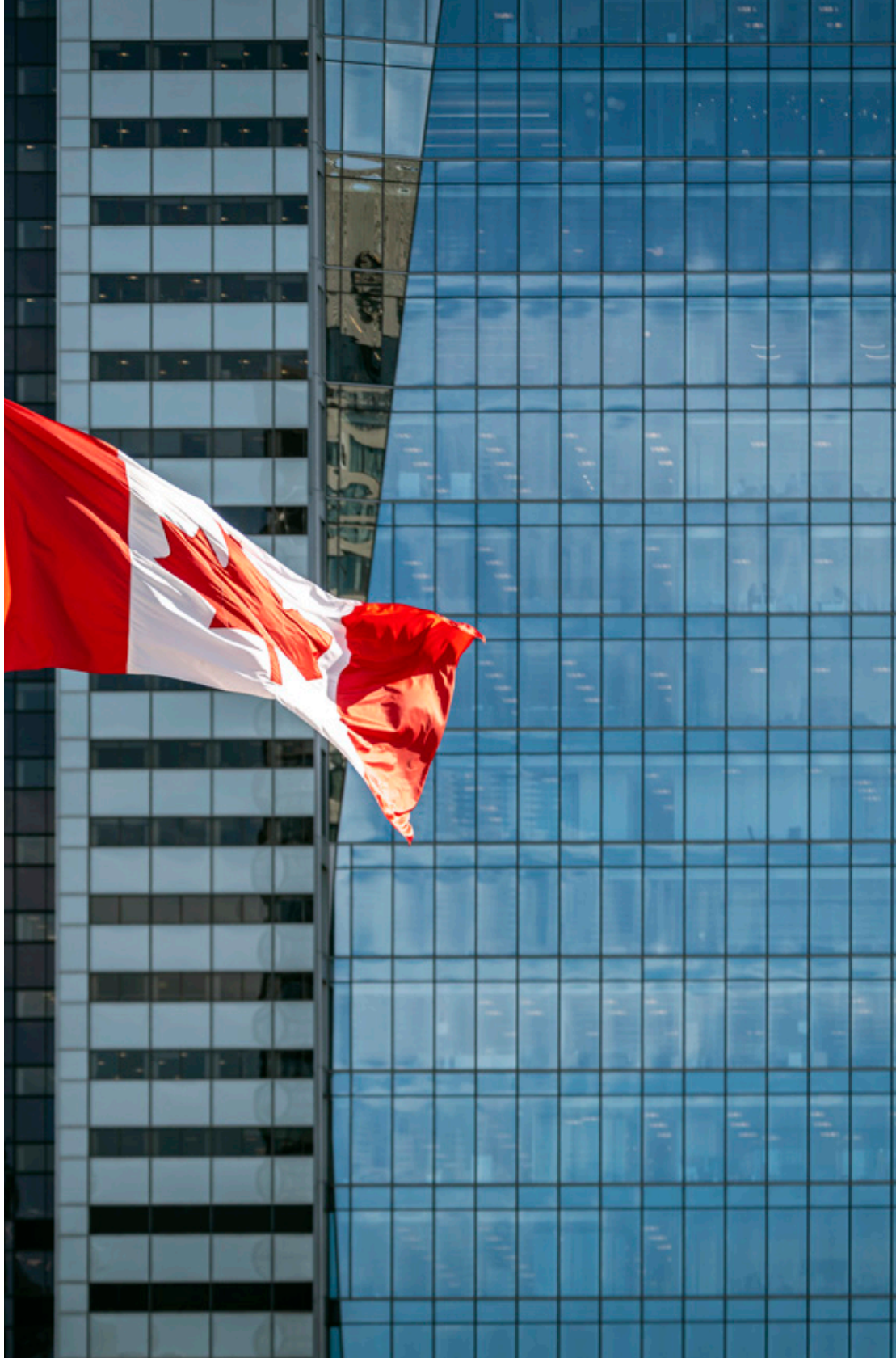
- **Confirmed Job Offer**: Where the exemptions noted above do not apply and other exempt categories are not available, a "Labour Market Impact Assessment" must be obtained from Service Canada, which is a federal institution that is part of Employment and Social Development Canada.

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.

10.2. Dependents of foreign workers

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 dependent children to attend elementary and secondary schools in Canada. However, it does not authorize the spouse or the children to accept 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.



11

How to invest in real estate in Canada: Opportunities and regulations for global investors

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. Public land registration systems have been established in each province and territory to document many of the foregoing interests, including registered ownership, and to facilitate the transfer of such interests.

Each province has jurisdiction over “property and civil rights” and 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. Effecting transfers of certain interests in land requires completion of specific documents, some of which are quite technical, and must be filed with the applicable land registration system.

There are different land registration systems throughout Canada; however, the dominant system is the land titles system. In Western Canada, including the provinces of British Columbia, Alberta, Saskatchewan and Manitoba, the land registration systems are based on the “Torrens” system (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, and effective as of June 1, 2022, all documents which are to be registered in the deed registration system must be written in the French language. 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.

The "Torrens" system is a form of land titles system, which simplifies, expedites and provides certainty to land ownership by maintaining a record of registerable interests for each parcel of land. The accuracy of the record is guaranteed by each province, and any inaccuracies are compensable through an assurance fund maintained by the corresponding province.

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 (prior claims in Québec). 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.

In contrast to the land titles system, 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; 30 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). Under a 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 enforceable against a third party who, for valuable consideration and without notice of such 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.

In addition to the provincial land titles system, a registry of beneficial ownership has been established in British Columbia, through the *Land Owner Transparency Act* ("LOTA"). Any individuals or reporting bodies (e.g., relevant corporations, trusts or partnerships as set out in LOTA) who are deemed to have an indirect interest in land are required to file a transparency report, which sets out certain personal information about the beneficial owners and which is housed in a searchable, public database called the Land Owner Transparency Registry ("LOTR"). Any prospective purchaser of land in British Columbia should take into consideration that the identity of the beneficial owner(s) of such land will be disclosed in a transparency report available in the LOTR.

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 registered against title to the land, because some encumbrances may severely restrict how the land may be used. Title searches are required to determine if any encumbrances are registered against title to the land, and a review of the documents creating such 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 diligence 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.

Effective as of January 1, 2027, the *Prohibition on the Purchase of Residential Property by Non-Canadians Act* prevents non-Canadians from buying residential property with three (3) dwelling units or less in Canada (with the exception of certain areas located outside of Census Metropolitan Areas (CMA) and Census Agglomerations (CA) as defined by Statistics Canada), for a period of two (2) years, until December 31, 2024. Further, 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*. 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 (whether legal or beneficial) 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. For example, British Columbia has enacted an additional property transfer tax (20 per cent of the residential property's fair market value) that applies to the purchase of residential properties by foreign non-residents, foreign corporations or taxable trustees 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 25 per cent property transfer tax (effective for home purchases made on or after October 25, 2022), which is levied against non-resident purchasers of properties containing one to six single-family residences in all of Ontario.

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.

Certain jurisdictions, such as British Columbia and the City of Toronto, have recently introduced legislation which imposes a vacancy tax on underused residential properties. Vacancy taxes are intended to discourage property owners from keeping their residential homes unoccupied in order to address the current housing shortage crisis.

12

Environmental laws in Canada: Information for companies

Canada has a well-developed regulatory regime for environmental protection over which federal and provincial governments have shared jurisdiction. Federal and provincial governments provide the primary source of environmental legislation, although territories, local, and Indigenous governments have environmental requirements of their own as well.

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.

In recent years, federal and provincial environmental laws have been revised to require the consideration and involvement of Indigenous communities in impact assessments, permitting decisions, and monitoring of ongoing projects or activities. The federal and British Columbia governments have passed legislation to make their laws consistent with the *United Nations Declaration on the Rights of Indigenous Peoples Act (UNDRIP)*. As UNDRIP becomes further enmeshed in Canadian law, proponents can expect to see new requirements to seek the free, prior, and informed consent of Indigenous communities who may face environmental impacts from projects or activities.

Public concern for the environment, greater regulatory oversight, Indigenous rights, and the fact that environmental laws differ from jurisdiction to jurisdiction are just some of the factors that businesses must account for when investing in Canada.

When purchasing a property, developing a project, or investing in a business in Canada, ensure environmental risks are identified early with a thoroughly conducted due diligence. Seeking the advice of an environmental lawyer 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 and regulatory processes and in implementing relationship building strategies with Indigenous communities that may be impacted by your operations.

12.1 Permits

The federal and provincial (and, to a lesser degree, territorial and local) 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. In recent years, the use and amounts of administrative penalties have increased. 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.

12.2 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 or operate on 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 environmental consultant conduct appropriate studies to determine whether (and to what extent) any real estate holdings contain contamination.

There are evolving provincial regulations for the relocation and reuse of soil, even where a site is not contaminated. For example, in British Columbia, subject to some exceptions, a person cannot remove soil from a site that has been used for a specified industrial or commercial use unless the person has analyzed the quality of the soil and completed a Soil Relocation Notification Form. Ontario has enacted regulations to govern the excavation and movement of excess soils between properties. When considering whether to operate on a site in Canada, particularly in British Columbia and Ontario, investors should ensure that they are prepared to meet ongoing soil management requirements.

12.3 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 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 Indigenous communities is also a key factor taken into consideration. The Crown may owe one or more Indigenous communities the duty to consult. The Crown may delegate procedural aspects of consultation to the project's proponent, but ultimately the duty to consult rests with the Crown. Proponents are strongly encouraged, and increasingly required, to engage Indigenous communities who may be impacted by a proposed project. Proponents in Canada often enter into joint ventures or partnerships with Indigenous entities to co-develop projects. Further, support of Indigenous communities 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 federal and provincial levels of government. Reviews may also include processes for Indigenous governments to evaluate the impacts of a proposed project or activity, with an increasing emphasis on seeking consent

from affected Indigenous communities. **In addition, recent legislative developments at the federal level and in Ontario and British Columbia have introduced measures to streamline permitting processes for certain projects, with the aim of improving timelines and efficiency while maintaining environmental standards**.

12.4 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 Indigenous 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. Further, the federal *Migratory Birds Convention Act* provides for the protection of migratory birds, including a prohibition on the deposit of substances harmful to migratory birds in any waters or areas frequented by migratory birds, unless authorized by regulation.

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.

12.5 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 must be 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.

The *Canadian Environmental Protection Act*, 1999 (CEPA) and the Cross-border Movement of Hazardous Waste and Hazardous Recyclable Material Regulations set out requirements for movement of waste internationally and within Canada. 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.

12.6 Management oftoxic substances

The federal government enjoys primary jurisdiction over the identification and regulation of chemical substances in Canada, including those identified as “toxic substances.” The principal legislation governing the regulation of toxic substances is CEPA, which is administered and enforced by Environment and Climate Change Canada. CEPA contains various inventories of substances, including a Domestic Substances List (an inventory of substances manufactured in, or imported into, Canada, for the purposes of commercial sale) and a List of Toxic Substances (for which stricter restrictions and controls apply).

Pursuant to the New Substances Notification Regulations (Chemicals and Polymers), new substances must be reported and assessed for potential risks to human health and the environment, and if necessary, made subject to proper control measures, before they may enter the Canadian marketplace. Similar reporting requirements apply where a person is proposing to use, import or manufacture a substance for a significant new activity (i.e., different quantity, concentration, or circumstances which could affect environmental or human exposure to the substance).

In 2006, the federal government created a Chemicals Management Plan to identify, assess and manage the risks posed by chemical substances. A key element of the Chemicals Management Plan is gathering information on the chemical substances used in Canada for the purposes of identifying substances that may be toxic, or the need for regulation. Environment

and Climate Change Canada frequently issues mandatory information gathering notices pursuant to its authority under CEPA, which require certain producers, importers or users of chemicals (or products containing chemicals) to provide the requested information. These information gathering notices are often broad in scope, covering thousands of chemicals, and therefore can represent a significant administrative burden on businesses.

In recent years, the federal government has shown a renewed and heightened focus on the Chemicals Management Plan. In June 2023, CEPA was substantively amended for the first time in approximately two decades. The amendments place an increased priority on the prohibition of high-risk toxic substances, requiring the federal government to establish both a "plan of chemical management priorities" and a "watch list" for substances that are not presently considered toxic, but which may pose a risk if uses change or exposure increases. The federal government has recently announced new regulations relating to toxic substances, including additional labelling and warning requirements for products containing substances on the List of Toxic Substances, as well as the proposed designation of additional substances as toxic (most notably, the entire class of per- and polyfluoroalkyl substances also known as "PFAS" or the "Forever Chemicals").

12.7 Circular economy

Waste management falls primarily within the jurisdiction of the provinces and territories, with each having its own waste permitting regime and related controls. Generally speaking, these regimes require operators to obtain appropriate permits or approvals before undertaking commercial activities relating to the discharge, transport or disposal of waste. The federal government also exercises jurisdiction with respect to interprovincial and imported waste and recyclable material.

The past several years have seen an increased focus on waste diversion through reusing, repairing, refurbishing, remanufacturing, repurposing or recycling products, to support what is often referred to as a "circular economy." Several provinces have enacted legislation introducing extended producer responsibility, under which producers of certain materials are deemed solely responsible for producers the cost of, and operational responsibility for, recycling their products. Certain provinces and local governments have also introduced, or are contemplating, single-use plastic bans.

At the federal level, "plastic manufactured items" were added to the List of Toxic Substances under CEPA in 2021, while regulations prohibiting the manufacture, import, sale and export of six types of single-use plastics were enacted in 2022 (although these measures are currently subject to judicial review). The federal government is also proposing to implement a federal plastics registry to better track and understand plastic waste, value recovery and pollution across Canada, as well as minimum recycled content and recyclability labelling rules in the near future. Businesses operating in Canada can expect to see all levels of government adopting further measures to further the circular economy in the coming years.

12.8 Climate change

Federal and provincial governments each regulate greenhouse gas (GHG) and other specific types of air emissions. Particularly since Canada signed the Paris Agreement on April 22, 2016, regulations of air emissions have increased at both the provincial and federal level.

The federal government also specific types of emissions through the CEPA, as part of a national target to reduce GHG emissions by 30% from 2005 levels by 2030. Regulations under the CEPA include requirements for reductions in GHG emissions from passenger vehicles and heavy-duty vehicles. The Clean Fuel Regulations require suppliers of liquid fossil fuels to reduce the carbon intensity of the fuels that they produce.

The federal government has also enacted the *Greenhouse Gas Pollution Pricing Act*, which provides a framework for federal GHG emissions pricing and offset credit systems. The Act is divided into two parts. Part 1 of the Act **formerly** applied a fuel charge on specific types of fuel and combustible waste. **Recent amendments have removed the consumer fuel charge component from the Act**. Part 2 sets out an **output-based pricing system for large industrial facilities emitters of GHG. The output-based pricing system continues to** entail extensive reporting and filing requirements on certain businesses.

To maintain a minimum national standard for GHG pricing, the output-based pricing system in the Greenhouse Gas Pollution Pricing Act will apply to provinces and territories that do not meet the federal benchmark for GHG pricing. Provinces and territories have flexibility in how they meet the minimum national standard for GHG pricing. Measures at the provincial and

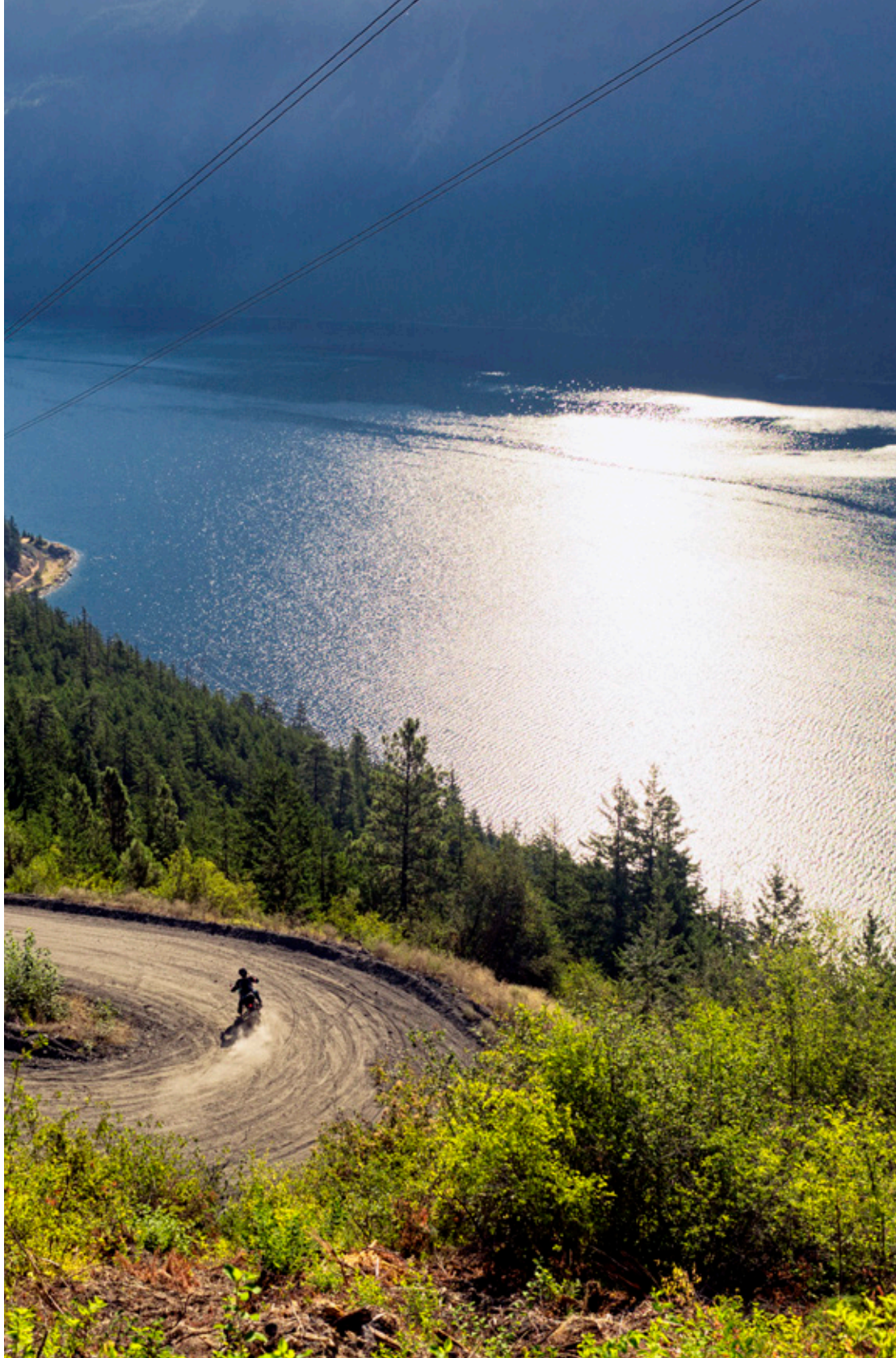
territorial level may include carbon taxes, cap-and-trade systems, limits on emissions, clean energy standards and other regulatory measures. In light of this, investors will need to carefully review the regulatory requirements that may apply to emissions from their facilities or products in Canada.

12.9 Water

The constitutional division of responsibility for water is complex, being shared between the federal and provincial governments, with the involvement of Indigenous governments.

The federal government has jurisdiction over some matters that bear on water management, including fisheries, navigation, international relations, federal lands and Indigenous people. The *Canada Water Act* provides a framework for joint federal-provincial management of Canada's water resources. **The 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).

Provinces manage water resources through 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. In some jurisdictions, certain provincial regulatory powers over water are delegated 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.



13

Consumer protection in Canada: Compliance for global businesses

In addition to addressing competition issues, such as price-fixing, bid-rigging and other anti-competitive practices, the federal *Competition Act* addresses a variety of consumer issues, including misleading advertising, 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.

13.1 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.

13.2 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*, 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. Administration and enforcement of the *Consumer Packaging and Labelling Act*, as it relates to non-food products, is the responsibility of the Competition Bureau, and as it relates to food products, the Canadian Food Inspection Agency (CFIA). 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 them, including 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 Labeling Act* requires labels to be affixed consumer textile articles, including to garments and certain stuffed and filled textile articles;
- 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* includes strict product safety and quality requirements, labelling regulations, and restrictions on the advertisement and promotion of cannabis, which are 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.

13.3 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 and consumer protection 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 negligence 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.

14

Franchising in Canada: Best practices for global brands

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, is a "distributorship" relationship, which limits the 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 most provinces.

14.1 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.

14.2 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.

14.3 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 is 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, 2019. 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 17 (Canadian language laws).

15

E-commerce in Canada: How international businesses can sell online

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.

15.1 E-Commerce legislation in Canada

The federal government and most provinces (except Québec) have modelled their e-commerce legislation after the *Model Law on Electronic Commerce* developed by the United Nations Commission on international Trade Law, and the *Uniform Electronic Commerce Act* developed by the Uniform Law Conference of Canada. The legislation defines “electronic” to mean created, recorded, transmitted or stored in digital or other intangible form

by electronic, magnetic or optical means or by any similar means. While the legislation covers a broad range of electronic contracts and documents, it does not apply to certain other documents, such as wills, powers of attorney and documents creating or transferring interests in land. Québec has taken a different approach in its legislation, although it is broadly similar to the legislation adopted in other provinces.

15.2 The validity of electronic documents

Existing e-commerce legislation generally provides 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.

15.3 Contract formation and contract enforceability

E-commerce legislation confirms that a valid contract can 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.

15.4 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.

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Canadian privacy laws and data protection: PIPEDA and beyond

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 substantial amendments to privacy legislation in Québec, some of which are already in force. Substantial reform to PIPEDA is currently being considered by Canadian parliament and is expected to be adopted within the next year. The Bill introducing this reform also proposes what would be Canada's first piece of legislation governing the development, use, and deployment of artificial intelligence. Finally, organizations transferring personal information outside Canada should keep in mind specific transparency requirements in this regard under Canadian law.

16.1 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.

The provinces of Québec (*Act respecting the protection of personal information in the private sector*, ARPPIPS), Alberta (*Personal Information Protection Act*, Alberta PIPA) and British Columbia (*Personal Information Protection Act*, BC PIPA) have all 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". In Québec, recent amendments to ARPPIPS exclude "personal information concerning the performance of duties within an organization by the person concerned" from the scope of its notice and consent requirements.

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 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). Québec is the most recent province to have enacted legislation in respect of personal health information; Bill 3 "*An Act respecting health and social services information and amending various legislative provisions*" was adopted in April 2023 and will come into force upon governmental decree.

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). The notion of sensitive information has been the subject of an interpretation bulletin by the OPC.
- 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. In Québec, the amended ARPPIPS contains similar explicit transparency requirements, and further restricts transfers of personal information outside the province by requiring that the destination jurisdiction provide "adequate protection," ascertained by a privacy impact assessment. The assessment must consider factors such as the sensitivity of the information, the purposes of its use, relevant safeguards, and legal regimes applicable in the destination jurisdiction. 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.

PIPEDA, the Alberta PIPA, and Québec's ARPPIPS all impose specific breach notification obligations on organizations when there is a risk of serious or significant harm/injury. PIPEDA and Québec's ARPPIPS also require that a detailed and up-to-date register of breaches be maintained internally within an organisation. In British Columbia the privacy regulator recommends that organizations report breaches to the regulator and notify affected individuals.

16.2 Other privacy obligations

In addition to PIPEDA and provincial legislation dealing specifically with the collection, use and disclosure of personal information in the private sector, businesses may have additional statutory privacy obligations. For example, several provinces have enacted legislation 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 and the *Québec Act* to establish a legal framework for information technology provide additional privacy obligations, including a statutory tort for privacy violations. In Ontario, the privacy tort of intrusion upon seclusion was recognized in 2012.

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.

16.3 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.

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Canadian language laws: Understanding bilingual regulations

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) has historically not imposed language obligations on businesses operating in Canada. However, in 2023, the federal legislature adopted a new law to impose new obligations on federally regulated private businesses concerning the use of French, both as a language of service and as a language of work. These new obligations will apply to their activities in Québec and in regions with a strong francophone presence. This new law, titled the *Use of French in Federally Regulated Private Businesses Act*, will come into effect on a future date to be determined by the federal government.

Language requirements applicable to businesses are also found in other specific 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 operating in Québec are subject to language requirements pursuant to the Charter of the French Language (the Charter). In 2022, the Charter was significantly amended to enlarge its scope of application, add new remedies, and create new requirements applicable to all persons and organizations doing business in Québec.

Among the changes made to the Charter in 2022 are the strengthening of civil remedies and penalties, the expansion of certain rules concerning the use of French, and the specification of stricter language requirements for contracts with the Quebec civil administration. These adjustments include the broadening of language rules, and now request for most contracts with the Québec civil administration (i.e., the Quebec government, departments, agencies, and municipalities) to be drafted exclusively in French, with all related documents provided in French only.

The Charter proclaims French as the official language of Québec. It mandates that every inscription on a product sold in the Québec market, including, with some exceptions, imported goods, must be drafted in French. This requirement extends to inscriptions on the product's container or wrapping, as well as on documents supplied with the product, such as directions for use and warranty certificates. It also applies to product catalogues and other similar publications, with only a limited number of exceptions. Another language can generally be used in addition to French, but it must then not be given greater prominence than French. Moreover, the French version of all commercial publications must be available on terms that are at least as favourable as those of their English counterpart.

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 made available on terms that more favourable than those of 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, contracts of adhesion (standard form contracts and contracts for which the essential stipulations are non-negotiable), contracts predetermined by one party and related documents must now be remitted in French first to the other party before they can validly request and accept to be bound by a contract exclusively drawn up in another language, such as English. Such contracts and their related documents can nevertheless be drawn up bilingually as long as the use of French is as prominent as the use of any other 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. On June 1, 2025, amendments to the Charter that restrict the use of non-French trademarks on public signage have come into force. Under these amendments, non-French recognized trademarks may still be listed on products, public signage and commercial advertising provided no French version is registered under the *Trademarks Act* (Canada). If a French version of a trademark is registered, then that version must be used. In addition, descriptive or generic terms describing the products if included in a trademark will now have to be translated to French, to the exception of the name of the business and the name of the product.

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, individual work contracts and any document related to work conditions 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. In this regard, employers must demonstrate that the linguistic needs associated with the duties of the position were evaluated before they required knowledge of a language other than French. They must also take all reasonable means to avoid imposing such a requirement, including by ensuring that the language knowledge already required from other staff members is insufficient for the performance of the duties of the position.

As of June 1, 2025, any enterprise in Québec that employs 25 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. This threshold was previously set at 50 or more. If, after analyzing the enterprise's linguistic situation, the Office considers that the use of French is generalized at all levels of the business, it issues a "francization" certificate to the enterprise. Otherwise, if this is not the case, the enterprise must then adopt and implement a francization program, the aim of which is ultimately to generalize the use of French throughout the enterprise within Québec. 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 Office also has the power to require enterprises that employ less than 100 employees to form such a committee.

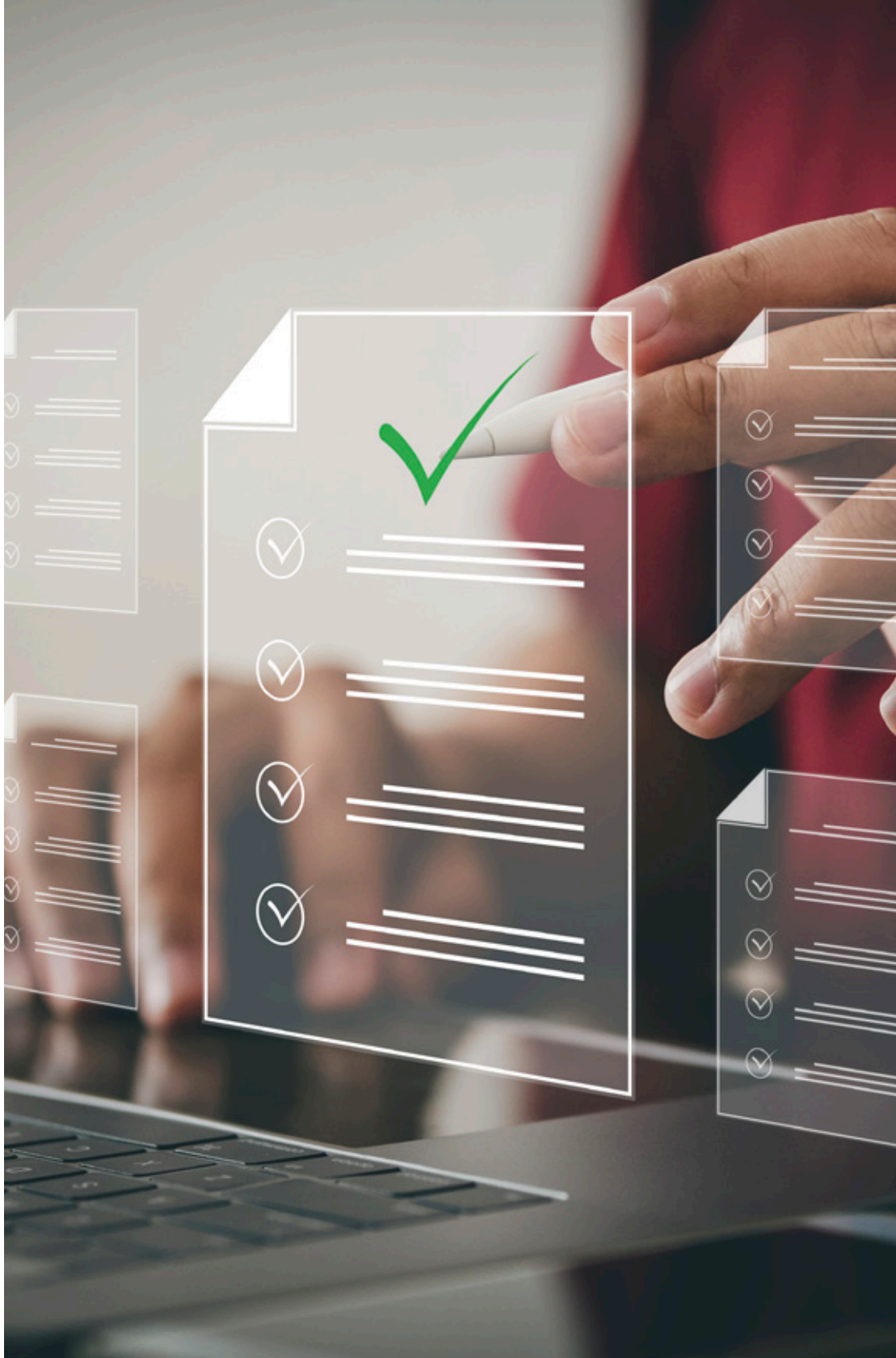
The Office enforcement powers have been increased in 2022, as it can now issue orders to comply with the Charter. Non-compliance with an order is an offence and fines have been substantially increased. A first offence now ranges from C$6,700 to C$7,000 for individuals and from C$3,000 to C$30,000 for corporations (per day of non-compliance with the order). The fines may be doubled for a second offence and tripled for a subsequent offence. If an offence continues for more than one day, it constitutes a separate offence for each day it continues. Directors and officers are subject to the same fines unless they can demonstrate that they took all necessary precautions to prevent the offence.

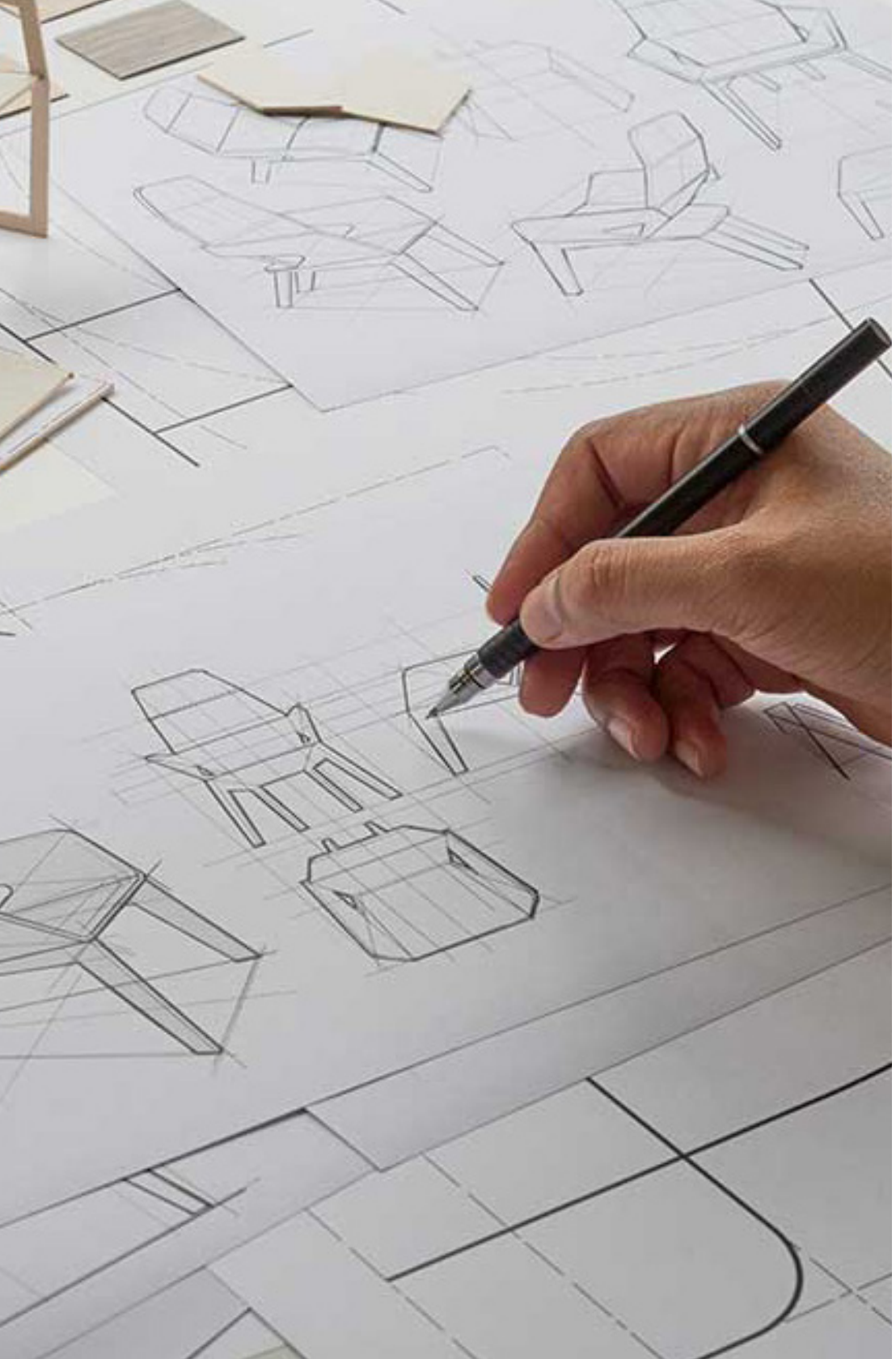
A court may also impose a further fine on the offender equal to the financial gain realized or derived from the offence, even if the maximum fine set out above has also been imposed.

The Charter also provides that if an enterprise repeatedly contravenes the provisions of the Charter, the Minister of the French Language may, on the advice of the Office, suspend or revoke a permit or another authorization issued by a Québec authority.

Companies can be subject to civil litigation, by customers and businesses, if they do not comply with certain language rules. For example, civil remedies include the possibility of having certain contracts nullified, when the rules requiring the use of French have not been adhered to.

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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Intellectual property law in Canada: Protect your innovations here

Canada is a country committed to being a global innovation leader and intellectual property features prominenty in Canadian legislation. 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.

The European Patent Office and the European Union Intellectual Property Office recently (January 2025) published a study demonstrating that companies that own intellectual property rights (IPRs) outperform companies without these rights. This was true for both large companies and small and medium enterprises (SMEs). The study also found that wages and revenue per employee are higher in companies that own IPRs as compared to those that do not. This difference was shown both overall, and individually for patent, trademark, and design rights. A 2022 study by the same groups estimates that over 47 per cent of the EU's total economic activity is generated by IPR-intensive industries and that 39% of all EU employment is directly or indirectly from IPR-intensive industries. In 2022, the U.S. Commerce Department released a report, titled "Intellectual Property and the U.S. Economy: Third edition." It found that in the U.S., IPR-intensive industries support at least 63 million jobs (33% of total employment) and contribute more than 41% of the GDP.

18.1 Patents

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

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

In exchange for this exclusivity, the inventor must disclose sufficient information about the invention to allow others to make use of the invention after the patent expires. The term of a Canadian patent is 20 years from the filing date of an application. Canada has two forms of patent term restoration; one for delays in the patent office issuing a patent, and one for delays in Health Canada approving a product. These terms run concurrently in cases where both are applicable to patents relating to pharmaceuticals.

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 meet these requirements of novelty, utility, and inventiveness. The invention also must be patentable subject matter, discussed further below.

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, while maintaining the same international filing date.

Canada does not require absolute novelty. 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). Similarly, this one-year grace period for disclosures by the applicant or someone who obtained knowledge form the applicant applies to the obviousness analysis. If a public disclosure is made by someone other than the applicant, the grace period applies to the time from the priority date of the patent application tois calculated back one year from the eventual filing date of the application. In the case of an international patent application that later enters Canada, the filing date is considered to be the international filing date.

Subject matter that is patentable in Canada is generally similar to what is patentable in most other patent systems. A mere algorithm is not patentable. However, business method and diagnostic methods can be patentable with suitable attention to drafting a description and claims that comply with Canadian requirements. There are also restrictions in Canada on patenting higher life forms. However, such inventions can usually be protected with claims to other aspects of the invention. As of the writing of this guide, methods of medical treatment are also considered to be non-patentable subject matter. However, that issue is currently before the Supreme Court of Canada, with a decision expected in 2026. The courts have upheld patent claims to uses, including medical uses, claims to which can often afford protection for inventions involving therapeutics.

18.2 Pharmaceutical patents – Unique considerations

Canada has a system linking generic and biosimilar drug approval to clearance of patent hurdles, similar to that found in the U.S. Certain types of patents and Certificates of Supplementary Protection (CSPs) 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 and/or are invalid, or await their expiry. If the innovator chooses to challenge the non-infringement and/or invalidity allegation in court, the generic/biosimilar company cannot enter the market until the challenge is lost. If the challenge is won, the generic/biosimilar company cannot enter the market until the expiry of the patent. Listing of patents on the Patent Register is voluntary. However, listing is the method to take advantage of these linkage regulations, which are typically the only way an innovative pharmaceutical company can obtain what amounts to an interlocutory injunction to preserve its market while the patent litigation is pending.

As mentioned above, certain types of pharmaceutical patents can be eligible for patent term restoration (a Certificate of Supplementary Protection) if the relevant conditions are met. Importantly, the New Drug Submission must be filed in Canada within a year of the first similar regulatory filing in any of the U.S., the U.K., the EU or its member countries, Switzerland, Australia, or Japan. Up to two years of additional term can be granted.

In addition, pharmaceutical companies in Canada are required to report patents and CSPs pertaining to a medicine to the Patented Medicines Prices Review Board (PMPRB). These patents and CSPs need only relate to the medicine by the "merest slender thread" to require reporting. Any drug that has patents or CSPs pertaining to it is subject to the jurisdiction of the PMPRB, which will set the maximum price the drug can be sold at in Canada at all times during the pendency of any patent or CSP. However, the PMPRB is not the only regulatory body in Canada that governs the price at which a medicine can be sold. Thus, it is prudent to talk to a lawyer.

18.3 Regulatory data protection

Canada has regulatory data protection for both biologic and small molecule innovative drugs. This data protection applies regardless of whether there are patents pertaining to the drug in question.

A total of 8 years typically applies, broken into two parts. No generic or biosimilar filer is permitted to file their drug submission in Canada for the first 6-years of that time period. Such filings can be made in the remaining two years, but regulatory approval cannot be granted until the full 8-years have passed.

An additional 6-months is available if pediatric studies are done and submitted before the 5-year mark after the first regulatory approval.

18.4 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 has undergone significant changes to harmonize its trademark law and process with international treaties. As a result, Canada is now a member of the Madrid Protocol and uses the Nice classification system for the classification of goods and services.

In addition, based on amendments to its national *Trademarks Act*, applicants for trademark applications in Canada are no longer required to declare use at the time of filing or at any time prior to registration, nor are there any use requirements to maintain a registration. This has significantly streamlined the trademark registration process – even though Canada, like the United States, requires further specification of goods and services covered by trademark applications.

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

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

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

The entire registration process takes approximately 18 to 24 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. Trademark owners doing business in the province of Québec should also ensure that packaging and labelling for products and advertising for goods and services are compliant with the additional requirements of the *Charter of the French language* and its related regulations (which seek to ensure that French is adequately represented).

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, are not examined on relative or absolute grounds and do not require periodic renewal.

18.5 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 70 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. However, 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 and no review process before obtaining a registration.

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. Only the author can enforce its moral rights; the rights cannot be assigned.

Copyright infringement occurs when a person does anything that only the copyright owner has the right to do (unless the owner consents). Infringement of moral rights is also actionable. Remedies are available if there is copyright and/or moral rights 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. Recent amendments relating to diagnosis, maintenance or repair, and interoperability were made to the *Copyright Act*.

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.

18.6 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.

The term of protection begins on the date of registration and ends on the later of 10 years after registration or 15 years from the Canadian filing date, offering protection for up to 15 years, provided the 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.

18.7 Trade secrets

A trade secret is business information that has been kept confidential and has value. Examples can 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 also 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 likelihood that it cannot be reverse engineered, the chances that a competitor will independently develop the trade secret, and the likelihood of obtaining a patent.

18.8 Other forms of intellectual property

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

18.9 Commercialization and licensing

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. Additionally, licences for trademarks must comply with the control requirement described in Section 18.3 of the Trademarks Act.

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 nonexclusive 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.

18.10 Intellectual property enforcement

In Canada, IP litigation is mainly conducted in the Federal Court, as it has the power to issue a country-wide injunction, and it is the only court that can invalidate patents, trademarks, and industrial designs *in rem*. Federal Court judges generally have more experience with IP issues than provincial court judges. However, Federal Court judges have varied backgrounds, not all of which are technical.

The Federal Court is a court of statutory jurisdiction. This means that if the litigation has a large component founded in breach of contract or tort, a provincial court may be better suited to litigate the claim.

There is a special procedure for certain types of pharmaceutical patents listed on the Patent Register, as described above. These cases must be brought in the Federal Court.

Interlocutory injunctions are difficult to obtain in many IP infringement cases, in particular in patent infringement cases. One of the elements that must be proven is 'irreparable harm not compensable by way of damages' and the jurisprudence has set this bar extremely high. In a few recent trademark

cases, the Court has recognized irreparable harm and granted the requested interlocutory injunction.

Litigation proceeds with the typical steps: pleadings, discovery, preparation of expert reports (if necessary) and trial. Complex cases can be assigned case-management, which helps to move the parties toward trial in a timely manner. Expert witnesses are not examined by the opposing party prior to trial. Discovery is limited to issues relevant to the pleadings. This is generally described as documents that will help or hurt either party's case and documents that a party plans to rely on at trial. A single representative of a party is discovered. In addition, any inventor or other assignor can be discovered. If a party wishes to discover anyone else, a motion is required.

Canada does not have Markman hearings. Summary judgment motions are difficult to bring due to the test that must be met in order to be granted. However, Canada does have a summary trial practice that have been used effectively to streamline trials or decide issues that may be dispositive of the need for a trial.

Canada is mainly a common law jurisdiction. (If litigating in Québec provincial court, it is a civil law jurisdiction.) Trials are typically two weeks or less and are tried in front of a judge alone. Either party can appeal the judgment as of right. It is important to note that a portion of attorney's fees are typically awarded to the successful party.

Permanent injunctions are often awarded in Federal Court when the IP is valid at the end of trial. Such orders are typically accompanied by orders for delivery up or destruction of infringing merchandise. Parties can also obtain orders for damages or an accounting of the infringer's profits.

Pre-judgment and post judgment interest is often awarded. Furthermore, parties can claim punitive damages for egregious conduct. The Federal Court is a court of equity and will consider equitable remedies under equitable principles.

18.11 Intellectual property strategy

While individual intellectual property assets can have value, this value can be increased by using a comprehensive and integrated strategic approach. Such an approach should encompass securing innovations, a company's branding, and its creations, in order to properly leverage intellectual property that has been protected and take enforcement steps against infringers. In the case of pharmaceutical and biotechnology companies, this strategy should also encompass consideration of the specific regulatory provisions that can have an effect on IP rights in Canada. This will help to maximize and maintain the value of the intellectual property concerned.

19

Indigenous Peoples and Business in Canada

Understanding the legal and historical context of Indigenous peoples in Canada is essential for businesses operating in the country. Indigenous rights, governance and economic participation play a significant role in industries such as natural resources, infrastructure and major development projects. Building respectful and mutually beneficial relationships with Indigenous communities not only aligns with reconciliation efforts, but also helps mitigate legal risks, project delays and disputes.

19.1 Indigenous Peoples and Governance

Canada recognizes three distinct Indigenous groups: First Nations, Inuit and Métis, each with unique culture, history, legal rights and governance structures.

Most Inuit are now represented by the territorial government of Nunavut and a variety of regional and corporate entities that implement a comprehensive agreement with the federal government dating back to the 1990s. Many Métis are increasingly organizing themselves into provincially-based organizations that are seeking self-government recognition from the federal government, but there are also dozens of smaller Métis communities – particularly in Alberta – with distinct self-government powers. Most First Nations are governed through a Chief and Council established under the *Indian Act*, but there are also many examples of traditional governance structures running in parallel and – especially in the north and British Columbia – there are an increasing number of First Nations moving out of the *Indian Act* through modern treaties and self-government agreements.

19.2 Indigenous and Treaty Rights

Indigenous rights in Canada are constitutionally protected under Section 35 of the *Constitution Act*, 1982. These rights include:

- **Aboriginal rights** recognized by the common law, which include rights to traditional customs, practices and traditions integral to Indigenous cultures

prior to European contact, such as hunting, fishing and land stewardship as well as Aboriginal title, which is the right to exclusive use and occupation of traditional lands, requiring Indigenous consent for significant developments.

- **Treaty rights** defined either through historic treaties that the Crown negotiated between the 17th and early 20th centuries across much of eastern Canada, Ontario and the prairies or modern treaty making that resumed in the late 20th century. Historic treaties typically provided for protection of lands, hunting and fishing rights, as well as other benefits, while modern treaties typically also allow for self-governance and financial compensation to address historic losses.

19.3 Duty to Consult and Accommodate

The duty to consult and accommodate arises when governments make decisions that may adversely affect Indigenous or treaty rights. This duty applies to minor and major projects, including resource development, infrastructure and corporate transactions. While the legal duty rests with the Crown (government), businesses often play a critical role in consultation processes.

Consultation obligations vary based on the potential impact of a project on Indigenous rights. Deep consultation, including accommodation measures such as revenue sharing, environmental protections and Indigenous equity participation, may be required in cases of significant impact. Failure to meet consultation obligations can lead to legal challenges, regulatory delays or project cancellations.

19.4 Indigenous Participation in Business

Indigenous participation in the economy is growing, with many communities actively involved in joint ventures, equity partnerships and procurement agreements. Businesses engaging with Indigenous groups should consider:

- **Impact and Benefit Agreements (IBAs):** Legally binding agreements that outline economic, employment and environmental benefits for Indigenous communities affected by a project.
- **Indigenous equity ownership:** Increasingly common in energy, mining and infrastructure projects, providing Indigenous communities with long-term economic benefits.
- **Procurement and supply chain partnerships:** Many companies and governments prioritize Indigenous businesses in procurement policies, supporting economic reconciliation.

- **Real Estate Development:** Increasingly, we are seeing dramatic growth in the pace and scale of on-reserve real estate development, supported by a variety of government initiatives and increased interest and comfort by private sector developers, lenders, and tenants to building, working, and living on reserve lands.

19.5 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

Canada has endorsed UNDRIP as a framework for reconciliation. UNDRIP endorses Indigenous peoples' rights to self-determination and directs governments to seek free, prior and informed consent (FPIC) from Indigenous groups in many contexts. British Columbia and the federal government have enacted legislation to align Canadian laws with UNDRIP and adopt action plans, influencing regulatory and business practices.

While the approach to FPIC is still under development and debate, at its core, it signals a commitment by some governments in Canada to meaningful consultation with the goal of securing support for major decisions.

19.6 Key Considerations for Businesses

Businesses operating in Canada should integrate Indigenous engagement strategies into their corporate planning and risk management frameworks. Best practices include:

- **Early engagement:** Proactively engaging Indigenous communities at the outset of a project to build trust and avoid disputes.
- **Legal due diligence:** Assessing Indigenous rights, land claims and consultation requirements during M&A transactions.
- **Sustainable partnerships:** Developing long-term, mutually beneficial relationships with Indigenous communities through employment, training and joint ventures.

20

Mergers & Acquisitions in Canada

Canada is an attractive and stable destination for foreign investment, offering a strong rule of law, a highly skilled, well-educated workforce, and a business-friendly regulatory environment. As one of the world's top mergers and acquisitions (M&A) markets, Canada provides foreign investors with significant opportunities to expand their businesses through acquisitions. A well-structured approach ensures compliance and strategic alignment with business objectives.

20.1 Acquisition Structures

Public company acquisitions in Canada typically proceed by one of two methods: a plan of arrangement or a takeover bid.

A plan of arrangement is a court-supervised process under Canadian corporate law that provides flexibility for transaction structure and is generally the preferred method for negotiated transactions. Importantly, an arrangement allows the purchaser to acquire all of the target's securities in a one-step transaction. However, as an arrangement typically requires approval by at least 66 ⅔per cent of target shareholders, a special meeting of the target shareholders is required which will impact how quickly the transaction can close. The most expedited timeline for a shareholder meeting is typically around 30 days once the proxy circular is mailed, and a plan of arrangement can generally take around 90 days from signing to closing, assuming no out of the ordinary regulatory approvals are required. In addition, because an arrangement is a negotiated transaction, involvement of and approval by the target's board of directors is required in addition to shareholder and court approval.

A takeover bid is a direct offer to shareholders to acquire outstanding securities of the target where such securities, together with the purchaser's securities of the target, constitute 20 per cent or more of the outstanding securities of the target issuer. Unlike a plan of arrangement, a takeover bid does not require the support of the target's board of directors. Takeover bids are subject to strict securities law requirements, including requirements to treat all target shareholders equally,

that the bid remain open for at least 105 days unless the target board agrees to a shorter period (minimum 35 days) and that at least 50 per cent of the target securities not owned by the purchaser are deposited to the bid. Financing must be secured in advance as bids cannot be conditional on financing. A takeover bid may be friendly or hostile—but given the strict regulatory requirements, the fact that a second-step transaction is required to obtain all of the target's securities and the comparative flexibility of a plan of arrangement, takeover bids are more typically used in only hostile transactions.

Like in many other jurisdictions, private M&A transactions in Canada are generally structured as either share purchases or asset purchases, depending on the intended outcome of the transaction and tax considerations, among other things.

A share purchase is where the acquirer assumes ownership of the target company, including its assets and liabilities. This structure often requires fewer third-party consents than an asset purchase, and the target business will generally operate as it did prior to the transaction, subject to any post-closing integration plans.

An asset purchase is where the acquirer purchases specific assets and/or liabilities from the target, but not the target company's shares. While an asset purchase allows for greater control over the acquired business, this structure may require multiple third-party consents, approvals, assignments, or some combination, which can impact the timing of the transaction.

20.2 Regulatory Considerations

M&A transactions in Canada are subject to a number of regulatory requirements.

Where a publicly listed company is the target of the M&A transaction and securities are used as consideration, the target's shareholders are entitled to robust disclosure, including prospectus-level disclosure about the purchaser and *pro forma* financial statements about the resulting business. In addition, Canadian securities laws aim to protect minority shareholders in M&A transactions and may require "majority of the minority" shareholder approval and formal valuations.

M&A transactions in Canada may require approval under the *Competition Act* if they exceed certain financial thresholds, with the Competition Bureau assessing the potential for anti-competitive effects. Additionally, the *Investment Canada Act* (ICA) mandates that foreign investments be reviewed to ensure they provide a net benefit to Canada, particularly in strategic industries such as natural resources, technology and infrastructure. These regulations reinforce Canada's commitment to maintaining a competitive and fair market while attracting global investment.

Acquisitions of businesses in certain industries will also be subject to heightened regulatory scrutiny. For example, bank and insurance company acquisitions require approval from the Office of the Superintendent of Financial Institutions (OSFI). Businesses in other industries, such as broadcasting, telecommunications or transportation may also be subject to change of control approval, Canadian ownership requirements, or both.

Canada's labour and employment laws are critical to M&A transactions, particularly in industries with unionized workforces. In share purchases, employment obligations transfer automatically, whereas asset deals require renegotiation of employment terms. Employers must comply with Canadian laws regarding termination rights, severance and reasonable notice. Understanding how employment laws impact post-transaction workforce integration is crucial for business continuity and employee retention.

20.3 Key Transaction Terms

Negotiated M&A agreements will typically include representations and warranties of the target company, covenants with respect to the parties' conduct between signing and closing, and various conditions of closing.

In the public M&A context, the target's board of directors will often be provided with a right to terminate the agreement and accept an unsolicited superior proposal from a third party, known as a "fiduciary out." The purchaser will be provided with corollary protections such as a matching right, break fees and non-solicitation covenants from the target. Importantly, in a public M&A agreement, the representations and warranties will not typically survive closing as it is not possible to pursue claims against a large group of shareholders.

Comparatively, private M&A agreements will include representations and warranties that survive closing and provide for related indemnities to the purchaser. Private agreements may also include working capital adjustments to ensure the financial condition of the target aligns with expectations at closing and post-closing indemnities to protect against unforeseen liabilities. Representation and warranty insurance is increasingly used in M&A transactions to mitigate risk, allowing sellers to exit cleanly while providing buyers with recourse.

20.4 The Role of Private Equity in M&A

Private equity (PE) firms are active participants in the Canadian M&A market, undertaking strategic acquisitions, leveraged buyouts and recapitalization transactions. PE-backed transactions often involve shareholder agreements, negotiated governance structures and exit strategies, such as initial public offerings (IPOs) or secondary sales. Management equity incentives and earn-outs are frequently used to align interests between investors and management teams.

20.5 Shareholder Activism and M&A

Shareholder activism continues to play a significant role in Canadian M&A, with investors increasingly influencing corporate governance, deal structures and strategic direction. Activist shareholders may push for changes such as board representation, operational improvements, or the rejection of a proposed transaction if they believe it undervalues the company. Activists can influence the success of a transaction by challenging deal terms, advocating for competing bids or pressuring management to enhance shareholder returns. Canadian securities laws provide a framework for shareholder activism, including early warning reporting requirements for investors acquiring 10 per cent or more of a public company's shares and rules governing proxy contests and shareholder proposals. Companies facing activism must carefully navigate defensive measures, such as shareholder rights plans (poison pills), staggered boards or strategic transactions that align with long-term shareholder value.

20.6 Tax Considerations

Structuring a transaction efficiently from a tax perspective is crucial. Share sales generally favour sellers due to capital gains tax treatment, whereas asset purchases allow buyers to benefit from stepped-up asset values. The Income Tax Act imposes withholding tax obligations on payments to non-residents, impacting cross-border deal structures.

21 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*, a federal law that generally applies to investments to acquire Canadian businesses or to establish new Canadian businesses by "non-Canadians"—a term that includes any person who is not a Canadian citizen or permanent resident of Canada, as well as any entity that is not ultimately controlled by Canadians.

The *Investment Canada Act* contains two separate foreign investment review processes: (i) the review of significant investments in Canada involving acquisitions of control of a "Canadian business" by non-Canadians to ensure they are of "net benefit" to Canada ("**Net Benefit Review**"); and (ii) a national security review process that is applicable to any investments by a non-Canadian, including non-controlling investments, to determine if it would be "injurious to national security" ("**National Security Review**").

In recent years, the National Security Review process has emerged as the key foreign investment screen, and even more recent changes have enhanced Canada's ability to screen and potentially block investments that could be injurious not only to national security, which encompasses a broad range of potential harms, including but not limited to defence and economic security.

21.1 Net Benefit Review

Under the Net Benefit Review process, a non-Canadian seeking to establish a new business or acquire control of an existing Canadian business must file either:

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

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".

Subject to rarely applicable special provisions that can apply to cultural businesses, Net Benefit Review only applies to "acquisitions of control" of a Canadian business or substantially all of its assets. For share/interest acquisitions, the acquisition of more than one-third of the voting interests in an entity is presumed to be an acquisition of control, but this presumption can be rebutted if it can be shown that control was not acquired in fact. The acquisition of more than half of the voting interests in an entity is irrebuttably deemed to be an acquisition of control.

A Notification can be filed at any time up to 30 days after closing of an investment (or establishment of a new business). However, where an Application for Review is required, it must be filed prior to closing and a waiting period applies to prevent closing until the Minister of Innovation, Science and Economic Development (or, in the case of cultural businesses, the Minister of Canadian Heritage) (collectively, the "**Minister**") determines that the proposed investment will be of "net benefit" to Canada.[8] The initial waiting period is 45 days from the filing of a complete Application for Review, but the Minister may unilaterally extend this by a further 30 days, and can also seek further extensions on the consent of investors, and investors practically have little choice but to consent. The review period is also extended automatically if the investment is subjected to the National Security Review Process. 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.

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.

21.2 Applicable Thresholds an Application for Review

Acquiring control of an existing Canadian business by a non-Canadian requires an Application for Review if the value of the Canadian business being acquired exceeds one of the following applicable thresholds:

- C$2.079 billion[1] in "enterprise value"[2] if the investor is a "**trade agreement investor**"[3] and not a state-owned enterprise ("**SOE**"), or the investor is a not a trade agreement investor and not an SOE but the Canadian business being acquired is controlled by a trade agreement investor;
- C$1.386 billion[4] in "enterprise value" if the investor is not a trade agreement investor or SOE but is a "**WTO investor**"[5], or if the investor is a non-WTO investor and not an SOE 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 SOE's, are not reviewable under the Net Benefit Review provisions, but are subject to Notification. This exception does not apply to non-WTO investors or to acquisitions of cultural businesses);
- C$551 million[6] in assets if the investor is a WTO investor *and* an SOE or if the investor is a non-WTO investor and an SOE, but the Canadian business being acquired is controlled by a WTO investor;

1 This threshold has been adjusted annually since January 1, 2019, 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)The Canada-United Kingdom Trade Continuity Agreement; (2) Comprehensive and Progressive Agreement for Trans-Pacific Partnership; (3) Canada-European Union Comprehensive Economic and Trade Agreement Implementation Act; (4) Canada-United States-Mexico Agreement; (5)Canada-Chile Free Trade Agreement Implementation Act; (6) Canada-Peru Free Trade Agreement Implementation Act; (7) Canada-Colombia Free Trade Agreement Implementation Act (8) Canada-Panama Economic Growth and Prosperity Act; (9) Canada-Honduras Economic Growth and Prosperity Act; (10) Canada-Korea Economic Growth and Prosperity Act

4 This threshold has been adjusted annually since January 1, 2021, 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.

- C$5 million in asset value for direct acquisitions and C$50 million in asset value for indirect acquisitions[7] 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.[8]

Additionally, amendments to the *Investment Canada Act* which have been passed but will not take effect until a date to be determined by the government (currently not expected to be implemented until 2026) will impose new preclosing filing requirements for foreign investments of any size in "prescribed" sensitive sectors—e.g., critical minerals (such as lithium for batteries), advanced technology (such as AI or semiconductors), or cultural assets (such as media)—if the investment grants access to material non-public information (e.g., proprietary data) or assets, or the right to appoint directors or senior management. These will apply even if the thresholds requiring an Application for Review set out above are not exceeded.

21.4 Substantive Net Benefit Review Factors

The factors that must be considered by the Minister in a determination as to whether an investment will be of "net benefit" to Canada are the:

- Effect of the investment on the level and nature of economic activity in Canada including the effect on:
  - employment;
  - resource processing;
  - utilization of parts, components and services produced in Canada;
  - exports from Canada.
- Significance of participation by Canadians in the existing or proposed business and in any industry in Canada of which the business forms or would form a part.
- Effect of the investment in Canada on:
  - productivity;
  - industrial efficiency;
  - technological development;
  - product innovation;
  - product variety.
- Effect of the investment on competition within any industry in Canada.
- Compatibility of the investment with national or applicable provincial industrial, economic and cultural policies.
- Contribution of the investment to Canada's ability to compete in world markets.

The Minister has issued additional guidelines which apply to investments by foreign SOEs. In particular, the ICA and policy pronouncements by the Government of Canada prohibit foreign SOEs from acquiring control of Canadian oil sands businesses, and significant additional scrutiny is typically applied to SOEs under the Net Benefit Review process across industries. For example, on October 28, 2022, the GoC released the Critical Minerals Policy, which provides that given the strategic importance of critical minerals and inherent economic risks posed by foreign SOEs, Net Benefit Review "applications for acquisitions of control of a Canadian business involving Critical Minerals by a foreign SOE will only be approved on an exceptional basis."[9]

Other than major investments by SOEs, significant investment in Canada is rarely blocked following a Net Benefit Review under the ICA. In almost all instances, however, negotiated undertakings relating to the investor's operation of the Canadian business going forward are given by the investor as a condition of the Minister's approval of an investment following an Application for Review. Such undertakings are negotiated between the Minister and the investor, and their terms 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

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

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 an SOE 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.

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.

21.5 National Security Review

The National Security Review process is a separate part of the *Investment Canada Act* from the Net Benefit Review process. Any direct or indirect investment in Canada by a non-Canadian, regardless of value or whether it confers control, can be subject to a National 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 Minister or Governor in Council (effectively, the federal Cabinet). If the investment has already been undertaken, the federal Cabinet can order divesture.

21.6 The National Security Review Timelines

If the Minister has reasonable grounds to believe that a proposed or implemented investment by a non-Canadian could pose a national security risk, they may send the investor a notice that an order for a National Security Review of the investment may be made. The deadlines for such a notice to be issued depend on what, if anything, the investor is required to file under the Net Benefit Review process:

- If an investment requires a Notification or Application for Review, the National Security Review process can be initiated at any time up to 45 days after the complete Notification or Application for Review is filed.
- If an investment does not require a Notification or Application for Review (such as non-controlling investments), the deadline depends on whether a "**Voluntary Notification**", which is very similar in content to a Notification, is filed:
  - If a Voluntary Notification is filed, the National Security Review process can be initiated at any time up to 45 days after filing.
  - If a Voluntary Notification is not filed, the National Security Review process can be initiated at any time up to five years after closing.

Once the National Security Review process is invoked, the Minister has up to 135 days to conduct the review, and can also seek further extensions on the consent of investors, and investors practically have little choice but to consent. The entire National Security Review process can range from 45 days to over a year, depending on the complexity of the case. During fiscal 2023-24, the average duration of completed National Security Reviews was 163 days. Generally, once the National Security Review process is commenced, if it has not already been closed, the investor cannot complete the investment until after the process is concluded.

21.7 Substance of the National Security Review Process

In recent years, the National Security Review process has emerged as the key foreign investment screen – and the recent changes to the ICA have further enhanced Canada's ability to screen and potentially block investments that could be injurious not only to national security but now, economic security, as announced by the government with clear but unstated reference to the Trump administration's ongoing trade actions.

In conducting a National Security 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 ICA does not define national security, but the recently updated Guidelines on the National Security Review of Investments, sets out the approach the government will take in reviewing foreign-controlled inbound investments. In practice, the NSR provisions have been interpreted to scrutinize investments by non-Canadians which could:

- Negatively impact public health or the supply of critical goods and services to Canadians (including energy, utilities, food, health, and water);
- Negatively impact access to any of the minerals on Canada's Critical Minerals List;
- Impact Canada or its allies' defence capabilities and interests (including R&D or the supply of military weapons and technologies);

- Facilitate the transfer of sensitive technology or know-how outside of Canada;
- Enable foreign surveillance or espionage or hinderance of intelligence operations and law enforcement;
- Facilitate the activities of illicit actors (e.g., terrorists/terrorist organizations, organized crime); and/or
- Undermine Canada's economic security by increasing integration of the Canadian Business with the economy of another country.

Investments meeting these criteria may face significant delays and the potential imposition of conditions by the government before they can be made, if they are allowed at all. The types of binding undertakings from an investor to mitigate national security concerns that may be required include, but are not limited to, commitments related to corporate governance, data protection, technology use, supply chain arrangements, or other risk factors.

21.8 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.

21.9 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 105(3) (Residency) for further details.

22 Competition Law

Canadian law relating to antitrust 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, wage-fixing and no-poach agreements, deceptive telemarketing, misleading advertising and deceptive marketing practices. Non-criminal, or "reviewable", matters include mergers, abuse of dominant position and anticompetitive civil agreements.

The Commissioner of Competition ("Commissioner"), who heads the Competition Bureau ("Bureau") is responsible for investigating alleged competition offences, although private parties can also take action under a number of civil provisions of the *Competition Act*.

The *Competition Act* has undergone significant amendments in recent years, signalling a fundamental reorientation of Canada's regulatory approach. Mergers and businesses now face heightened scrutiny, stricter compliance requirements, and increased risks of enforcement, whether by the Bureau or through private litigation.

22.1 Merger Notification

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.

Mergers that exceed certain thresholds are required to be notified to the Competition Bureau in a prescribed form before closing. A filing fee (C$88,690.45 as of April 1, 2025) and a waiting period also apply. For most transactions, the primary applicable thresholds are:

- 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 in Canada being purchased, or of the assets in Canada on the books of the entity being purchased, or the gross revenues from sales in or from Canada derived from those assets or on the books of the entity being purchased exceed C$93 million.[10]

In the case of acquisitions of voting shares in an entity, a share-holding threshold also applies. This threshold is exceeded where as a result of the transaction, the purchaser, together with its affiliates, would own more than 20% of the voting shares of a public company or more than 35% of the voting shares of a private company. If the purchaser and its affiliates already collectively surpass either the 20% or 35% thresholds, as applicable, this threshold is exceeded by any subsequent share purchase that results in the bidder and its affiliates owning more than 50% of the target's voting shares.

Where a merger exceeds the applicable thresholds and is therefore notifiable, the parties must each file prescribed documentation to the Bureau, including

- Completed pre-merger notification forms, which include information on corporate structures, customers, suppliers and regions of sales.
- Copies of the transaction agreements.
- All studies, surveys, analyses and reports that were prepared or received by a senior officer or director of the corporation for the purpose of evaluating or analyzing the proposed transaction.

The initial waiting period is 30 days after the last of the party's prescribed documentation is filed, subject to early termination by the Commissioner. The parties also generally jointly prepare and submit a request for an advance ruling certificate ("ARC") from the Commissioner. ARC requests are typically narrative submissions outlining why the parties do not believe that a proposed transaction raises substantive concerns. If granted, an ARC exempts the parties from the need to file the prescribed documentation (if it has not already been filed).

The Bureau has implemented internal service standards (which are different from the statutory waiting periods). These establish soft deadlines for completion of the Bureau's review of a notified transaction, which the Bureau can normally be expected to meet. The service standard applicable to any particular transaction, and the time expected to complete a review of the transaction, depends on whether the Bureau classifies the transaction as noncomplex or complex, which is based on the review team's assessment of the chances of competitive harm resulting from the transaction. The target maximum turnaround times for the reviews are:

- For a noncomplex transaction: 14 days.
- For a complex transaction: 45 days.

Where the Bureau fails to complete its assessment of a proposed transaction by the end of the waiting period, the Bureau has a number of options available if there are material concerns about the potential anti-competitive impact of a proposed transaction. For example, the Bureau can request:

- additional information from the parties, in which case, closing would be barred until 30 days after compliance with the information request.
- that the parties not proceed with the transaction pending the completion of its review.
- that the parties only close the transaction subject to certain conditions (such as a "hold separate" agreement).

The Commissioner can also bring an *ex parte* application before the Competition Tribunal ("Tribunal"), a specialized independent administrative tribunal overseen by judges of the Federal Court of Canada, for an interim order to prevent the completion or implementation of the proposed transaction. Where the Commissioner applies for an interim order to enjoin closing, the parties are prohibited from closing the merger until the injunction application has been heard and disposed of by the Tribunal

On completing its review if it does not have concerns, the Bureau typically issues an ARC, or a no-action letter stating that based on its review to date, that the proposed transaction is not likely to substantially lessen competition in Canada.

Where a notifiable transaction under the Competition Act involves a transportation undertaking, the parties must also file a notification with the Minister of Transport pursuant to subsection 53.1 of the Canada Transportation Act. The information provided in this notification will be substantially similar to that filed with the Bureau but also needs to include information concerning the public interest as it relates to national transportation.

22.2 Merger Review

The Bureau or Commissioner does not have the power to block, dissolve or impose conditions on mergers. Rather, they can launch an application

10 This is the threshold value for 2025. This value can be adjusted annually based on changes in gross domestic product

to the Tribunal seeking an order blocking, dissolving or imposing conditions on a merger. Only if the Tribunal finds that a merger is likely to substantially prevent or lessen competition in a market can it issue a remedial order. Subject to certain exceptions, the Commissioner has the power to challenge any merger, including those below the thresholds for notification set out above. Mergers that are not notified to the Bureau can be challenged for up to three years after closing, while mergers that are notified can be challenged for up to one year after closing.

The Bureau's substantive review of a proposed merger is determine whether to challenge it on the basis that it is likely to result in a substantial lessening or prevention of competition in Canada in relevant product and geographic markets. The *Competition Act* includes a provision that provides that where the Commissioner challenges a merger, it is presumed to result in a substantial lessening or prevention of competition if it results in a combined market share exceeding 30 per cent or if the post-merger concentration index (i.e., the Herfindahl-Hirschman Index) rises by more than 100 points and exceeds 1,800. If the Commissioner challenges a merger, this shifts the burden to merging parties to rebut the presumption that the merger will harm competition.

In determining whether a merger will substantially prevent or lessen competition, the Competition Tribunal will consider a variety of factors, including:

- Market shares and concentration;
- The extent and effectiveness of remaining post-merger competition;
- Barriers to entry into the market
- The likelihood of the business of one of the parties to the merger failing in the absence of the merger;
- Network effects within a market; and
- The effect of the merger on price or non-price competition, including quality, choice or consumer privacy.

If the Commissioner challenges a merger and the Tribunal determines that it is likely to substantially lessen competition, the Tribunal may prohibit or dissolve the merger, in whole or in part, or may allow it to proceed under imposed conditions. Parties to a merger and the Commissioner may also enter into consent agreements whereby the parties agree to remedial measures as a condition of the Commissioner not challenging or discontinuing a challenge of a merger.

22.3 Criminal Offences

The Attorney General of Canada has exclusive jurisdiction over all criminal prosecutions under the *Competition Act*. Those suspected of engaging in criminal offences are referred by the Commissioner to the Attorney General for Canada for prosecution in court. 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 including drip pricing. 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.

Amendments that came into force in June 2022 also criminalized wage-fixing and no-poach agreements **between employers**, and such agreements are now subject to the same sanctions as criminal conspiracies. These agreements need not be between competitors, just two or more employers.

These amendments also removed the maximum fine under the conspiracy provisions.

In addition to criminal sanctions, private parties can launch follow on class actions in civil courts to recover the amounts equal to the loss suffered by the class.

22.4 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, and private parties can also launch class actions. 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, imposing significant administrative monetary penalties (up to $10M for a first offence and $15 for subsequent offences), and providing for the possibility of monetary recovery for the persons affected by the conduct, the latter which is limited to the amount of the benefit derived.

Criminal deceptive marketing practices include drip pricing, double ticketing of prices, pyramid selling, bait-and-switch selling, 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, greenwashing claims, drip pricing, 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.

22.5 Abuse of Dominance

Abuse of dominance can arise when a business with market power engages in (i) a practice of anti-competitive acts; or (ii) conduct that had, is having or is likely to have the effect of preventing or lessening competition substantially in a market in which the person or persons have a plausible competitive interest, and the effect is not a result of superior competitive performance.

While there is no precise definition in the Competition Act of what conduct constitutes an “abuse of dominance”, such conduct refers generally to practices aimed at a competitor that, objectively viewed, are predatory, exclusionary or disciplinary. The Competition Act provides a number of examples of conduct that constitute an abuse of dominance including: (i) buying up products to prevent erosion of prices from existing levels; (ii) the use of certain exclusive dealing arrangements to foreclose competition; and (iii) the adoption of practice or product standards that are designed to prevent entry or diminish or limit competition.

Either the Commissioner or private parties with leave of the Tribunal can commence applications before the Tribunal seeking an order in respect of alleged abuse of dominance. The Tribunal can order a party found to have abused dominance to alter conduct or, it can impose civil administrative monetary penalties up to the greater of: (i) $25,000,000 for the first order and $35,000,000 for each subsequent order; and (ii) three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3% of the person’s annual worldwide gross revenues.

22.6 Civil Anticompetitive Agreements

The Civil Anticompetition agreements provision of the Competition Act (s.90.1) allows the Tribunal to issue a remedial order on application by the Commissioner or a private party with leave with respect to agreements that are found to harm competition. The provision – which originally was limited to agreements between competitors, has been expanded significantly to include a wider variety of potentially anti-competitive agreements including vertical agreements between suppliers and customers where a “significant purpose” is to lessen competition. This shift was partly spurred by concerns over real estate deals, like exclusivity clauses between landlords and anchor tenants that lock out rival stores. For example, a supplier barring a retailer from stocking competitors’ goods could now face a Tribunal challenge, even if the parties aren’t direct rivals.

The Tribunal can order behavioural and monetary penalties for violations of this provision.

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