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Doing Business in Canada

Navigating Opportunities
for Investment and Growth



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INTRODUCTION



INTRODUCTION

What are the key considerations when planning to establish or acquire a business in Canada? What are the potential opportunities, and where are the possible pitfalls?

Doing Business in Canada was developed by McCarthy Tétrault as a basic guide to the legal aspects of establishing or acquiring a business in Canada. It is written for the non-resident businessperson, but with few exceptions, the same considerations apply when all parties are based in Canada.

We have organized this guide into what we hope you will find to be a useful and user-friendly resource. Beginning with an overview of the Canadian political and legal systems, the guide proceeds through the areas of law most likely to affect your business decisions: foreign investment, international trade, corporate finance, mergers & acquisitions, competition, taxation, intellectual property, real property and others.

The discussion in each section is intended to provide general guidance, and is not an exhaustive analysis of all provisions of Canadian law with which your business may be required to comply. For this reason, we recommend that you seek the advice of one of our lawyers on the specific legal aspects of your proposed investment or activity. With offices in Canada's major commercial centres, McCarthy Tétrault has substantial presence and capabilities to help you successfully complete any business transaction in Canada.

Unless otherwise indicated, the information in this publication is current as of December 2016.

**DOING BUSINESS
IN CANADA WAS
DEVELOPED BY
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AS A BASIC GUIDE TO
THE LEGAL ASPECTS
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BUSINESS IN CANADA.**

CANADA



CANADA

Canada is the second-largest country in the world, with an area of approximately 10 million square kilometres and a population of just over 36 million. Roughly 50% of its population resides within about 150 kilometres of its southern boundary with the United States, much of it in the highly industrialized corridor between Windsor, Ontario and Québec City, Québec. Canada's two official languages are English and French.

As one of the 10 largest economies of the industrialized countries, Canada is a member of the world's Group of Eight (G8) industrialized nations. Currently, approximately three quarters of Canada's exports go to the United States, and under 5% to each of the European Community, the United Kingdom and China. Canada is the largest importer of goods and services from the United States, with imports from the U.S. comprising approximately two-thirds of all Canadian imports.

The Toronto Stock Exchange (TSX) and the TSX Venture Exchange rank third among North American exchanges and eighth among world stock exchanges in terms of market capitalization. More resource company stocks are listed on the TSX than anywhere else in the world.

Canada is a federal state, with governmental jurisdictions divided among a national government, 10 provincial governments and three territorial governments. The *Constitution Act, 1867* provides the federal and provincial governments with exclusive legislative control over enumerated lists of subjects, and also provides exclusive legislative control to the federal government over residual subjects not clearly assigned to the provincial governments. Each of Canada's two levels of government is supreme within

its particular area of legislative jurisdiction, subject to the limits provided by the *Canadian Charter of Rights and Freedoms*, which forms part of the *Constitution Act, 1982*.

The federal government has legislative jurisdiction over, among other matters, the regulation of trade and commerce, banking and currency,

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bankruptcy and insolvency, intellectual property, criminal law and national defence. The provincial governments have legislative jurisdiction over, among other matters, real and personal property, civil rights, education, health care and intra-provincial trade and commerce. Certain aspects of these provincial powers are delegated to municipal governments, which enact their own bylaws.

Both levels of government are based on the British parliamentary system. At the federal level, the prime minister is the head of government; at the provincial level, the premiers. These individuals are the leaders of the political parties that have either the greatest number of seats in the House of Commons or the provincial legislatures, respectively — or that have, at a minimum, the support of a majority of the members of the House of Commons or provincial legislatures, respectively.

When establishing or acquiring a business in Canada, one must be concerned with the federal laws as well as the laws of the provinces or territories within which the business will be conducted. In nine of the 10 provinces and in the three territories, the legal systems are based on common law. In Québec, the legal system is based on civil law. In this publication, we have chosen to refer primarily to Ontario legislation, but the legislation and programs of the other common law provinces are similar to those of Ontario. We have included references to Québec legislation — in particular, under the heading **Language**. Lawyers in the various offices of McCarthy Tétrault would be pleased to conduct a review of the federal and provincial laws and regulations and municipal bylaws relevant to your particular business operation.



BUSINESS ORGANIZATIONS

By Sven Milelli



BUSINESS ORGANIZATIONS

A wide variety of legal arrangements may be used to carry on business activity in Canada. Some of the more commonly used arrangements are corporations, limited partnerships, partnerships, trusts, co-ownerships, joint ventures and unlimited liability companies.

The selection of the appropriate form of business organization will depend in each case upon the circumstances of the investor, the nature of the activity to be conducted, the method of financing, income tax ramifications and the potential liabilities related to the activity.

Generally, one of the first issues faced by a foreign entity contemplating carrying on business in Canada is whether to conduct the business directly in Canada as a Canadian branch of its principal business or to create a separate Canadian entity to carry on the business. The following issues should be taken into consideration before making this decision:

- the treatment of Canadian business income for tax purposes in the proponent's home country;
- the advisability of isolating the assets of the principal business from claims arising out of the Canadian business;
- whether one or more parties will own the Canadian enterprise;
- criteria for the availability of federal, provincial and municipal government incentive programs; and
- Canadian tax considerations.

A foreign entity carrying on a branch operation in Canada must be registered in each of the provinces in which it carries on business. In addition, foreign entities must complete many of the same disclosures and filings with the federal and provincial governments as are required of Canadian corporations.

Of the forms of business organization referred to above, the corporation with share capital is the entity most often used to carry on commercial activities in Canada. Unlike the limited partnership, partnership, trust, co-ownership or joint venture, the corporation is a legal entity separate from its owners. The shareholders do not own the property of the corporation, and the rights and liabilities of the corporation are not those of the shareholders. The liability of the shareholders is generally limited to the value of the assets they have invested in the corporation to acquire their shareholdings. In addition to the advantages of limited liability, the



securities of a corporation are generally more readily marketable. As a result, corporate shares (and debt instruments) are often seen as more attractive investments than units in partnerships or joint ventures. In some situations, there may also be tax advantages to using a corporation.

CORPORATE SHARES (AND DEBT INSTRUMENTS) ARE OFTEN SEEN AS MORE ATTRACTIVE INVESTMENTS THAN UNITS IN PARTNERSHIPS OR JOINT VENTURES.

Unlike a corporation, a partnership is not a separate legal entity, but a relationship that exists between the parties who carry on business in common with a view to profit.

Partners share in the profits, losses and net proceeds on dissolution. The most significant advantage of a partnership is that it is permitted to “flow through” losses to its partners that may, subject to certain rules in the *Income Tax Act* (Canada), be used as deductions against the partners’ other income. The most significant disadvantage of a general partnership is that each of the partners is personally liable for the liabilities of the partnership, and their personal assets are exposed in the event the partnership assets are insufficient to cover such liabilities. The exposure of a partner to liability can be minimized by using a limited partnership rather than a general partnership. In a limited partnership, the liability of a limited partner is limited to the extent of its investment in the partnership, so long as it takes a passive role in the business and governance of the limited partnership.

In each case, the selection of the form of business organization best suited to carry on business in Canada will depend entirely on individual circumstances.

Where a corporation is the preferred vehicle for carrying on business within Canada, consideration must be given to the appropriate jurisdiction for incorporation. The nature of a corporation’s particular undertaking (e.g., banking) may be such that it falls within the exclusive legislative purview of either the federal or provincial governments, with an attendant requirement to incorporate under a specific statute. However, corporations not specifically subject to such legislation may be incorporated under the federal laws of Canada or under the laws of any one of the provinces or territories.

The principal federal corporate statute is the *Canada Business Corporations Act* (CBCA), which is modeled on modern business statutes

in the United States. Most provinces and territories in Canada also have their own corporate legislation, based largely on the CBCA. There are minor differences between the various federal and provincial corporate statutes that can affect the choice of jurisdiction of incorporation, depending upon the particular circumstances.

A foreign investor will find the following features of Canadian corporate legislation of interest:

- Under the CBCA, 25% of a Canadian corporation's directors must be "resident Canadians" (i.e., individuals resident in Canada who are either Canadian citizens or Canadian permanent residents). Directors' residency requirements for corporations established under the laws of the provinces or territories differ from one jurisdiction to another. Several provinces and territories have no residency requirements at all.
- The board of directors of a Canadian corporation must consist of at least one individual, but can have an unlimited number of directors.
- Each director must be an individual person, and a director may not appoint an alternate to serve in his or her place.
- Directors are generally subject to a number of liabilities and obligations under corporate law, as well as under a range of other federal and provincial laws, including those relating to the environment, tax, securities, pensions and employment.
- The shareholders of a Canadian corporation can, in most cases, enter into a "unanimous shareholders' agreement" to restrict the powers of the board of directors. To the extent the powers of the directors are so restricted, the liabilities and obligations of the directors will generally be transferred to the shareholders.
- Single shareholder corporations are permitted and directors need not hold shares in the corporation.
- Minority shareholders of a Canadian corporation have significant statutory rights and remedies and eliminating minority shareholders can often be difficult and costly.

THERE ARE MINOR DIFFERENCES BETWEEN THE VARIOUS FEDERAL AND PROVINCIAL CORPORATE STATUTES THAT CAN AFFECT THE CHOICE OF JURISDICTION OF INCORPORATION, DEPENDING UPON THE PARTICULAR CIRCUMSTANCES.



- The board of a Canadian corporation must approve the corporation's financial statements annually and present them to the corporation's shareholders.
- Generally, there is no requirement to file a Canadian corporation's financial statements with a government body, except in the case of a public company.
- The requirement that the corporation's financial statements be audited varies by jurisdiction; in most cases, it is possible for the corporation's shareholders to consent to exempt it from the audit requirement, except in the case of a public company.
- The identities of a Canadian corporation's shareholders are not a matter of public record and a corporation is not obliged to disclose the names of its shareholders, unless it is a public company, a Québec private company or a company carrying on business in Québec.
- Meetings of the board of directors and, in certain limited circumstances, the shareholders of a Canadian corporation need not take place in Canada.
- Resolutions of directors or shareholders may be passed by a written instrument signed by all of the directors or shareholders, as the case may be, in lieu of a meeting.
- The statutory books and records of a Canadian corporation, including those maintained in electronic form, must be kept in Canada.

United States businesses coming to Canada may, in certain circumstances, use unlimited liability companies (ULCs) as a vehicle for their business activity in Canada because of the favourable treatment afforded to ULCs as "flow-through" entities under U.S. tax law. U.S. advice should be obtained.

In addition, certain anti-hybrid provisions in the *Canada-United States Income Tax Convention* (1980) (U.S. Convention) should be considered, as in certain circumstances they may eliminate the tax benefits associated with such entities or give rise to adverse tax consequences without proper tax planning. See [Taxation](#).

FOR MORE INFORMATION, PLEASE CONTACT:

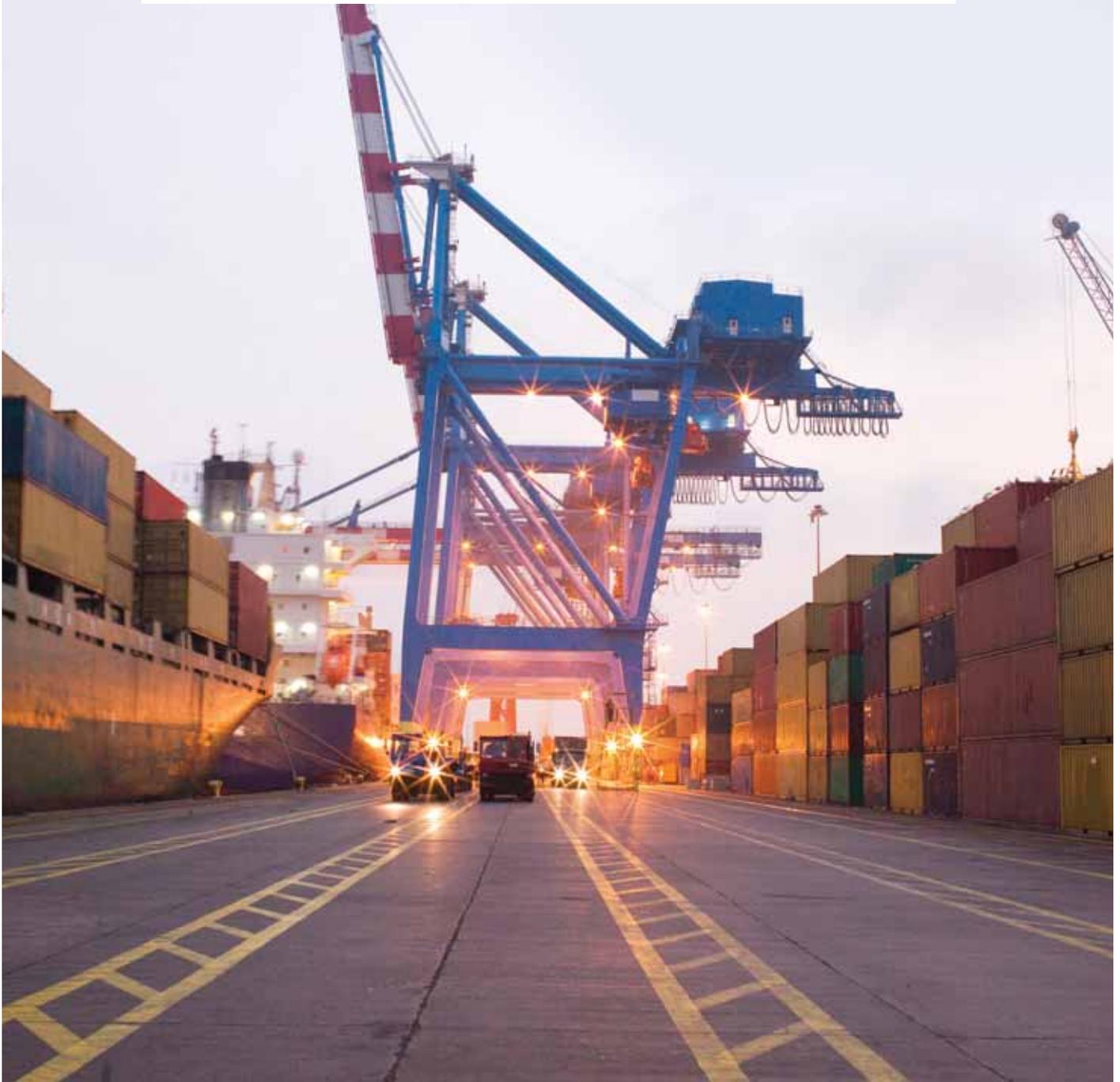
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By Oliver Borgers and Michele Siu



FOREIGN INVESTMENT LAWS & NATIONAL SECURITY

General Overview

Whether a non-Canadian investor acquires a business with a presence in Canada or establishes a new Canadian business, the investment may be subject to foreign investment review or notification requirements of the *Investment Canada Act (ICA)*.

Generally, the direct acquisition of control¹ of a significant Canadian business (either by virtue of its “enterprise value²” in excess of C\$600 million or, if it is engaged in a “cultural business,” C\$5 million in asset book value) by a non-Canadian requires review and prior approval by the Minister of Innovation, Science and Economic Development (formerly the Minister of Industry) or the Minister of Canadian Heritage in the case of cultural transactions³. In the fall of 2016, the government announced that the C\$600 million threshold will be raised to C\$1 billion in 2017, two years sooner than the originally planned date of 2019.

Although one of the ICA’s stated purposes is to encourage investment in Canada by non-Canadians, which contributes to economic growth and employment opportunities, investments that are subject to review require the filing of detailed information concerning the target business and the investor’s plans for it. The review process generally takes at least 45 to 75 days. A non-Canadian investor will be required to satisfy the relevant Minister that the transaction will likely be of “net benefit” to Canada before the Minister will approve the transaction. It is typical for a non-Canadian investor to agree to give written undertakings to the government of Canada to secure approval. Such undertakings often include promises

WHETHER A NON-CANADIAN INVESTOR ACQUIRES A BUSINESS WITH A PRESENCE IN CANADA OR ESTABLISHES A NEW CANADIAN BUSINESS, THE INVESTMENT MAY BE SUBJECT TO FOREIGN INVESTMENT REVIEW OR NOTIFICATION REQUIREMENTS OF THE INVESTMENT CANADA ACT (ICA).

1. An acquisition of control occurs when a majority of the Canadian business is acquired, and is presumed where a third or more of a corporation is acquired.
2. The enterprise value calculation varies depending on whether the proposed acquisition involves the acquisition of (i) public entities, (ii) non-public entities or (iii) Canadian businesses acquired by way of an acquisition of assets.
3. Such as where the Canadian business’s activities relate to music, broadcasting, video, publishing and film.



relating to employment and expenditures in Canada and Canadian participation in the business.

Although rejections are rare, it is strongly advised to plan early for the ICA review process to minimize the risk of a negative outcome.

Investments to establish a new Canadian business, and acquisitions of control of existing businesses that do not exceed applicable thresholds, are subject to “notification,” which requires the filing of a relatively short information form either before or shortly after completion of the transaction.

Certain statutory provisions restrict foreign investment and ownership in specific areas, including the financial services, air transportation, and broadcasting and telecommunications sectors. There are also foreign investment disincentives for media and publishing.

Transactions which the Canadian government believes may be injurious to Canada’s “national security,” including minority investments, can be reviewed and blocked or unwound by the government.

Investments by investors whom the Canadian government considers foreign state-owned enterprises (SOE) receive special attention under the ICA and related policy documents.

Relevant Laws

The ICA is the only federal foreign-investment law of general application in Canada. The ICA regulates investments in Canadian businesses by non-Canadians.

The *Competition Act* (Canada) is another statute that regulates investments by non-Canadians. See [Competition Law](#). Additionally, investments in transportation businesses, which raise public interest issues and exceed the *Competition Act*’s pre-merger notification thresholds, may also be subject to the *Canada Transportation Act*’s pre-closing review.

Compliance with provisions of the ICA does not bar review or action by Canada’s Competition Bureau under the merger provisions of the *Competition Act*. The review processes under these statutes are separate from each other. However, the effect of the investment on competition is one of the “net benefit to Canada” factors under an ICA review.

Responsible Authority

Two federal ministers are responsible for administering the ICA: the Minister of Innovation, Science and Economic Development (non-cultural matters) and the Minister of Canadian Heritage (cultural matters). Any required review process for cultural businesses as defined under the ICA will be done through the Department of Canadian Heritage instead of Industry Canada.

Exempt Investments

Not all investments in Canadian businesses by non-Canadians are subject to review or notification under the ICA. For example, the ICA contains a number of exempt transactions, such as the acquisition of shares by a person whose business is dealing in securities. An investment to acquire an interest in an existing Canadian business that does not result in an acquisition of control under the ICA will also generally not be subject to notification or review.

Confidentiality

Information submitted under the ICA is treated as confidential and, subject to certain exceptions, will not be disclosed to the public.

Information produced can be shared with other investigating agencies. However, generally, information provided to the Minister in the context of an investment review is protected from disclosure to other government agencies unless necessary for the purposes of the administration and enforcement of the ICA. The Minister is able to compel a party to provide information within the context of a review application that the Minister “considers necessary.”

For information produced with respect to a national security review, the Minister may communicate this information to prescribed investigative bodies, which may also disclose the information to others for the purposes of that agency’s investigation.

Review Thresholds

WTO Investor Thresholds

The threshold for review for an acquisition of a non-cultural business by or from a “WTO Investor” (a person or entity from countries, other than Canada, that are members of the World Trade Organization), is higher than for non-WTO Investor investments.

- Where there is a direct acquisition of control of a Canadian business (through the acquisition of voting shares of a corporation incorporated in Canada or through the acquisition of voting interests of a non-share capital corporation, partnership, trust or joint venture carrying on that business, or by the acquisition of substantially all of the assets used to carry on that business) and the “enterprise value” of the Canadian business is C\$600 million⁴ or more, the acquisition is subject to review and pre-approval by the Minister.
- The calculation to determine “enterprise value” will vary depending on whether the proposed acquisition involves the acquisition of (i) public entities; (ii) non-public entities; or (iii) Canadian businesses acquired by way of an acquisition of assets. The “enterprise value” for publicly listed companies is equal to the market capitalization of the entity (plus non-operating liabilities, minus cash and cash equivalents). For the acquisition of private companies and for asset acquisitions, the “enterprise value” is the purchase price (plus non-operating liabilities, minus cash and cash equivalents).
- An indirect acquisition of control of a non-cultural Canadian business through, for example, the acquisition of the foreign corporate parent of an entity in Canada carrying on the Canadian business by or from a WTO Investor, is not subject to review, regardless of the value of Canadian assets. It is important to note that review threshold considerations are different for investments where the target’s business is cultural or raises national security concerns, as well as whether the investor is a SOE. See below for further detail.

It is important to note that review threshold considerations are different for investments where the target’s business is cultural or raises national security concerns, as well as whether the investor is a SOE. See below for further detail.

REVIEW THRESHOLD CONSIDERATIONS ARE DIFFERENT FOR INVESTMENTS WHERE THE TARGET’S BUSINESS IS CULTURAL OR RAISES NATIONAL SECURITY CONCERNS, AS WELL AS WHETHER THE INVESTOR IS A FOREIGN STATE-OWNED ENTERPRISE.

4. The thresholds for review of WTO investments in a Canadian business will be increased to C\$1 billion in 2017, two years sooner than the originally planned date of 2019. After that, the applicable threshold will be determined on an annual basis using a prescribed formula.

Cultural Investment and Non-WTO Investor Thresholds

Generally, when a non-Canadian is acquiring control of a Canadian cultural business, or the purchaser of a Canadian business is not a WTO Investor and the vendor is Canadian or a non-WTO Investor, review and approval by the relevant Minister are required in the following cases:

- Where there is a direct acquisition of control of a Canadian business, the book value of the assets of the Canadian business is C\$5 million or more.
- Where there is an indirect acquisition of control of a Canadian business if either (i) the Canadian business has assets of C\$50 million or more in value; or (ii) the Canadian business represents more than 50% of the assets of the acquired group of entities and the Canadian business has assets of C\$5 million or more in value. Note, for an indirect acquisition that triggers the thresholds in either (i) or (ii), the acquisition is reviewable on a post-closing basis. The value of the assets for the financial threshold analysis is usually calculated by using book values based on the most recent audited financial statements for the relevant entity.

The value of the assets for the financial threshold analysis is usually calculated by using book values based on the most recent audited financial statements for the relevant entity.

Areas of “cultural heritage and national identity” include book publishing, magazine publishing, film production and distribution, television and radio, and music production and distribution.

Note, even if an acquisition or establishment of a cultural business does not trigger the reviewable threshold, the governor-in-council may, nonetheless, order a review if it considers it in the public interest.

Other Review Threshold Considerations — SOE Investments and National Security

As mentioned above, review threshold considerations are different for investments where the target’s business raises national security concerns or the investor is a SOE.

SOE Investments

The definition of a SOE under the ICA includes an entity controlled or influenced, directly or indirectly, by a government or agency of a foreign state. In addition to this broad definition, the Minister has broad powers

to retroactively determine that an entity is controlled in fact by a SOE, as well as to determine retroactively whether there has been an acquisition of control in fact by a SOE.

SOE investments are subject to review where the book value of the assets of the Canadian business is C\$375 million (2016) or more.

National Security

The Canadian government has the power to review all investments where there are “reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security.” There is no financial threshold for investments under the ICA’s national security review regime. (See National Security Review below.)

“Net Benefit to Canada” Review

General

With certain exceptions, a non-Canadian may not implement a reviewable direct investment until the investment has been reviewed and the relevant Minister is satisfied, or deemed to be satisfied, that the investment “is likely to be of net benefit to Canada.”

In determining “net benefit to Canada,” the Minister must consider:

- the effect of the investment on the level and nature of economic activity in Canada;
- the degree and significance of participation by Canadians in the Canadian business and the industry of which it forms a part;
- the effect of the investment on productivity, industrial efficiency, technological development and product innovation and variety in Canada;
- the effect of the investment on competition within an industry in Canada;
- the compatibility of the investment with national industrial, economic and cultural policies; and
- the contribution of the investment to Canada’s ability to compete in world markets.

If the Minister initially decides that the investment will not be of such benefit, the non-Canadian will be given an opportunity to make

representations and submit undertakings with respect to the investment with a view to satisfying these requirements.

SOE Investments

In recent years, the Canadian government has made it clear that investments by SOEs will be assessed differently than other investments under the ICA.

For example, following the approval of an acquisition by a SOE (CNOOC Ltd.) of a Canadian oil sands business (Nexen Inc.) at the end of 2012, the Prime Minister announced that going forward, the Minister of Innovation, Science and Economic Development will find the acquisition of control of a Canadian oil sands business by a SOE to be of net benefit (and therefore allowed) only in exceptional circumstances. It remains to be seen what the rules will be in other economic sectors besides oil sands.

Review Guidelines for SOE investments

The Canadian government has also issued guidelines for the review of SOE investments. The guidelines articulate specific factors that the relevant Minister will examine as part of his or her assessment of the “net benefit” factors listed above. The guidelines reflect the potential concerns the Minister may have regarding the “governance and commercial orientation of the SOE.” The Minister will examine:

- The corporate governance and reporting structure of the SOE, including whether it adheres to Canadian standards of corporate governance. This includes commitments to transparency and disclosure, independent members of the board of directors, an independent audit committee, equitable treatment of shareholders and adherence to Canadian laws and practices.
- Whether the Canadian business to be acquired by the SOE will continue to have the ability to operate on a commercial basis and specify a number of important indications. These include where exports go, where processing takes place, the participation of Canadians in the operations and the level of capital expenditures to maintain the Canadian business.

A SOE can therefore anticipate that it may be required to provide undertakings beyond those normally expected of a non-SOE in order

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OWNED ENTERPRISES.

to secure approval by the Minister. Indeed, the Minister expects a SOE investor to address its inherent characteristics (specifically that it is susceptible to state influence) in its plans for the Canadian business to be acquired and related undertakings. A SOE will also need to demonstrate its strong commitment to transparent and commercial operations.

National Security Review

The Canadian government has the authority to review all proposed investments (including minority investments) where the responsible Minister has “reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security.”

There is no definition of “national security.” As mentioned above, no financial threshold will apply to a national security review. The Canadian government may deny the investment, ask for undertakings, provide terms or conditions for the investment, or, where the investment has already been made, require divestment. Review can occur before or after closing and may apply to corporate reorganizations where there is no change in ultimate control.

In 2015, extended national security review timelines came into force which means that a national security review may now take up to 200 days.

To date, where details of the Minister’s approach to national security reviews are made public, they have not been significantly enlightening. Such was the case in the 2013 rejection of the proposed acquisition by Accelero Capital (a corporation controlled by Egyptian billionaire Naguib Sawiris) of Allstream (Manitoba Telecom Services’ network subsidiary). While the Minister of Industry referenced the national security provisions of the ICA in rejecting the deal, exactly what threat the transaction posed was left largely unsaid other than the following comment: “MTS Allstream operates a national fibre optic network that provides critical telecommunications services to businesses and governments, including the Government of Canada.” In 2015, according to media reports, a Chinese SOE’s investment to establish a new Canadian business was blocked on national security grounds. Beida Jade Bird’s proposal to build a new fire alarm systems factory in Québec was blocked based on national security grounds because of the site’s proximity to the Canadian Space Agency’s facilities located less than two kilometres away. Beida

Jade Bird planned on building fire-alarm systems for the Chinese market. Interestingly, the Québec government had given Beida Jade Bird C\$3 million in loans and a C\$1 million grant in respect of its project. The Québec government continued to assist Beida Jade Bird after the rejection and said the company plans to locate its factory elsewhere, likely still in Québec.

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By Oliver Borgers



COMPETITION LAW

The federal *Competition Act* (Act) provides for criminal sanctions against persons involved in agreements with competitors that fix prices, restrict supply or allocate customers or markets, or that are involved in bid-rigging, deceptive telemarketing, or wilful or reckless misleading advertising offences. A civil regime regulates the less egregious forms of misleading advertising. The Act also contains non-criminal or administrative provisions that allow the Competition Tribunal, on application by the Commissioner of Competition, to review certain business practices, and, in certain circumstances, to issue orders prohibiting or correcting conduct to eliminate or reduce its anticompetitive impact. Reviewable practices include mergers, agreements among competitors, abuse of dominant position, or monopoly, and a number of vertical practices between suppliers and customers such as price maintenance, tied selling, refusal to supply and exclusivity arrangements. Private parties are also able to apply to the Competition Tribunal to challenge certain types of reviewable conduct, such as price maintenance, exclusive dealing, tied selling and refusal to deal. The Competition Tribunal also has the power to impose monetary penalties for abuse of dominant position and misleading advertising.

Merger Regulation

Certain mergers (meaning the acquisition of control over a significant interest in the whole or a part of a business) may be subject to pre-merger notification requirements under the Act (as described below). If the Commissioner of Competition believes that a merger is likely to prevent or lessen competition substantially, and the Commissioner of Competition challenges the merger before the Competition Tribunal, the merger is then subject to review by the Competition Tribunal. If an adverse finding is made, the Competition Tribunal may issue an order preventing or dissolving the merger in whole or in part.

The Act includes a list of criteria to be considered by the Competition Tribunal when determining whether a merger substantially lessens competition. Such criteria are generally similar to those found in U.S. case law, although their application may be different. Because of the small size of the Canadian domestic economy, greater concentration may be acceptable in

BECAUSE OF THE SMALL SIZE OF THE CANADIAN DOMESTIC ECONOMY, GREATER CONCENTRATION MAY BE ACCEPTABLE IN CERTAIN INDUSTRIES.

industries where even a relatively high percentage of the Canadian market would still not allow for optimal efficiency and international competitiveness. This is why the thresholds that could trigger government review, such as those relating to market share, will in many industries be higher in Canada than in the U.S.

Larger mergers require pre-merger notification and the filing of information with the Commissioner of Competition. Generally, for a merger to be notifiable (i.e., subject to pre-merger notification), two threshold tests must be met: the “size of parties test” and the “size of transaction test.” Under the “size of parties test,” the parties to the transaction, together with their respective affiliates (defined to include all corporations joined by a 50%-plus voting link), must have assets in Canada or gross revenues from sales in, from and into Canada in excess of C\$400 million in the aggregate. The size of transaction threshold is met where the assets in Canada or gross revenues from sales in and from Canada generated by such assets exceed a stipulated amount (an annually adjusted amount). The 2016 “size of transaction” threshold is C\$87 million, which is expected to increase in 2017.

In general, and with certain exceptions, these asset and revenue values are calculated using book values based on the most recent audited financial statements for the relevant entity. Pre-merger notification involves the filing of a notification form with the Commissioner of Competition. A transaction that is subject to pre-merger notification may not be completed until the applicable waiting period has expired.

The initial waiting period is 30 days. If, within this initial period, the Commissioner of Competition issues a supplementary information request (SIR), then the waiting period is extended to 30 days after a complete response to the SIR has been provided to the Commissioner of Competition. Unlike the *Investment Canada Act* where the relevant minister approves the proposed transaction, the passing of the applicable waiting period under the Act does not preclude the Competition Bureau from subsequently opposing the merger at any time within one year after the merger has been completed. Accordingly, while a transaction may be completed after the expiry of the relevant waiting period, the parties will generally wait until they receive an indication from the Commissioner of Competition that the transaction will not be challenged before they complete the transaction. The Commissioner of Competition’s review of complex mergers may take longer than the applicable statutory waiting period. It is possible in some circumstances to



obtain an Advance Ruling Certificate (ARC) from the Commissioner of Competition and thereby avoid the pre-merger notification process. If an ARC is issued in respect of a proposed transaction, the Commissioner of Competition will thereafter be precluded from challenging the transaction, assuming there are no material changes in circumstances prior to closing. It should be noted, however, that the granting of an ARC is discretionary, and that ARCs are typically issued only when it is clear the merger raises no competition issues. The Commissioner of Competition can also, in lieu of issuing an ARC, exempt the transaction from notification and issue a “no-action letter” indicating that the Commissioner of Competition does not have grounds to challenge the transaction, which is usually sufficient comfort for the merging parties to proceed. A C\$50,000 filing fee is payable in respect of any transaction that is subject to pre-merger notification.

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Abuse of Dominant Position

Abusing a dominant position in a market constitutes a reviewable practice that could give rise to an order (including monetary penalties up to C\$15 million) by the Competition Tribunal if it results in a substantial lessening of competition. To start with, there must be a dominant position or control of a market. A monopoly is not a prerequisite, but there must be a relatively high market share, such that the dominant firm or firms can, to a substantial degree, dictate market conditions and exclude competitors.

There must also be an abuse of such dominant position by the practice of anti-competitive acts. There is nothing wrong with market dominance as such; what causes a problem is the adoption by a dominant player of predatory or exclusionary business tactics. When a dominant firm attempts to exclude potential competitors or to eliminate existing competition, the Competition Tribunal can be called upon to intervene. It is not always easy to distinguish competitive from anti-competitive practices. There is nothing wrong with tough competition, even from a dominant firm. However, when a firm’s intention is to eliminate competition or prevent entry into or expansion in a market, there could be an abuse of dominant position. The Act includes a non-exhaustive list of anti-competitive acts. These include



selling at prices lower than acquisition costs in order to discipline or eliminate a competitor, inducing a supplier to refrain from selling to competitors, or a vertically integrated supplier charging more advantageous prices to its own retailing divisions. Predatory pricing is also a practice that could constitute an anticompetitive act.

Criminal Violations

It is a crime under the Act (subject to available defences) to enter into an agreement or arrangement with a competitor to fix prices for the supply of a product, allocate customers or markets for the production or supply of a product, or restrict the production or supply of a product. It is also a crime to engage in bid-rigging. These practices are prohibited regardless of their effect on competition. Deceptive telemarketing and wilful or reckless misleading advertising are also offences under the Act. Penalties for persons found guilty of such activities include imprisonment for up to 14 years and/or multi-million dollar fines. A violation of the criminal provisions of the Act can also result in a civil suit for damages by the person or persons who have suffered a loss as a result of such violation.

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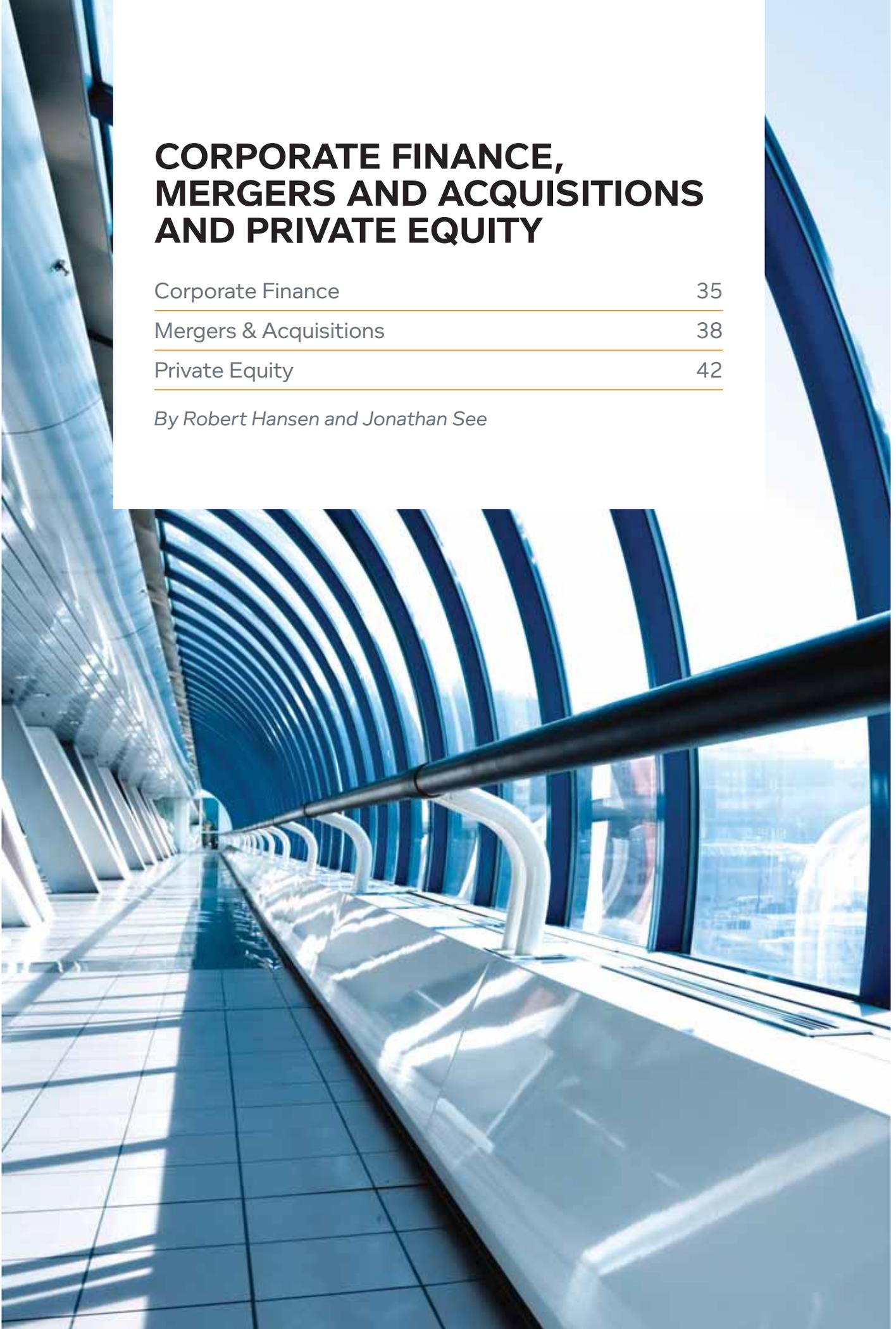
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CORPORATE FINANCE, MERGERS AND ACQUISITIONS AND PRIVATE EQUITY

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By Robert Hansen and Jonathan See



CORPORATE FINANCE, MERGERS & ACQUISITIONS AND PRIVATE EQUITY

Corporate Finance

Canada has well-developed and sophisticated capital markets. The main sources of capital are Canadian chartered banks, other financial institutions (including pension funds, mutual funds and insurance companies), public markets and government agencies. Securities of Canadian and foreign public companies can be listed and traded on one or more of Canada's stock exchanges. The Toronto Stock Exchange (TSX) is the country's largest stock exchange. Canada also has active over-the-counter markets for a variety of other securities, including, in particular, debt securities. Canadian chartered banks are the principal source of revolving lines of credit and term loans.

Public Offerings and Private Placements

In Canada, securities law is currently regulated under provincial jurisdiction and consequently each Canadian province and territory has its own separate securities regulator, as well as its own securities legislation. Nonetheless, securities legislation in Canada is largely harmonized through the use of national and multilateral instruments adopted by the Canadian Securities Administrators (CSA), an umbrella organization comprising all of the provincial securities regulators, and implemented as law by the provinces. Further, the "principal regulator" or "passport" system adopted by each province of Canada (other than Ontario, which is Canada's largest capital market) allows many aspects of securities law to be effectively regulated by only one participating jurisdiction (i.e., the "principal regulator" in the circumstances), in addition to Ontario. These aspects include the review and receipt of prospectuses, compliance with continuous disclosure obligations and obtaining exemptions from various provisions of securities law.

SECURITIES LEGISLATION IN CANADA IS LARGELY HARMONIZED THROUGH THE USE OF NATIONAL AND MULTILATERAL INSTRUMENTS ADOPTED BY THE CANADIAN SECURITIES ADMINISTRATORS (CSA), AN UMBRELLA ORGANIZATION COMPRISING ALL OF THE PROVINCIAL SECURITIES REGULATORS, AND IMPLEMENTED AS LAW BY THE PROVINCES.

When debt or equity securities are offered to the public in Canada, whether

as part of an initial public offering (IPO) or not, a prospectus must be filed with the securities regulatory authorities in those provinces and territories where the securities are being offered. The prospectus will be reviewed by the principal regulator under the passport system described above. A copy of the prospectus must also be provided to potential investors. The prospectus must contain full, true and plain disclosure of the nature of the securities being offered and the business of the issuer.

Where securities are being offered in Québec, an English language prospectus must also be translated into and distributed in French.

The requirement to prepare a prospectus can be avoided where the securities are offered on an exempt basis exclusively to institutional or other “accredited investors” by way of a private placement, although in such cases market practice may nonetheless dictate the delivery to investors of an “offering memorandum” containing disclosure that is often substantially equivalent to a prospectus. There are a number of other prospectus exemptions, including those for the issue of securities by “private issuers” or to employees, or the issue of short-term commercial paper with an approved rating and bank debt, in which case generally either no disclosure document or an abbreviated one is used. Securities sold on an exempt basis may be subject to resale restrictions.

Shareholders of Canadian public companies are not generally afforded statutory or contractual pre-emptive rights. Accordingly, new equity issues are typically effected by way of public offering or private placement, rather than by way of rights offerings to existing shareholders.

Issuers with equity securities listed on certain Canadian exchanges can take advantage of Canada’s short-form prospectus distribution system, which enables capital to be raised in the public markets quickly by preparing and filing a shorter prospectus that incorporates by reference the issuer’s most recent financial statements and other continuous disclosure documents. Generally, issuers eligible for this system can clear a prospectus with the provincial securities authorities within four business days of filing a preliminary prospectus. In the case of more senior issuers, it is common for Canadian underwriting syndicates to enter into a “bought deal” arrangement. This constitutes an enforceable agreement by the underwriters to purchase the securities being offered for sale, even before the filing of a preliminary prospectus, with the result that the syndicate

incurs the risk of price fluctuations in the market from the time of signing the “bought deal” letter with the issuer until the closing of the offering. In such cases, a preliminary prospectus must be filed within four business days of the signing of the bought deal letter, and the syndicate may begin to solicit purchasers immediately upon the signing of the letter and the issuance of a news release. For issuers that do not qualify under the short-form system, prospectus clearance can often take from three to six weeks, and sometimes longer.

Canadian securities laws also provide issuers with the ability to file a base shelf prospectus for an aggregate dollar amount of securities (which may be unallocated between debt, equity and other securities) for subsequent issuance over a period of up to 25 months. At the time of an actual distribution of securities qualified by the base shelf prospectus — and not later than two business days after the determination of the offering price of the securities — the issuer simply files a relatively brief supplement to the prospectus containing the specific terms of the securities then being offered, as well as any additional information that was not available to the issuer at the time the prospectus was filed. Although there are exceptions (e.g., where innovative, structured or derivative products are being distributed), supplements to the base shelf prospectus are not reviewed, allowing issuers to act quickly and take advantage of narrow windows of opportunity for financing in the markets.

Continuous Disclosure Obligations

An issuer filing a prospectus, listing its securities on a Canadian stock exchange or acquiring a Canadian reporting issuer through a share exchange transaction, will become a “reporting issuer,” and thereby become subject to various continuous and timely disclosure obligations. These include the requirement to prepare and file quarterly and annual financial statements and the related management’s discussion and analysis, as well as an annual information form and reports with respect to material changes in the affairs of the issuer. Directors, officers and other “insiders” of the issuer will be required to file reports with respect to any trading they conduct in securities of the issuer and will be precluded from trading in the issuer’s securities if they possess any material non-public information about the issuer. Management information circulars must be prepared for annual and special shareholder meetings and must contain prescribed disclosure, including comprehensive disclosure on executive compensation in the case of annual

general meetings or other meetings where directors will be elected or executive compensation will be voted on.

Foreign issuers that meet certain conditions and have become reporting issuers in Canada, whether by listing on a Canadian exchange or by acquiring a Canadian reporting issuer through a share exchange transaction, may generally satisfy their ongoing continuous disclosure obligations in Canada by filing their home jurisdiction documents.

The CSA has adopted various instruments modeled on U.S. Sarbanes-Oxley legislation. These include a national instrument on auditor oversight, a national instrument requiring CEO and CFO certifications and a national instrument on audit committees. In addition, a national instrument and a national policy have been adopted on corporate governance. The latter sets out guidelines for corporate governance; the former requires issuers to disclose, on an annual basis, their corporate governance practices.

Canadian and U.S. securities regulatory authorities have implemented a multi-jurisdictional disclosure system (MJDS) that enables securities of large U.S. issuers to be offered to the public in Canada using a U.S. registration statement that has been reviewed only by the U.S. Securities and Exchange Commission (SEC). Corporations with securities listed on a Canadian stock exchange are subject to the rules and regulations of that exchange.

Mergers & Acquisitions

There are three commonly used methods to acquire a public company in Canada: a take-over bid, a plan of arrangement and a merger/amalgamation.

Take-Over Bids (Tender Offers)

Harmonized provincial and territorial securities laws regulate the conduct of public take-over bids. A public take-over bid is defined generally as an offer made to a person in a Canadian province or territory to acquire voting or equity securities of a class of securities of a target company which, if accepted, would result in the bidder (together with persons acting in concert with the bidder) owning 20% or more of the outstanding securities of that class of securities. A take-over bid must offer identical consideration to all shareholders, with no “collateral benefit” to any shareholder permitted. The bid must be open for acceptance for at least 105 days, subject to abridgement to no less than 35 days with the agreement of the target company in a friendly transaction or where

another abridged bid or a going-private transaction has been announced. A take-over bid is subject to a mandatory tender condition that a minimum of more than 50% of all outstanding target securities owned or held by persons other than the bidder and its joint actors be tendered and not withdrawn before the bidder can take up any securities under the take-over bid. The take-over bid must also be extended by the bidder for at least an additional 10 days after the bidder achieves the minimum tender condition and all other terms and conditions of the bid have been complied with or waived.

The bidder must provide shareholders of the target company with a take-over bid circular containing prescribed information about the offer, including prospectus level disclosure about the bidder (including pro forma financial statements) if the bidder's securities form part of the offered consideration. The directors of the target company must respond by sending a directors' circular to shareholders that includes the board's recommendation as to whether the shareholders should accept the offer or, if the board declines to make a recommendation, an explanation of why no recommendation has been made. Both the take-over bid circular and the directors' circular must be translated into French if the take-over bid is being made in Québec (unless a de minimis or other exemption from the translation requirement is obtained in Québec).

Certain take-over bids are exempt from compliance with the foregoing requirements. These include: transactions involving the acquisition of securities from not more than five shareholders of the target company, provided that the price paid does not exceed 115% of the prevailing market price; normal course purchases on an exchange not exceeding 5% of the issuer's outstanding securities in a 12-month period; the acquisition of securities for which there is no published market of a company that is not a reporting issuer and has fewer than 50 shareholders exclusive of current or former employees; and foreign take-over offers where, among other things, the number of shares held beneficially by Canadian shareholders is reasonably believed to be less than 10% of the total outstanding shares and Canadian shareholders are entitled to participate on terms at least as favourable as other shareholders.

Generally, where a bidder successfully acquires 90% or more of the voting shares of a target company (other than shares held by the bidder or its affiliates prior to making the offer) pursuant to a public take-over bid made

to all shareholders, the corporate statutes provide that shares held by those who did not tender to the offer can be acquired by the bidder at the same price as under the offer pursuant to a statutory compulsory acquisition procedure. Where this procedure is not available because the 90% threshold has not been reached, but at least 66 $\frac{2}{3}$ % of the outstanding shares have been acquired under the bid, the shares of the remaining shareholders who did not tender their shares to the offer may also generally be acquired by way of a second step squeeze-out merger/amalgamation at the same price as under the offer.

Notice is required to be given to the market pursuant to “early warning” disclosure requirements in the event of an acquisition of equity or voting securities representing 10% or more (5% where a take-over bid has already been made) of a class of securities of a target company (including shares beneficially owned by the purchaser and its joint actors). The purchaser must give this notice to the market by issuing a press release no later than the opening of trading on the next business day and filing, within two business days, an “early warning” report in the prescribed form (which must include disclosure of the purpose for the transaction, including plans or future intentions which the purchaser may have which relate to or would result in certain enumerated corporate actions with respect to the target company). There is also a cooling-off period that prohibits further purchases until the expiry of one business day after the report is filed. A further press release is required to be issued and an additional report filed if there is a change in a material fact contained in a prior report, upon an increase or decrease in ownership or control of over 2% or more of the class of securities or upon a decrease of ownership or control to less than 10% of the class of securities.

Plans of Arrangement

The corporate statutes in Canada generally provide that companies can be merged and their outstanding securities can be exchanged, amended or reorganized through a court-supervised process known as a plan of arrangement. Currently, acquisitions of Canadian public companies are most often completed by way of a plan of arrangement.

The target company will apply ex parte for an initial court order directing the target company to seek the approval of its shareholders and fixing certain procedural requirements for obtaining such approval. A management information circular will be prepared by the target company and mailed to its shareholders containing prescribed information, including prospectus level

disclosure about the acquiror (including pro forma financial statements) if the acquiror's securities form part of the offered consideration. Unlike with a take-over bid circular and directors' circular, this management information circular is not required to be translated into French, although a French language version is often provided where there are a significant number of shareholders in Québec. Plans of arrangement require both shareholder approval (generally by a special majority vote of 66 2/3% of votes cast at the shareholder meeting) and final court approval (based on compliance with the initial court order and a determination by the court as to the substantive fairness of the arrangement). A plan of arrangement provides maximum flexibility to implement various structuring aspects of a transaction that might not be possible to implement under a take-over bid or merger/amalgamation. A plan of arrangement will generally also enable the issuance of securities of the acquiror to U.S. holders of the target company without requiring such securities to be registered in the U.S.

If the acquiror is a TSX-listed company and is issuing shares under a take-over bid or plan of arrangement that would cause dilution to its shareholders of more than 25%, it will be required by the TSX to seek approval from its own shareholders prior to completing any such transaction.

Mergers/Amalgamations

Where an acquiror believes that it is highly likely that the holders of over two-thirds of the outstanding target company shares will support the transaction, but that it is unlikely to achieve a 90% tender in a take-over bid and there is no need for the structuring flexibility offered by a plan of arrangement, the acquiror may prefer to propose a going-private merger. Pursuant to a going-private merger, the target company will be amalgamated with an affiliate of the acquiror and all of the target company's shareholders will exchange their shares of the target for whatever consideration is being offered (either cash or shares of the acquiror). A shareholder meeting of the target company is needed to approve the merger, generally by the vote of shareholders holding 66 2/3 % of the votes cast at the meeting. This transaction has the advantage in these circumstances of achieving 100% ownership of the target by the acquiror in a one-step transaction, instead of the two steps required pursuant to a take-over bid followed by a squeeze-out merger, and unlike with a plan of arrangement, the merger/amalgamation is not subject to a court-supervised process.

Related-Party Transactions

The securities laws of certain Canadian provinces contain complex rules governing transactions between a public company and parties that are related to it (i.e., major shareholders, directors and officers) and that are of a certain threshold size. These rules are designed to prevent related parties from receiving a benefit from a public company to the detriment of its minority shareholders without their approval.

A take-over bid made by a related party of the target company (i.e. an “insider bid”) will engage these special rules. In particular, a formal valuation of the target company’s shares prepared by an independent valuator under the supervision of an independent committee of the target company’s board will generally be required.

If the acquiror in a plan of arrangement or merger/amalgamation is related to the target company or if a related party is receiving a “collateral benefit,” these rules will also generally apply. In particular, approval by a majority of the minority shareholders (i.e., shareholders unrelated to the acquiror or any related party who receives a collateral benefit) will generally be required in addition to the shareholder approval required by applicable corporate law. Where the related party is acquiring the target company or is a party to a concurrent “connected transaction” of a certain threshold size, then a formal valuation of the target company shares, prepared by an independent valuator under the supervision of the target company’s board or an independent committee of directors, may be required.

Private Equity

Private equity funds are active participants in merger and acquisition transactions in Canada. Set forth below is a brief discussions on some legal topics that are particular to private equity funds.

A private equity fund that proposes to distribute its securities to persons located in Canada must either qualify the distribution pursuant to a prospectus prepared and filed in accordance with applicable Canadian securities regulatory requirements or it must conduct the distribution in reliance upon a prospectus exemption, such as the private-issuer exemption. The private-issuer exemption is available for a distribution of securities by a private issuer to a prescribed class of persons who purchase the securities as principal. By relying on this exemption, a private issuer can raise any amount of capital through any number of financings with no prospectus requirement.

When forming a private equity fund in Canada, consideration should be given to the application of dealer registration, adviser registration and investment fund manager registration requirements to the establishment and operation of the fund. A person is required to register as a dealer under Canadian securities laws if it engages in, or holds itself out as engaging in, the business of trading securities. A person is required to register as an adviser if it engages in, or holds itself out as engaging in, the business of advising others as to the investing in, or the buying or selling of, securities. A person is required to register as an investment fund manager if it acts as the manager of an investment fund. Depending on the activities to be undertaken by a private equity fund, it can be structured in a such a manner so that it is exempt from dealer registration, adviser registration and investment fund manager registration requirements.

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AND INVESTMENT
FUND MANAGER
REGISTRATION
REQUIREMENTS TO
THE ESTABLISHMENT
AND OPERATION OF
THE FUND.

Private equity investments in Canada are similar to traditional mergers and acquisitions. When acquiring public companies, the legal analysis discussed above with respect to take-over bids, plans of arrangement and mergers/amalgamations is applicable. As most investments by private equity investors are leveraged with debt, special consideration should be paid to the financing of the acquisition (particularly reducing or removing financing conditions that are incremental to the conditions in the principal purchase agreement). See [Bank Loans and Other Loan Capital](#).

Private equity funds may acquire majority or minority interests and therefore shareholder agreements (or similar operating agreements, such as partnership agreements) become increasingly important for governance, control, capital contributions, distributions and liquidity rights or restrictions (such as tag-along rights, drag-along rights, rights of first refusal, rights of first offer and ownership restrictions).

As private equity investments are made for a set time frame, tax structuring is very important to ensure an efficient structure is utilized, particularly for cross-border investments by U.S. private equity funds. Similar to the U.S., there are many exit strategies that can be utilized by private equity funds

in Canada. Typical exit strategies exercised in Canada are a sale to (i) the current management through a management buyout, (ii) other shareholders through share/unit transfer rights set out in the shareholder/partnership agreement, (iii) a third party through either a private sale or a controlled auction, or (iv) the public through an IPO.

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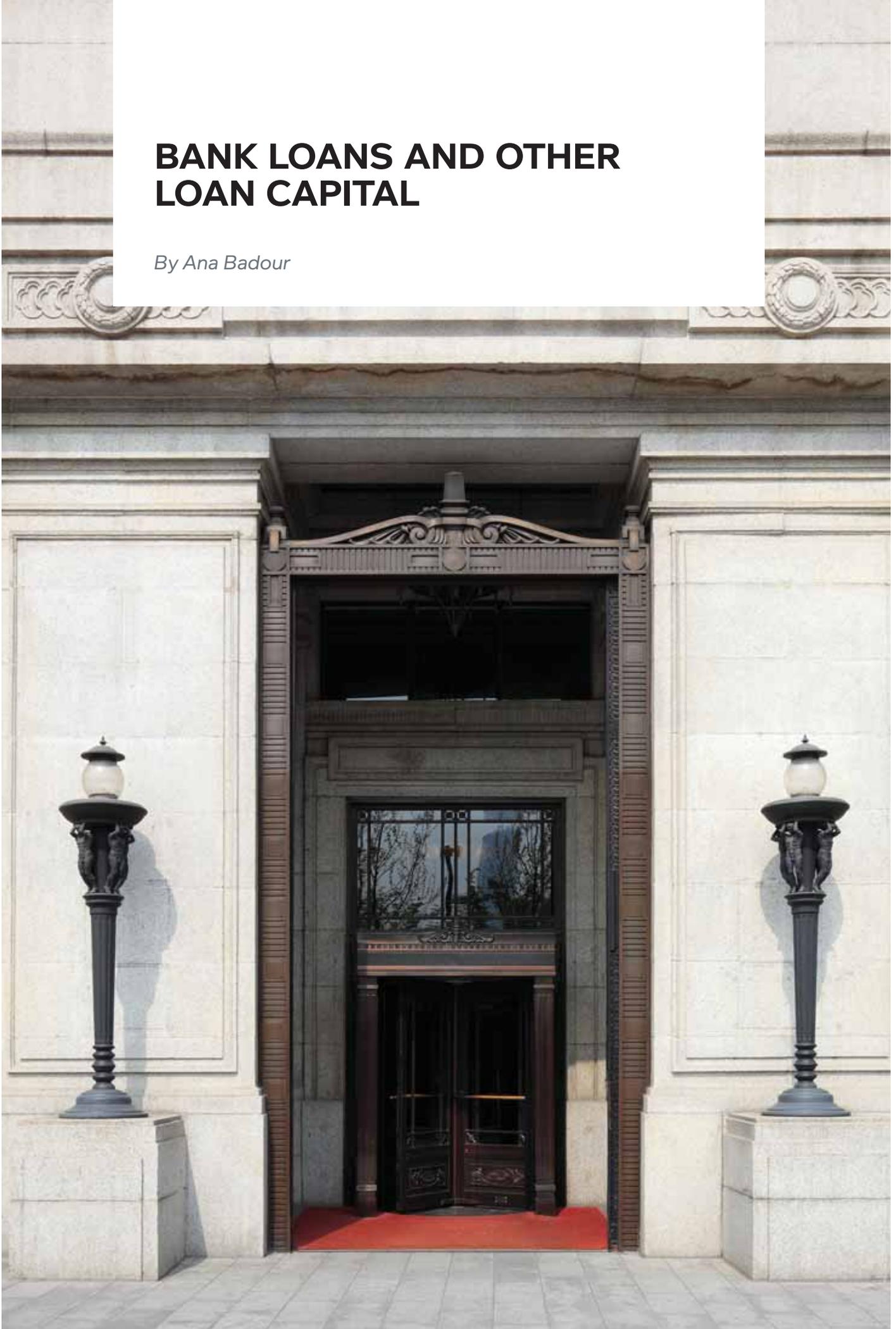
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BANK LOANS AND OTHER LOAN CAPITAL

By Ana Badour



BANK LOANS AND OTHER LOAN CAPITAL

Bank loans in Canada are readily available from sophisticated domestic banks as well as from non-Canadian foreign bank subsidiaries and Canadian branches of non-Canadian banks. The Canadian banking system is well regulated and Canadian banks are well capitalized. The Canadian banking system won international praise for its resiliency in the recent global banking crisis and bank credit continues to be available in Canada. Canada also has competitive non-bank lenders that are particularly active in the asset-based loan, mezzanine debt and project finance markets. As well, there are two federal government financial institutions that provide financing — the Business Development Bank of Canada, which offers financing to small- and medium-sized businesses, and Export Development Canada, which is specifically targeted to assist Canadian exporters with financing.

Floating-rate loans are often indexed to a “prime rate” set by a Canadian bank on a periodic basis and based on the rate announced weekly by Canada’s central bank, the Bank of Canada. Fixed-rate loans are typically priced off long-term Government of Canada bond rates. Other forms of borrowing and interest rate pricing (such as LIBOR loans and bankers’ acceptances) are also offered. Borrowers generally incur some fees associated with such transactions. These typically include legal costs, commitment and processing fees and other charges.

Short- and long-term loans in Canada can be unsecured or secured against the real or personal property of the borrower. Lenders may insist that unsecured loans be supported by a parent company guarantee, or by a “negative pledge,” where the borrower agrees (with some exceptions) not to grant security over its assets. All provinces provide an electronic registry for the recording of security interests over personal property. All provinces also have established land registry systems to record interests in real property. See [Real Property](#).

Canada has no currency restrictions. Loans are available in multiple currencies, but are most commonly denominated in Canadian and U.S. dollars. Due to the competitive nature of Canada’s loan markets, interest rates are often lower for comparable credits compared to other jurisdictions, particularly the U.S. Where Canadian tax rates are higher than those of a foreign jurisdiction, the benefits of deducting interest

expenses for loans in Canada are correspondingly higher. There are other tax advantages when borrowing in Canada. For example, thin-capitalization rules do not apply to arm's-length, third-party debt to limit the deductibility of interest. In addition, Canadian withholding tax will generally not apply to interest (other than certain types of interest) paid on arm's-length, third-party debt. Finally, Nova Scotia, Alberta and British Columbia have unlimited liability companies. These are hybrid entities that create tax-planning opportunities for U.S. cross-border transactions. See [Taxation](#).

A number of federal and provincial programs and agencies provide grants and/or loans to Canadian businesses. The availability of government assistance will depend upon a number of factors. These include the location of the proposed investment, the number of jobs that will be created, the export potential for the product or service, whether the investment would be made without the government assistance and the amount of equity the owners of the business are investing. Foreign ownership of a corporation does not generally preclude the availability of government assistance programs.

A NUMBER OF
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All provinces and territories in Canada (other than Prince Edward Island) have *Securities Transfer Act* (STA) legislation. These acts govern, among other matters, the transfer of securities and other investment property and work with personal property security legislation to regulate the perfection of security interests in securities and other investment property, including securities in uncertificated form. The STA legislation was modelled after Revised Article 8 of the Uniform Commercial Code of the United States. This approach was taken so that there could be a more consistent regime governing the transfer of securities and other investment property cross-border between Canada and the U.S., as well as a uniformity of approach across Canada.

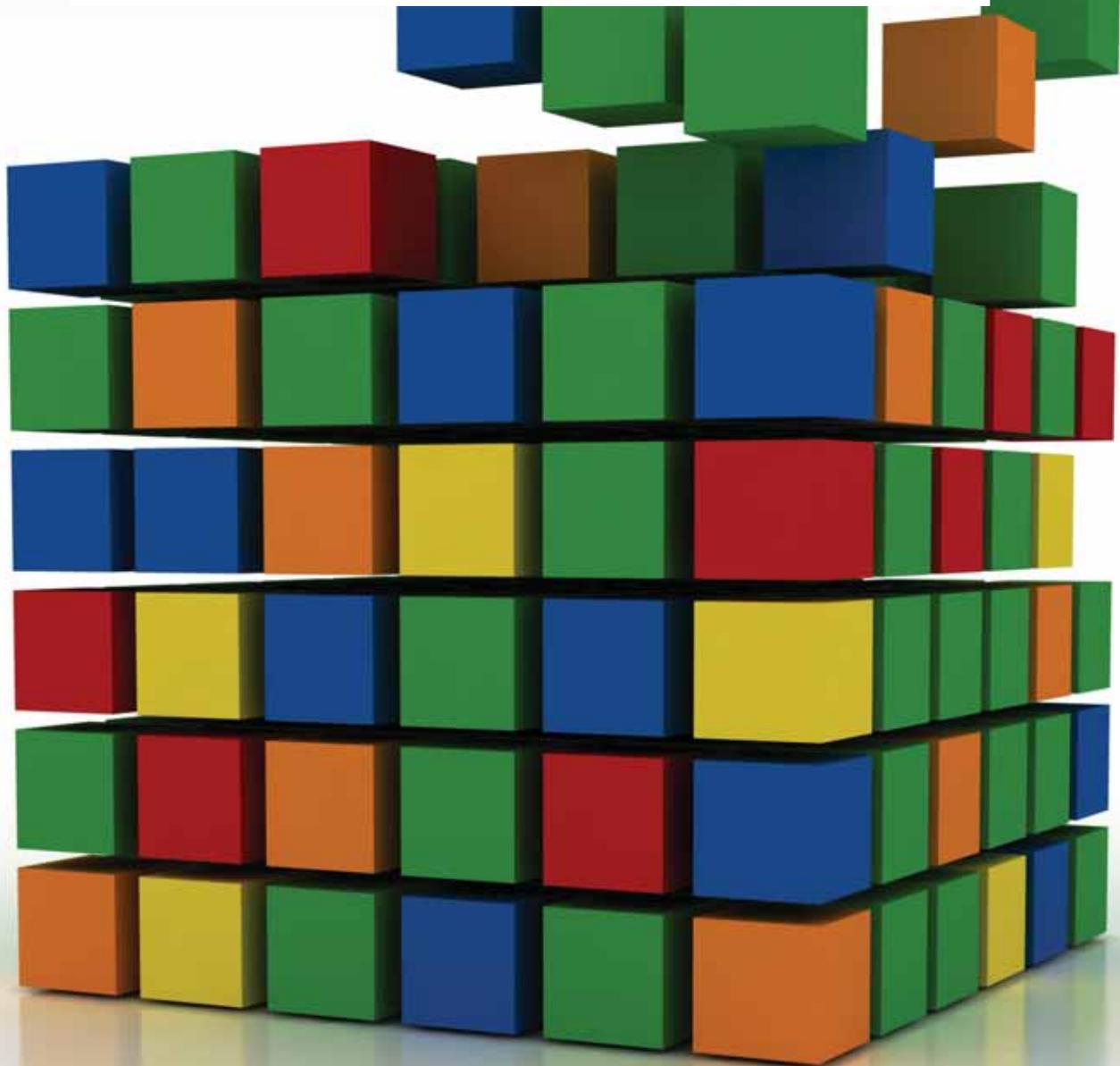
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By Ron Mar



TAXATION

Income Tax

Income taxes are imposed at the federal level, as well as by the various provinces and territories. Federal income tax is levied on the worldwide income of every Canadian resident and, subject to the provisions of any applicable income tax convention, levied on the Canadian source income of every non-resident who is employed in Canada, who carries on business in Canada or who realizes a gain on the disposition of certain types of Canadian property. Generally, a province or territory will also impose an income tax on persons resident, or carrying on business, in the provincial or territorial jurisdiction. Certain provinces also tax non-residents on gains realized on the disposition of certain types of Canadian property situated in the province.

INCOME TAXES ARE IMPOSED AT THE FEDERAL LEVEL, AS WELL AS BY THE VARIOUS PROVINCES AND TERRITORIES.

The combined federal and provincial rate of income tax imposed on corporations varies widely depending on the nature and size of the business activity carried on, the location of the activity and other factors. In 2016, the highest combined rate of income tax applicable to non-Canadian-controlled private corporations was approximately 31%, while the lowest rate applicable to the ordinary business profits of such a corporation was approximately 25%. Tax credits and other incentives are also available in certain circumstances to reduce the effective tax rates.

Individuals are subject to graduated rates. These rates depend on the type of income, the province of residence and other factors. In 2016, the highest marginal combined federal and provincial rate of tax on taxable income of an individual was approximately 54%, while the lowest top marginal combined federal and provincial rate was approximately 48%.

Canada also levies a 25% withholding tax on the gross amount of certain types of Canadian source income of non-residents.

Payments subject to withholding tax include dividends, certain types of interest, rents, royalties and certain management or administration fees. Withholding tax can also apply to payments made between non-residents if the payments relate to a Canadian business or to certain

types of Canadian property. Generally, there is no Canadian withholding tax on interest paid by a Canadian resident to arm's-length non-residents of Canada (other than interest that is contingent on the use of or production from property in Canada, or interest that is computed by reference to revenue, profit or cash flow). An applicable income tax convention may reduce or eliminate the relevant rate of withholding tax. While withholding taxes are imposed on the non-resident recipient, the payer is responsible for withholding the tax from amounts paid to the non-resident and for remitting the withheld amount to the government.

The following sections highlight some of the principal tax matters that should be considered in deciding whether to carry on business in Canada through a Canadian subsidiary or as a branch operation.

Carrying on Business Through a Canadian Subsidiary

A corporation incorporated in Canada will be resident in Canada and subject to Canadian federal income tax on its worldwide income. As noted above, income of the subsidiary may also be subject to provincial and/or territorial income tax.

The combined federal and provincial/territorial income tax rate to which the subsidiary is subject will depend on the provinces and territories in which it conducts business, the nature of the business activity carried on and other factors.

A CORPORATION INCORPORATED IN CANADA WILL BE RESIDENT IN CANADA AND SUBJECT TO CANADIAN FEDERAL INCOME TAX ON ITS WORLDWIDE INCOME.

The calculation of the subsidiary's income will be subject to specific rules in the *Income Tax Act* (Canada) and any applicable provincial or territorial tax legislation. Income includes 50% of capital gains.

Expenses of carrying on business are deductible only to the extent they are reasonable. Neither federal nor provincial/territorial income tax is deductible in computing income subject to the other level of tax. Generally, dividends may be paid between related Canadian corporations on a tax-free basis. Groups of corporations may not, however, file consolidated income tax returns. Accordingly, business losses of the subsidiary will not be directly available, for Canadian tax purposes, to offset income of an affiliated company. However, it may be possible to enter



into intra-group income balancing transactions in certain situations.

Transactions between the subsidiary and any person with whom it does not deal at arm's length, including its parent corporation, will generally need to be effected for tax purposes on a "fair-market-value" basis. Certain contemporaneous documentation may also be required under Canada's transfer pricing rules.

The debt/equity structure of the subsidiary will be subject to thin capitalization rules, which operate to deny the deduction of interest payable to specified non-residents by the subsidiary to the extent that the subsidiary is "thinly capitalized." The subsidiary is considered to be thinly capitalized where the amount of debt owed to the non-resident shareholder is more than 1.5 times the aggregate of the retained earnings of the corporation, the corporation's contributed surplus that was contributed by the non-resident shareholder and the paid-up capital of the shares owned by the non-resident shareholder. Interest that is not deductible because of the thin-capitalization rules is deemed to have been paid as a dividend and is subject to withholding tax as such.

In some cases, the subsidiary may be established as an unlimited liability company (ULC) under the laws of Alberta, British Columbia or Nova Scotia. This may be done to access the advantages of both a branch and a subsidiary operation for a U.S. parent corporation. The reason is that while a ULC is treated as a corporation for Canadian tax purposes, we understand that it may be treated as a branch for U.S. tax purposes. U.S. tax advice should be obtained on this point and certain provisions in the *Canada-United States Income Tax Convention (1980)* (U.S. Convention) should also be considered, as in certain cases they may eliminate the tax benefits associated with such hybrid entities or give rise to adverse tax consequences without proper tax planning.

The withholding tax regime, briefly described above, will apply to the subsidiary's payments to non-residents, including interest and dividends. In the case of payments by a subsidiary to a U.S.-resident parent, the U.S. Convention eliminates the withholding tax on interest (other than certain types of interest, such as interest determined with reference to profits or cash flow or to a change in the value of property). The benefits of the U.S. Convention are, subject to some exceptions, available only to certain "qualifying persons," as defined in the "Limitation on Benefits"



provisions of the U.S. Convention.

In October 2015, the Organization for Economic Co-operation and Development (OECD) released the package of final reports from its base erosion and profit shifting (BEPS) project. The 2016 Canadian federal budget reaffirmed Canada's commitment to move forward with a number of initiatives to address BEPS. These initiatives include the introduction of country-by-country reporting for large multi-national enterprises in taxation years beginning after 2015, the release of legislative proposals to implement the OECD common reporting standard in respect of financial accounts held by non-residents and Canada's ongoing participation in the development of a multilateral treaty to combat tax treaty abuse. Negotiations in respect of this multilateral treaty were concluded on November 24, 2016.

Carrying on Business in Canada Through a Branch Operation

Subject to the provisions of any applicable income tax convention, a non-resident corporation will be subject to Canadian income tax on business profits from carrying on business in Canada through a branch operation. A non-resident carrying on business in Canada must also pay a branch tax. The branch tax essentially takes the place of the withholding tax that would have been payable on dividends paid by a Canadian subsidiary carrying on the business. Because the withholding tax is imposed on dividends when they are paid and the branch tax is imposed when the profits are earned, it may be favourable in some circumstances to establish a subsidiary by the foreign business rather than a branch.

If the non-resident of Canada is: (i) a resident of a jurisdiction that has entered into an income tax convention with Canada; and (ii) entitled to the benefits of that convention, generally the non-resident will be taxable on its business profits earned in Canada only to the extent that such profits are attributable to a permanent establishment situated in Canada. Under certain of Canada's income tax conventions, a non-resident may have a significant business presence in Canada without being deemed to have a permanent establishment in Canada. As noted above, in the case of the U.S. Convention, treaty benefits are generally available only to U.S. residents who are qualifying persons. A thorough review of the applicable convention is crucial in determining the relative merits of establishing a branch or a subsidiary business in Canada.



Generally, the income of the branch will be computed under the same rules that are applicable to the computation of the subsidiary's income, including the thin-capitalization rules.

If the Canadian operation will incur start-up losses, it may be possible for the non-resident to deduct these losses in computing its income for its domestic tax purposes if the Canadian business is carried on through a branch operation. When the Canadian business becomes profitable at a future time, it may be possible to transfer the branch operation to a newly incorporated Canadian subsidiary with no significant adverse Canadian income tax consequences.

Foreign Currency Controls and Repatriation of Income

There are no foreign exchange or currency controls in Canada, nor are there exchange restrictions on borrowing from abroad, on the repatriation of capital or on the ability to remit dividends, profits, interest, royalties and similar payments from Canada.

As noted above, there may be a withholding tax payable on the repatriation of certain types of income, including interest, dividends and royalties.

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By Wendy Brousseau



SALES AND OTHER TAXES

The federal government and most of the provinces have sales tax regimes.

Federal Goods and Services Tax

The federal government imposes a 5% multi-stage, value-added tax called the Goods and Services Tax (GST), which applies to taxable supplies (e.g., supplies of most types of property, including intangibles and real property as well as services) made in Canada. Certain types of property and services, including most financial services, are exempt for GST purposes and certain supplies, defined as zero-rated supplies, which include exports, are taxed at a rate of 0%.

GST is also levied on taxable goods imported into Canada, and there are self-assessment obligations on certain purchasers of imported services and intangibles.

The GST is a value-added tax and it applies at each stage of the production and distribution chain. Generally, businesses making taxable supplies of property and services must register for, collect and remit the applicable GST on their supplies made in Canada. While GST applies to every transaction throughout the distribution chain, it is imposed on the ultimate consumer; accordingly, businesses involved in commercial activities are entitled to recover the GST they pay through an input tax credit mechanism.

It is not always easy to determine whether supplies made to or by non-residents of Canada attract GST; accordingly, consideration of specific rules is required. For example, whether GST applies to recent e-commerce developments requires close examination.

Harmonized Sales Tax

Five provinces currently have harmonized their provincial sales taxes with the GST: Ontario, Nova Scotia, New Brunswick, Newfoundland and Labrador and Prince Edward Island. In those provinces, the Harmonized Sales Tax (HST), made up of the federal 5% GST component and a provincial component that varies from 8% to 10%, applies on the same basis as the GST. Accordingly, the discussion above regarding the GST also generally applies to the HST. It should be noted, however, that Ontario and Prince Edward Island have implemented temporary restrictions on the ability of certain large businesses to claim input tax credits with respect to

the provincial component of the HST on certain specified supplies.

Once it is determined that a supply is made in Canada, it must then be determined whether the supply is made in a harmonized province and therefore subject to HST. Detailed rules apply to determine whether a supply is made in a harmonized province, which vary depending on the type of supply at issue.

Effective January 1, 2013, the Province of Québec harmonized the Québec sales tax (QST) with the federal GST; however, unlike other harmonized provinces, the QST is a separate tax imposed under provincial legislation. As of January 1, 2016, the QST rate is 9.975%.

Provincial Sales Tax

British Columbia, Saskatchewan and Manitoba currently impose a single incidence provincial sales tax (PST) (in addition to the 5% GST) on end-users of most tangible personal property and certain services in their respective provinces. General rates of PST vary from 5% to 8%.

Alberta does not impose a PST; accordingly, only the 5% GST applies in Alberta.

Provincial Payroll Taxes

Manitoba, Ontario and Newfoundland and Labrador levy an employer payroll tax that is calculated based on a percentage of remuneration paid in the province (subject to a certain threshold). Québec also levies a similar employer tax in the form of contributions to a provincial health services fund.

Other Taxes

The federal government imposes other taxes, including customs duties and excise taxes. Various provinces also impose other taxes, including provincial capital taxes (often limited to financial institutions), fuel, gas and insurance taxes and real estate transfer taxes. Most municipalities impose annual taxes on the ownership of real estate. In 2008, the City of Toronto enacted a municipal land transfer tax.

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MANUFACTURE AND SALE OF GOODS

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By Chris Hubbard



MANUFACTURE AND SALE OF GOODS

Regulations and Product Standards

The *Canada Consumer Product Safety Act* came into force in 2011. This legislation prohibits the manufacture, importation or sale of consumer products that pose a “danger to human health or safety.” It also expands the federal government’s powers to regulate, inspect, test and recall consumer products and creates a wide array of related offences and penalties. Manufacturers, importers and retailers need to comply with stringent requirements to maintain required records concerning their products and report incidents.

In addition, federal statutes such as the *Food and Drugs Act*, the *Hazardous Products Act*, the *Consumer Packaging and Labelling Act* and the *Textile Labelling Act* (and regulations made under them), as well as a range of provincial regulations, can directly affect business operations in Canada, since goods that fail to comply with the statutory and regulatory requirements may not lawfully be sold.

For example, regulations made under the *Hazardous Products Act* cover items as diverse as cellulose insulation, mattresses, booster cushions, tents, pacifiers and children’s sleepwear, and also describe product standards that must be met before such products can lawfully be sold in Canada. Regulations under the *Food and Drugs Act*, the *Consumer Packaging and Labelling Act*, and the *Textile Labelling Act* contain detailed provisions concerning a wide range of goods and products.

Failure to comply with statutory or regulatory requirements can result in criminal prosecution, civil liability — or both. The Standards Council of Canada (SCC) is a federal Crown Corporation with a mandate to promote efficient and effective development and application of standards. It carries out a variety of functions designed to ensure the effective and co-ordinated operation of standardization in Canada. The SCC oversees Canada’s National Standards System, a network of more than 400 organizations and 15,000 volunteers involved in the development, promotion and implementation of standards.

The National Standards System does not itself develop standards or

**FAILURE TO COMPLY
WITH STATUTORY
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LIABILITY — OR BOTH.**



verify the conformity of products or services to standards, but accredits those organizations that do develop standards or verify the conformity of products or services to standards, such as the Canadian General Standards Board (CGSB), a federal government organization, and the Canadian Standards Association (CSA), an independent non-profit organization.

The CSA develops standards and tests products to certify that the products meet the CSA's published standards. CSA certification is mandatory under government regulation for some products (e.g., toys that are operated electrically) and voluntary for others. The CSA certification mark ensures that a product meets a basic level of conformity to the product features deemed essential by the published standard.

Once a standard is published by the CSA, product manufacturers may elect to have their products tested by either the CSA or another approved certification laboratory, in order to obtain CSA certification. After certification, CSA representatives conduct regular, unannounced, on-site visits to manufacturing locations to ensure that the products continue to meet CSA standards. Where CSA certification is mandatory, manufacturers may be required by inspectors appointed under the *Hazardous Products Act* to pull or recall non-conforming products.

Consumer Protection

The *Canada Consumer Product Safety Act* gives the federal government authority to deal with products that may pose a danger to human health and safety. Any safety incidents involving the product must be reported. Manufacturers, importers and retailers are also required to report recalls or similar measures involving the product anywhere in the world. The government also receives reports directly from consumers. Such reports can lead to inspections, requirements for product testing or product recalls. The government may also conduct an inspection in the absence of a report.

Federal and provincial governments have also enacted specific legislation that prohibits deceptive or unfair business practices (including misleading advertising), imposes sanctions on businesses engaging in such conduct and provides additional protection for Canadian consumers. Class actions, which are becoming increasingly popular as a consumer protection tool in Canada, are often based on alleged breaches of the *Competition Act* or provincial consumer protection statutes.

To ensure that consumers are not misled, the *Competition Act* contains important provisions concerning advertising of products and promotion of business interests. Making a representation to members of the public that is false or misleading in a material respect, and making this representation knowingly or recklessly, is punishable by substantial fines and even jail terms. False or misleading statements can also lead to liability to consumers for monetary damages. See [Competition Law](#).

Provincial statutes such as Ontario's *Consumer Protection Act, 2002* are also aimed at providing protection for consumers in their dealings with corporations and businesses. These statutes provide consumers who have been harmed by deceptive or unconscionable business practices with a variety of statutory remedies, including damages, punitive damages and rescission of agreements. Specific, consumer-friendly contract terms may be mandated. Other contract terms, such as waivers of implied statutory warranties or terms requiring any disputes to be submitted to binding arbitration or purporting to ban a consumer from initiating or participating in a class action, may be unenforceable against consumers.

For a discussion of the application of consumer protection laws to online commerce, See [Information Technology — Consumer Protection — Internet Agreements](#).

Product Liability

Any business involved in the design, manufacture, distribution or sale of products is a potential defendant in a product liability claim. Claims may be based on breach of a contract or on negligence; sometimes they are based on both. Product liability claims are also popular subjects for class action litigation in Canada. See [Dispute Resolution — Class Actions](#).

Provincial statutes such as the Ontario *Sale of Goods Act* provide that warranties of fitness for purpose and of merchantable quality are implied in contracts between buyers and sellers for the sale of goods. Parties can contract out of the implied terms, except in the case of consumer or retail sales. A buyer of a product purchased from someone other than the product's manufacturer may not rely on the implied warranties under the *Sale of Goods Act* in a claim against the manufacturer. However, the buyer may be able to assert a contract claim against the manufacturer for breach of warranty if a collateral warranty was provided by the manufacturer and that warranty is found to be a representation inducing the sale.

Contract claims are strict liability claims. Absence of negligence is not a defence.

Often, no contractual relationship will exist between a product manufacturer and the ultimate purchaser or user, and as a result, many product liability claims are tort-based claims alleging negligence.

Claimants must prove that:

- a duty of care was owed to them;
- the product was defective;
- there was a failure to meet the applicable standard of care; and
- the claimants suffered damage caused by the defendant's negligence.

The mere presence of a defect in a product can justify an inference of negligence in the manufacturing process. Where a product is not necessarily defective, but is or could be dangerous, a product liability claim may be based on a failure to provide adequate warnings concerning the use of the product and/or a failure to warn of risks associated with use of the product. The duty to warn is a continuing duty and can be triggered by information that becomes known after the product is in use.

In defining the standard of care, Canadian courts will assess the reasonableness of the defendant's conduct with regard to industry standards. However, if the industry standard is inadequate, a defendant may be found negligent despite conforming to it. Although conformity with regulatory standards can be highly relevant to the assessment of reasonable conduct in a particular case, meeting those standards alone will not necessarily absolve a manufacturer of liability.

Generally, a manufacturer's duty is to take reasonable care to avoid causing either personal injury or damage to property. However, where a product has not in fact caused any physical injury or damage to property, a person may still recover damages for economic losses (e.g., the cost of repairing a defective product) where the failure to take reasonable care resulted in defects that pose a real and substantial danger of actual physical injury or property damage.

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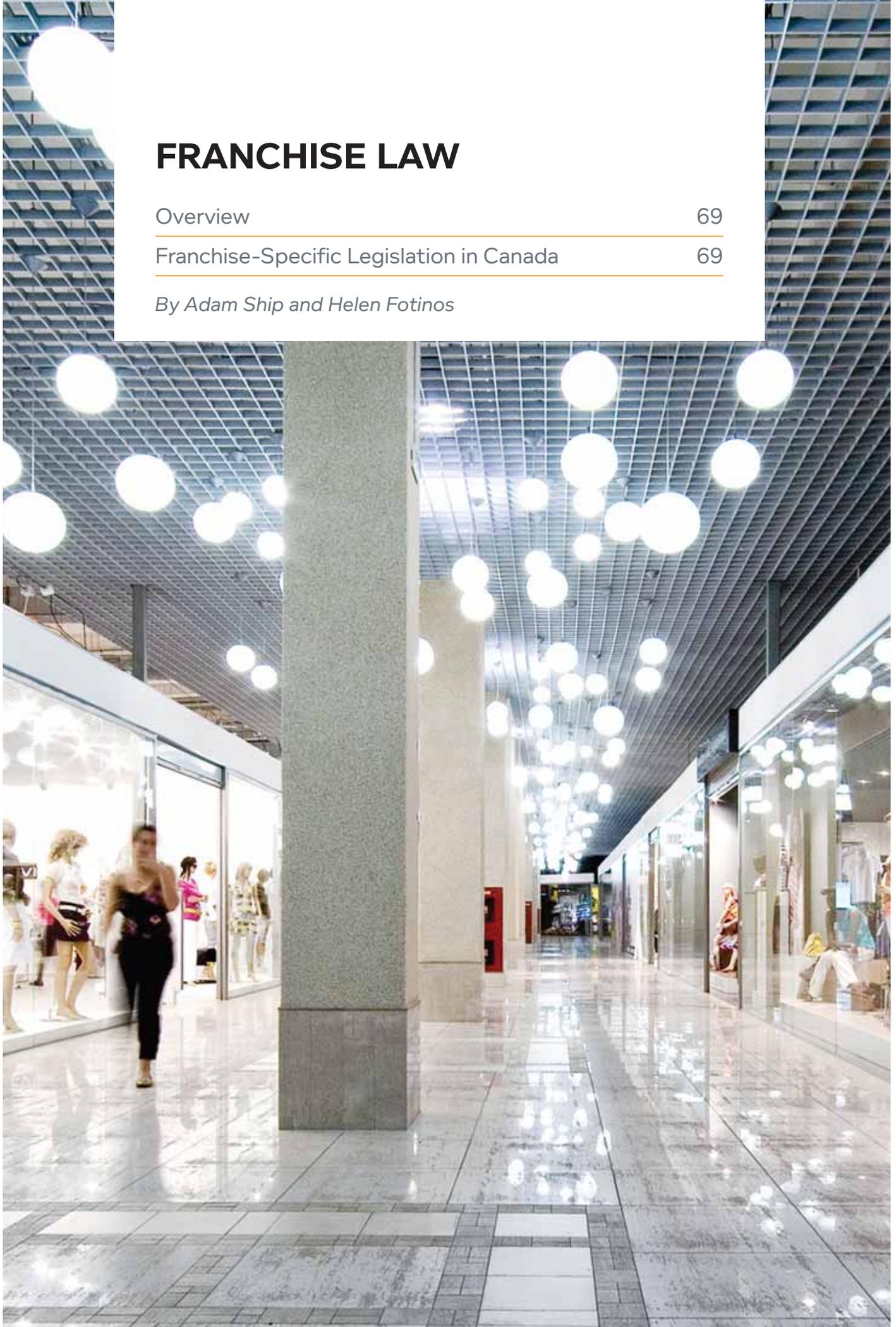
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FRANCHISE LAW

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By Adam Ship and Helen Fotinos



FRANCHISE LAW

Overview

The franchise business model is commonly used in Canada and has experienced significant growth over the last decade. According to the Canadian Franchise Association, the leading national franchise industry group, approximately 1,300 franchised brands operate in Canada through 78,000 franchised units, employing more than one million Canadians and generating approximately C\$68 billion in annual revenue. Franchising is common across many industries in Canada, including quick service restaurants, hospitality, home care, automotive retailing, telecommunications retailing, education and beauty/cosmetics.

Foreign franchisors can expand into Canada with or without opening a brand office or incorporating a local subsidiary. These decisions will be driven in large part by tax considerations.

Foreign franchisors often pursue expansion in Canada through master franchising or area development arrangements with Canadian companies that have a track record of successfully bringing foreign brands to the Canadian market. These structures essentially involve the foreign franchisor delegating a number of the roles that it usually plays in its domestic market to the Canadian master franchisee or area developer. A master franchisee will have territorial rights to grant sub-franchises on its own account and will often provide ongoing support to local sub-franchisees. The rights of an area developer, by contrast, are limited to opening multiple units directly or through an affiliate.

Foreign franchisors can also directly franchise in Canada. This involves the foreign franchisor (or its Canadian subsidiary) entering into franchise agreements with individual franchisees for specific units in Canada.

Several areas of Canadian law interact with the franchise business model in specific ways. Below, we focus on the most direct form of legal regulation of franchising in Canada: franchise-specific legislation.

Franchise-Specific Legislation in Canada

The jurisdiction to regulate franchising is held by Canada's provinces. To date, six provinces have enacted franchise-specific legislation: Ontario, British Columbia, Alberta, Manitoba, New Brunswick and Prince Edward



Island (Statutory Provinces).

While there are subtle differences between the franchise statutes found in the Statutory Provinces, they are largely consistent and focus on pre-sale disclosure. It is common for franchisors in Canada to use national Franchise Disclosure Documents (FDDs) where they grant franchises in more than one Statutory Province. Many franchisors will also voluntarily provide their national FDD to prospective franchisees in non-Statutory Provinces.

A franchisor granting franchises in one of the Statutory Provinces must provide a prospective franchisee with an FDD not less than 14 days before the earlier of either (i) the signing of the franchise agreement; or (ii) the payment of consideration by the franchisee.

FDDs must contain all material facts, which includes both facts that are specifically prescribed in the regulations passed under the applicable franchise statutes and all other facts that could reasonably be expected to have a significant impact on the value of the franchise or the franchisee's decision to purchase the franchise.

For example, the regulation passed under the Ontario franchise statute currently prescribes more than 25 different categories of information that must be included in an FDD. Some of the key subject areas include: (i) detailed background information about the franchisor, its directors and officers; (ii) upfront costs to the franchisee to establish the franchise; (iii) information concerning the closure of other franchises in the system; (iv) information about specific policies and practices of the franchisor, such as those imposing restrictions on goods and services to be sold and those relating to volume rebates or other financial benefits obtained by the franchisor; (v) information concerning the expenditures of any advertising fund to which the franchise must contribute; and (vi) information concerning territorial rights granted to the franchisee and/or reserved to the franchisor.

The FDD must also include all agreements relating to the franchise as well as all other material facts beyond those specifically prescribed.

A number of court decisions have interpreted Canadian franchise legislation as requiring an FDD to include facts and information that are material to the individual location being granted to a franchisee, for example: (i) an FDD must include any head-lease entered into between



the franchisor and the third party landlord where the franchisor requires the franchisee to be responsible for the head-lease through a mandatory sublease; and (ii) one court has found an FDD to be deficient where it failed to disclose that the previous owner of the franchise seriously mismanaged the location.

As a result of these and other similar decisions, FDDs in Canada are drafted to include not only facts that are material to the franchisor and the franchise system, but also facts that are material to the individual franchise being granted.

Additionally, every FDD must contain the franchisor's financial statements in either audited or review-engagement form for the most recently completed fiscal year, unless an exemption is available to the franchisor. The FDD can include an opening balance sheet for the franchisor if either the franchisor has been operating for less than one year or 180 days have not yet passed since the end of the franchisor's first fiscal year.

Each of the Canadian franchise statutes currently contains an exemption from the requirement to include financial statements for large, mature franchisors that meet the prescribed criteria.

Where a "material change" occurs between the delivery of an FDD and the signing of the franchise agreement or the payment of consideration, a franchisor must also provide the prospective franchisee with a Statement of Material Change describing those material changes. This must be delivered as soon as practicable after the change has occurred.

Canadian franchise legislation contains a number of exemptions from the requirement to deliver an FDD. There are differences in the exemptions available in the various Statutory Provinces and the courts have generally interpreted the exemptions narrowly. Generally speaking, the exemptions are limited to where: (i) the franchisee already has intimate knowledge of the franchise system; (ii) the financial risk to and investment by the franchisee are very small; or (iii) the franchisee acquires the franchise from a third party without any active involvement of the franchisor.

Statutory rescission is the primary remedy to a franchisee who fails to receive an FDD or who receives a deficient FDD. Statutory rescission gives the franchisee the right to both terminate all franchise and ancillary agreements with the franchisor without penalty or further obligation and



substantial financial compensation to put the franchisee back into its pre-sale position.

Given the scope of the rescission remedy, franchisors granting franchises in the Statutory Provinces have strong motivation to ensure their FDDs are fully compliant and up to date each time they are delivered to prospective franchisees. The length of time during which a franchisee may seek rescission depends on the gravity of the deficiency in the FDD: (i) a 60-day limitation period for minor, non-material deficiencies; or (ii) a two-year limitation period for significant deficiencies or failure to provide an FDD.

In addition to pre-sale disclosure, Canadian franchise legislation also establishes reciprocal duties of good faith and fair dealing for parties to a franchise agreement and provides franchisees with the right to associate with one another.

The duty of good faith requires the franchisor to consider the legitimate interests of its franchisees before exercising contractual rights, and imposes a standard of commercial reasonableness on the parties. The application of the duty is highly fact-dependent and there is a large body of case law that has interpreted the duty in the context of different types of franchise disputes.

Franchisors are prohibited from interfering with or restricting franchisees' statutory right to associate with one another in any way and any provision in a franchise agreement that attempts to restrict association between franchisees is void. This provision has been interpreted by Canadian courts to provide franchisees with the right to join together in litigation against the franchisor, for example in a class action.

All Canadian franchise legislation expressly prohibits parties to a franchise agreement from contracting out of or waiving any of the rights or duties contained in such legislation. This means that a foreign franchisor granting franchises in the Statutory Provinces cannot use a choice-of-law clause or any other provision in its franchise agreements to avoid the application of these franchise-specific statutes.

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By Godyne Sibay, Paul Galbraith and Valérie Mac-Seing

REAL PROPERTY

Land Registration Systems

Each Canadian province has its own systems for registering interests in real property, as property legislation is constitutionally a provincial responsibility in Canada. In Ontario, for example, there are two land registration systems: registry and land titles. The older of the two is the registry system, which merely provides for the public recording of instruments affecting land and does not guarantee the status of title.

Most Ontario properties, however, are in the land titles system, which is operated by the province pursuant to the *Land Titles Act*. Title to land within this system is guaranteed by the province. Where the land titles system applies, each document submitted for registration is certified by the province and, until this certification is complete, the registration is subject to amendment at the request of the registry officials.

In other provinces, registration systems vary. In the western provinces, for example, land falls exclusively within the provincial land titles systems. These systems are similar to the land titles system in Ontario, creating an “indefeasible title” that is good against the world, subject only to certain limited exceptions. In the Atlantic provinces, on the other hand, registry systems dominate land registration, except in New Brunswick, where its land titles system encompasses most of the land in the province. Québec has its own unique system for registering interests in land, which in its effect is more similar to a registry system than to a land titles system.

Canadian provinces have been working to modernize their land registration systems by automating the paper-based records and converting to electronic systems. In most of Canada, real property instruments can be registered and obtained electronically. In addition, in many provinces, including Ontario, registration occurs in real time. In other words, upon registering an instrument against specific land, the instrument will immediately thereafter appear on the title relating to such land.

Planning Legislation

All Canadian provinces regulate property development to some degree, and often this regulation occurs at the municipal level. Official plans, zoning bylaws, development permits, subdivision bylaws and servicing

bylaws are the primary means by which municipalities control land use and development.

At the provincial level, the subdivision of land is restricted by statute in a number of Canadian provinces. In Ontario, the *Planning Act* is the main statute that controls subdivision. In British Columbia and many other provinces, the *Land Title Act* of that province is the main statute that controls subdivision. In addition, most provinces have legislation granting power to municipalities to regulate the subdivision and servicing of lands. In most cases, instruments such as transfers, subdivision plans or separation of title, which result in the issuance of separate titles, and instruments such as leases, mortgages or discharges, which deal with part of a parcel, require subdivision approval.

**MOST PROVINCES
HAVE LEGISLATION
GRANTING POWER
TO MUNICIPALITIES
TO REGULATE THE
SUBDIVISION AND
SERVICING OF LANDS.**

Subject to certain exceptions, the *Planning Act* in Ontario prohibits any transfer or mortgage of land or any other agreement granting rights in land for a period of 21 years or more (this includes leases and easements) unless the land is already described in accordance with a plan of subdivision or the transaction has previously received the consent of the appropriate governmental body. If the proposed transaction does not fall within one of the exceptions outlined in the *Planning Act*, then it may be necessary to obtain a severance consent for the transaction to proceed. The process to obtain a consent typically takes at least 90 to 120 days to complete.

A number of changes recently introduced by the Ontario government will directly impact how development approval applications are prepared, submitted, processed and appealed. The goal of the province seems to have been to put greater control of the development approval process in the hands of municipalities, although the real effect of these changes may be to require applicants to look farther down the road, past the municipal process, to eventual appeals to the Ontario Municipal Board (OMB), and to take careful steps to put their applications on OMB-ready footing from the outset.

Many provincial statutes (including Ontario's) provide that no interest in land is created or conveyed by an improper transaction carried out



contrary to the governing legislation. Investors in real property in Canada need to consider the possible application of subdivision control regulations both at the provincial and municipal level when they are contemplating subdivision and development of land.

Title Opinions and Title Insurance

Rights in land are not required to be registered. That said, registration in the appropriate land registry office is essential to protect an owner's priority over subsequent registered interests and to protect an owner against loss from a bona fide third party. On an acquisition, in addition to registering a deed in the appropriate land registry office, a lawyer's opinion on title is typically issued to the purchaser of real property following closing.

However, the use of commercial title insurance as an alternative to the traditional lawyer's opinion on title continues to gain popularity, particularly for lenders (since the available protections are broader for lenders). Unlike a traditional lawyer's title opinion, title insurance provides protection against hidden risks such as fraud, forgery and errors in information provided by third parties (e.g., a government ministry). Fraud, in particular, represents a significant loss when it does occur and this is a risk generally better assumed by a title insurer. (Note, however, that for commercial properties coverage is typically only provided for fraud that occurred prior to the date of placement of the policy.) Also, unlike a traditional lawyer's title opinion, title insurance is a strict liability contract — the policy holder is not required to prove that the title insurer has been negligent in order to receive compensation for a covered loss (up to the amount insured, which is typically the purchase price for an owner's policy and the mortgage amount for a lender's policy).

There are two types of commercial title insurance policies that may be issued: (i) an owner's policy that protects the purchaser against loss or damage arising from disputes regarding property ownership; and (ii) a loan policy that protects the lender against loss or damage arising from the invalidity or unenforceability of the lien of the insured mortgage.

While the benefits of an owner's policy remain in effect only as long as the insured owner possesses title to the property, the benefits of a lender's policy automatically run to the insured lender's successors and/



or assigns, thereby facilitating the sale of mortgages in the secondary market.

There is a wide variety of different title insurance packages and varying premiums for such coverage, and there is no regulation of title insurance rates in Canada. Policy premiums are negotiated, and when a premium is paid to the title insurer, such premium constitutes consideration for both the policy and any endorsements (the total price of which is typically lower than the combined price for premiums and endorsements in the U.S.).

Environmental Assessments

In Canada, there is a legislative framework at both the provincial and federal level that governs the duties of land owners with respect to the storage, discharge and disposal of contaminants and other hazardous materials connected with real property. The liability for improper environmental practices runs with the land and can be inherited by future owners of the property. In certain circumstances, any “guardian” of a property, such as a tenant, may face liability for contamination. Additionally, it is incumbent upon a potential purchaser to inspect a property and assess environmental risks, as government officials in Canada cannot certify that properties are free of environmental risk. Commercial lenders in Canada will customarily require the completion of an environmental assessment of a property before the advance of funds.

THE LIABILITY FOR IMPROPER ENVIRONMENTAL PRACTICES RUNS WITH THE LAND AND CAN BE INHERITED BY FUTURE OWNERS OF THE PROPERTY.

Non-Resident Ownership

Non-residents may purchase, hold and dispose of real property in Canada as though they are residents of Canada, pursuant to the federal *Citizenship Act*. However, each province has the right to restrict the acquisition of land by individuals who are not citizens or permanent residents, in addition to corporations and associations controlled by such individuals. For example, in Québec, a non-resident (individual, corporation or any other legal entity) is not entitled, directly or indirectly, to acquire farm land except with the authorization of the *Commission de protection du territoire agricole du Québec*.



Each province has different legislation as regards to the particularities of foreign ownership of Canadian real property. In Ontario, for example, non-citizens have the same rights as Canadians to acquire, hold and dispose of real property, though corporations incorporated in jurisdictions other than Ontario must obtain a licence to acquire, hold or convey real property. Non-residents who dispose of real property situated in Canada are subject to withholding tax requirements under the federal *Income Tax Act* (ITA), as described below.

NON-RESIDENTS WHO DISPOSE OF REAL PROPERTY SITUATED IN CANADA ARE SUBJECT TO WITHHOLDING TAX REQUIREMENTS UNDER THE FEDERAL INCOME TAX ACT.

Proceeds of Crime Legislation and Real Estate Developers

In January 2008, new amendments and regulations with respect to the federal *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* were made. These came into force on Feb. 20, 2009, and address transactions involving, among other groups, real estate developers (generally defined as those who sell new developments to the public, other than in the capacity of a real estate broker or sales representative). The amendments impose mandatory reporting and recordkeeping requirements on real estate developers, who are obligated to report suspicious transactions, large cash transactions and any property in their possession that is owned or controlled by terrorists. They are also required to keep records of funds received, large cash transactions and client information, copies of official corporate records and suspicious transaction reports, and to ascertain the identity of any individual: i) who conducts a large cash transaction (taking reasonable measures to determine whether that individual is acting on behalf of a third party); ii) for whom they must keep a client information record or receipt of funds record; and iii) for whom they must send a suspicious transaction report. They must also develop a compliance regime that includes, among other things, the appointment of a compliance officer, written compliance policies and ongoing compliance training programs. If real estate developers fail to comply with these requirements, criminal or administrative penalties may be imposed.



Some Taxes on the Transfer of Real Property in Canada

Withholding Obligations

The ITA contains provisions that protect Canada's ability to collect taxes when a non-resident disposes of "taxable Canadian property" (which includes, among other types of property, real property situated in Canada).

Unless (i) the purchaser has no reason to believe, after making reasonable inquiries, that the vendor is not a non-resident of Canada; (ii) the purchaser concludes after reasonable inquiry that the non-resident person is resident in a country with which Canada has a tax treaty, the property disposed of would be "treaty-protected property" if the non-resident were resident in such country, and the purchaser provides the Canada Revenue Agency with a required notice; or (iii) the purchaser is provided with an appropriate certificate in respect of the disposition issued by the Canada Revenue Agency, the purchaser will be liable to pay as tax on behalf of the non-resident up to 25% of the purchase price of land situate in Canada that is capital property and up to 50% of the purchase price of land inventory situate in Canada, buildings and other depreciable fixed-capital assets. If the non-resident vendor does not provide the purchaser with an appropriate certificate (or the purchaser is not satisfied that the conditions of either (i) or (ii) have been met), the purchaser will generally deduct from the purchase price the amount for which the purchaser would otherwise be liable. Québec tax legislation imposes similar requirements in respect of the disposition of immovable property situate in the Province of Québec. It should be noted that gains realized by a non-resident on the disposition of Canadian real estate are generally not, subject to certain exceptions, exempt from tax under Canada's treaties, and therefore real estate in most cases will not qualify as "treaty-protected property" for purposes of the ITA. Accordingly, absent an appropriate certificate, most purchasers acquiring real estate from non-residents will withhold from the purchase price and remit the withheld amount to the applicable taxing authority.

Land Transfer Tax

In all Canadian provinces, land transfer taxes (or in Alberta, "registration fees") are generally imposed on purchasers when they acquire an interest in land (typically including a lease in excess of 40 or 50 years, though the threshold is 30 years in British Columbia) by registered conveyance and,



in some cases, by unregistered disposition.

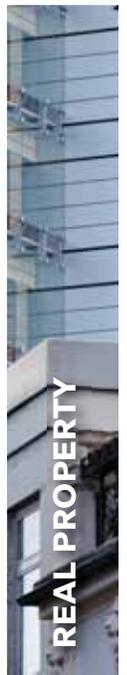
Provincial rates vary widely. In Ontario, for example, land transfer tax is calculated on the “value of the consideration” paid for the interest transferred, whereas in Alberta the fees assessed against a purchaser are based on the value of the land being acquired by the purchaser, and in British Columbia the tax is calculated on the “fair market value” of the interest transferred. In Québec, the calculation is made on the basis of imposition that equals the greatest of i) the consideration furnished for the transfer; ii) the consideration stipulated for the transfer; and iii) the market value of the immovable property at the time of its transfer. Of note, the City of Toronto has recently mandated an additional land transfer tax for conveyances within the city that is roughly equivalent to the Ontario land transfer tax (resulting in what is essentially a doubling of the total land transfer tax payable when real property is conveyed in Toronto). In addition, the City of Montréal has, via bylaw, set a higher rate than what is provided for under the provincial legislation for the calculation of duties for any part of the basis of imposition that exceeds C\$500,000.

Federal Goods and Services Tax, Provincial Sales Tax, and Harmonized Sales Tax

In Canada, the Goods and Services Tax (GST), currently at a rate of 5%, is generally payable upon a supply of real property (this includes a sale). See [Sales and Other Taxes — Federal Goods and Services Tax](#). The vendor is responsible for collecting GST from the purchaser in respect of a sale of real property unless the purchaser is registered for GST purposes and required to self-assess the applicable GST. The conveyance of previously owned residential property is not subject to GST (except where such residential property has been “substantially renovated”).

In provinces that have “harmonized” their provincial sales tax with the GST the rate of the harmonized sales tax (HST) is generally payable on the sale of any non-residential real property and any new or substantially renovated residential property, on the same basis as the GST.

The same self-assessment rules that apply for GST purposes apply for HST purposes.



QST

The province of Québec harmonized the Québec sales tax (QST) and the same rules apply to real property (immovable) in Québec as for GST/HST purposes.

Financing

Real estate financing for commercial, industrial, retail, multi-family residential and mixed-use real property as well as condominiums, hotels, casinos and other types of real estate can be structured in a variety of ways, including:

- conventional mortgage lending;
- public and private capital market financing;
- portfolio loans;
- acquisition financing;
- permanent financing;
- public and private bond financings;
- syndications;
- restructurings; and
- securitization.

Banks, pension funds, credit unions, trust companies and other entities all arrange such financing on credit terms that vary on the basis of the transaction itself and the risks involved. Various rate and term combinations are offered. See **Bank Loans and Other Loan Capital**. There are various instruments used to take primary security over real property in Canada, such as a mortgage or charge, a debenture containing a fixed charge on real property and trust deeds securing mortgage bonds (where more than one lender is involved). Additional security usually includes assignments of rents, leases and other contracts, guarantees and general security agreements.

Common Forms of Ownership/Interest

Generally, both asset acquisitions and share acquisitions are common in Canada. Canadian real estate transactions typically involve the following common forms of ownership/interest in real property: freehold, condominium, mortgage/charge, easements and leasing. In Québec,



where the real property regime is based on civil law concepts, these forms of ownership/interest in real property all have their equivalents, but other types of interests, based mainly on surface or building rights, also exist.

Developments on Aboriginal lands are subject to a unique set of legal regimes governing ownership interests and security arrangements. See **Aboriginal Law**.

Common Investment Vehicles for Real Property in Canada

There are various avenues for investment in real property in Canada, including corporations, partnerships, limited partnerships, trusts, co-ownerships and condominiums. See **Business Organizations**.

Each of these vehicles has its own nuances and with careful planning and legal advice, investors in the Canadian real property market can structure their investments so as to take maximal advantage, for tax purposes or otherwise, of the available alternatives. A real estate investment trust (REIT) is a special type of trust whereby a trustee agrees to hold real property assets for the benefit of unitholders as the beneficiaries of the trust. The trustee (or more commonly, a corporate nominee) will hold legal title to the trust property. One disadvantage of this vehicle is that under common law, beneficiaries of a trust are potentially subject to unlimited liability. Commercial documentation, however, is generally crafted so as to limit such liability that may arise in relation to the assets or business dealings of the trust. Like shares of corporations, units of REITs can be publicly or privately held. The units of public REITs may be listed on public stock exchanges, like shares of common stock, and REITs can be classified as equity, mortgage or hybrid.

The REIT structure was designed to provide a structure for investment in real estate that is similar to the one mutual funds provide for investment in stocks. Currently, a significant advantage to a REIT is that if its income is distributed to the unitholders, it will be taxed in their hands at their

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marginal rates rather than at the REIT level. REITs have been generally excluded from the income trust tax legislation changes the federal government enacted in 2007; these require income trusts to be taxed in the same manner as corporations beginning in the 2011 tax year. Legal advice is often necessary to determine whether a particular REIT falls within the exclusion provisions and to ensure the REIT continues to qualify for exclusion.

Co-Ownership Arrangement

A co-ownership arrangement is typically used where joint and several liability is not desirable. The advantages to using a co-ownership arrangement include the following: (i) each co-owner receives its own share of the revenues and pays its own share of expenses; (ii) each co-owner decides its own capital cost allowances, subject to the rules in the ITA; and (iii) each co-owner can sell, mortgage or otherwise separately deal with its interest.

Condominiums

Condominium ownership is a form of real estate ownership where the owner receives title to a particular unit and has a proportionate interest in certain common areas. Legal advice is needed to ensure that condominium projects satisfy all local policies and legislative requirements, including:

- structuring the project, e.g. common and shared facilities, exclusive use areas, commercial versus residential facilities, phasing and community associations;
- pre-selling units — preparing real estate disclosure statements or prospectuses, complying with securities and pre-marketing regulations;
- registering condominium/strata plans, declarations, descriptions and bylaws and developing policies; and
- closing and conveying the individual units.

Issues can include, for example, obtaining exemptions from the Ontario Securities Commission to permit the sale of rental pool units without a securities prospectus.

Nominees

Limited partnerships, REITs, trusts and even some corporations will often



structure their business affairs so that a separate entity, usually a single purpose corporation, holds registered title to real property as “bare trustee,” “agent” or “nominee” for the beneficial owner. For both tax and accounting purposes, the property belongs to the beneficial owner and appears on its balance sheet; it is not the property of the nominee. Although nominee arrangements may be used for several reasons, they are frequently established to facilitate dealing with property in the land registration system where there is a complex, underlying ownership structure — either to permit the beneficial ownership of the property to be kept confidential or to facilitate corporate reorganizations or third party transfers on a land transfer tax-deferred basis.

Pension Funds

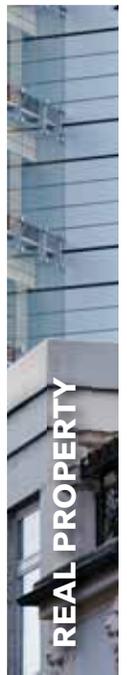
Canadian pension funds have been steadily increasing their presence in the Canadian real property market over the last few years through acquisitions of various portfolios, including Class A office buildings and shopping centres. Pension fund capital has, in fact, recently overtaken public real estate capital as the primary impetus of large real estate transactions in Canada. Pension funds that invest in real estate need to comply with strict national and provincial rules to retain their tax-exempt status.

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PUBLIC-PRIVATE PARTNERSHIPS

By Godyne Sibay and Morgan Troke



PUBLIC-PRIVATE PARTNERSHIPS

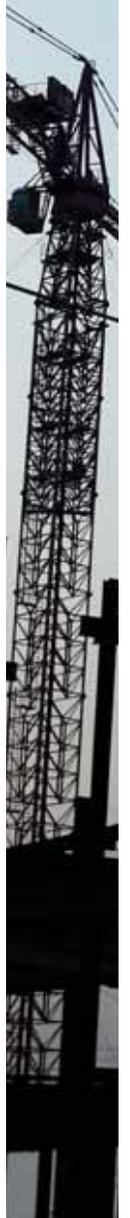
Canadian governments utilize Public Private Partnerships (PPP's or P3's) between governments and public entities on one side and private sector investors and contractors on the other side to deliver infrastructure projects and services that address public service commitments. In addition, large infrastructure projects, which are commonly procured as PPP's, are a key component of Canada's and every province's economic stimulus packages.

Canada now enjoys a mature and robust PPP market with Canadian PPP projects in various industry sectors, including hospitals and health care, justice and corrections, light rail and other mass transit, roads, bridges, schools, recreation and culture, water and wastewater, airports and civil aviation, ports, energy, universities, government services, property management, data centres, defence and communications. Over the course of the last twenty years the experience, expertise and capabilities related to PPP projects in Canada have grown dramatically, both in the public infrastructure procurement authorities, and also in the major investor entities, construction companies and service providers who constitute the participants in PPP projects.

The result of the experience gained with the large number of recent projects has been a project procurement process that allocates risk reasonably between the parties and achieves value for money for the public. The recent projects have been procured under a clear and competitive process and that process has been steadily refined by the development of common "best practices" across Canada.

The Canadian PPP market is highly competitive, and includes both domestic and international constructors, service providers, equity providers and lenders. In most Canadian projects there is no "local source" requirement, and international companies are encouraged to participate. However, project teams must pre qualify in order to participate in the RFP process and usually only three teams are qualified, so that smaller international

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participants often initially enter the market as part of a consortium.

International banks were major participants in PPP infrastructure financing prior to 2008, but their high level of participation has declined and they have been replaced by a combination of primarily Canadian banks with a smaller number of international banks (providing debt financing primarily during construction) together with an active private placement and broadly marketed bond market in Canada and the U.S (providing primarily longer term debt).

Government support for PPP projects in Canada is strong (although it varies somewhat by province) as this method of procurement has proven to address the infrastructure backlog and the need for projects to be delivered “on time and on budget” because it efficiently transfers significant risks of delivery and performance to the private sector.

Many federal, provincial and municipal governments in Canada have established dedicated agencies, which manage the process of using PPP’s to achieve the completion of infrastructure projects. These agencies include Infrastructure Ontario, Partnerships BC, PPP Canada, Infrastructure Québec, SaskBuilds and Partnerships New Brunswick. In addition to the public sponsors of projects, there is a growing trend among large pension funds and private equity firms to identify large infrastructure projects that could be procured using PPP’s, and then actively promote these opportunities within government. An example in this regard is CDPQ Infra, a subsidiary of Caisse de dépôt et placement du Québec, which recently proposed a new integrated light rail transit system for the Greater Montréal area.

There are several different models of PPP in Canada including build finance, design-build-finance, design-build-finance-maintain (DBFM) and concession, in all of which the project entity is compensated by milestone payments (often paid upon achievement of substantial completion of construction), availability payments, project revenue or a combination of them. In a typical DBFM PPP:

- a private entity (usually a consortium of one or more equity providers with one or both of a construction contractor and a service provider) (Project Co) and the government/public sector entity enter into a single contract under which Project Co accepts responsibility to design, build, finance and maintain the infrastructure asset;

- the project is delivered by Project Co which contracts with a construction contractor to design and build the infrastructure, and with a service provider to operate and maintain the infrastructure asset;
- the operation and maintenance obligation extends over a long period (usually 25 to 35 years) with pre-defined hand-back conditions;
- operating and maintenance requirements are performance based;
- payment from government or the public sector entity begins upon completion of construction and extends over the operation and maintenance term (with interim payments during construction in many cases); and
- payments from government or public sector entities are subject to deduction for failures in service delivery.

Every province in Canada has its own regulatory and legislative requirements, but there are significant similarities in the procurement process and documentation. The Canadian jurisdictions utilizing PPP's share a desire to utilize a crisp PPP procurement process followed by a fast closing. The process is administered by well-staffed and experienced procurement agencies which routinely publish RFP documents and project agreements as well as value for money reports. The procurement is intended to be transparent and may be subject to the supervision of a "fairness monitor," and all elements of the procurement process have become increasingly standardized.

Each procurement authority tends to utilize its own standard RFP process and bid requirements over all or most types of projects utilizing common bid submission documents, the same project documents negotiation process and established closing protocols. Bid submissions are required to be for a fixed price and to include committed or underwritten financing. There are varying but always short periods from bid to closing, based on the settled documents and committed financing at bid.

The Canadian PPP market is expected

EACH PROCUREMENT AUTHORITY TENDS TO UTILIZE ITS OWN STANDARD RFP PROCESS AND BID REQUIREMENTS OVER ALL OR MOST TYPES OF PROJECTS UTILIZING COMMON BID SUBMISSION DOCUMENTS, THE SAME PROJECT DOCUMENTS NEGOTIATION PROCESS AND ESTABLISHED CLOSING PROTOCOLS.

to remain active in the coming years as all levels of government have witnessed the benefits of using PPP's to deliver infrastructure projects and related public services.

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ABORIGINAL LAW

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By Bryn Gray



ABORIGINAL LAW

Business transactions and projects in Canada can impact or involve Canada's Aboriginal communities, particularly in the context of resource or land development. While many businesses have successfully engaged and partnered with Aboriginal communities, this is a rapidly evolving area of law and practice and there are many issues that often need to be effectively navigated to ensure success. Where Aboriginal issues exist for any proposed transaction or project, it is important to consider the issues in the context of the current law and prudent business practices and to develop business strategies that are most likely to achieve the desired results.

Overview

Aboriginal rights and claims are frequently implicated by the acquisition and development of land and natural resources in Canada. This is of considerable interest to businesses involved in the energy, mining, forestry and transportation sectors, particularly for developments and activities on lands subject to claims of Aboriginal rights or title.

By way of background, there are three distinct Aboriginal Peoples in Canada – First Nations, Inuit, and Métis. Within these groups, there are more than 617 *Indian Act* bands (representing approximately 50 distinct First Nations), 53 Inuit communities in four distinct regions, and six provincial and territorial Métis organizations. There are significant cultural and historic differences between these groups and the nature and scope of their asserted or established rights vary considerably.

In 1982, the Aboriginal and treaty rights of First Nations, Métis and Inuit peoples in Canada became constitutionally protected through the enactment of section 35 of the *Constitution Act, 1982*. While this significantly increased the protection of Aboriginal and treaty rights in Canada, the Supreme Court of Canada has recognized that these rights are not absolute, and can be infringed by the Crown if certain requirements are met.

The law regarding Aboriginal rights and title is constantly evolving and business practices relating to Aboriginal communities often change to keep up with developments in the law, government policies and the expectations of these communities. In addition, Aboriginal groups are becoming increasingly active in the commercial marketplace as



equity participants and in public-private partnerships. It is important to understand both the stakeholders as well as the issues involved with the making of contracts and the taking of security where Aboriginal participants are involved.

Jurisdiction Over Aboriginal Peoples

Canada's federal Parliament has exclusive legislative jurisdiction over "Indians and lands reserved for Indians" under s. 91(24) of the *Constitution Act, 1867*. This includes First Nations, Inuit, and Métis peoples, although jurisdiction over the Métis was unclear until it was recently confirmed by the Supreme Court of Canada in April 2016. The federal government has enacted a range of legislation mostly for First Nations, including the *Indian Act*, the *First Nations Fiscal Management Act*, the *First Nations Land Management Act* and the *Indian Oil and Gas Act*.

While the federal government has exclusive jurisdiction over Canada's Aboriginal Peoples, provincial and territorial laws of general application still typically apply to First Nations, Metis and Inuit in each jurisdiction.

Aboriginal Rights and Interests

The Supreme Court of Canada has recognized that there is a duty to consult and potentially accommodate Aboriginal groups where the federal, provincial, and territorial governments are making a decision that could adversely affect asserted or established Aboriginal or treaty rights. This duty is triggered for the vast majority of Crown approvals for resource development.

Aboriginal rights are those rights that have been traditionally exercised by Aboriginal Peoples, including customs, traditions and activities integral to the distinctive culture of the Aboriginal group in question. Aboriginal rights can include rights that have been traditionally enjoyed by the members of an Aboriginal group, such as hunting, trapping, fishing and gathering. It can also include Aboriginal title, which is a sui generis right in land that is distinct from other proprietary interests, such as fee simple estates.

Aboriginal title confers a broad bundle of rights similar to fee simple, including the right to use, manage, and derive economic benefits of the land. However, there are three important limitations which ensure continuity of the Aboriginal group's relationship with the land: (i) the land must be collectively held; (ii) it cannot be alienated except to the



Crown; and (iii) it cannot be encumbered, developed or misused “in a way that would substantially deprive future generations of the benefits of the land.”

To date, Aboriginal title has only been established in one case. In 2014, the Supreme Court of Canada found that the Tsilhqot’in Nation had established Aboriginal title over a tract of land in central British Columbia. The Court held that if Aboriginal title is proven, the consent of the Aboriginal group is required in order for the Crown or a proponent to proceed with development or use of the Aboriginal title lands. Absent such consent, the Crown would need to justify any proposed incursion onto the land or infringement of title by a compelling and substantial governmental objective that was consistent with the Crown’s fiduciary duty to the Aboriginal group.

The majority of Aboriginal title assertions in Canada are in British Columbia and most of these assertions have some degree of overlap with the Aboriginal title assertions of other Aboriginal groups in the province. In addition, there are also unsettled Aboriginal title claims in the north, Alberta, Ontario, Québec and Atlantic Canada, as well as Métis claims in Manitoba. Some of these claims also include assertions of Aboriginal title to water beds or bodies of water, an issue that has not been judicially considered to date in Canada.

Although there are Aboriginal title assertions throughout Canada, Aboriginal title has been surrendered, modified, or is no longer asserted in many areas of the country pursuant to treaty, such as the claims of Aboriginal signatories to the 26 modern treaties and the 11 historic numbered treaties. These treaties and other historic treaties with land surrender provisions cover Northern Québec, much of Ontario, Manitoba, Saskatchewan, Alberta, portions of B.C., Nunavut, and large portions of the Yukon and Northwest Territories. Aboriginal title assertions are nonetheless relevant for certain historic treaties, including the numbered treaties, as some Aboriginal groups challenge the validity of the land surrender provisions, dispute the boundaries of the treaty, or argue that they are not treaty signatories.

Treaties

Many Aboriginal Peoples have rights set out in historic and modern treaties.



There are approximately 70 recognized historic treaties and 26 modern treaties in Canada. These treaties cover much of the country's land mass as discussed above but differ significantly in their length, terms, and original purpose. Historic treaties, which were entered into prior to 1975, are generally quite short and recognize rights, such as hunting, fishing, trapping, and trade for a moderate livelihood, among other things. Some of these treaties include land surrender provisions while others do not. Modern treaties are much more detailed agreements and confer a broader range of rights and benefits from harvesting rights to subsurface rights, self-government provisions, fee simple ownership of specific lands, and significant capital transfers.

Consultation and Accommodation

As noted above, the Crown has a duty to consult and potentially accommodate Aboriginal groups when it is making a decision or issuing an approval that may adversely affect asserted or established Aboriginal or treaty rights. The obligations imposed by the Crown's duty can often be significant, and in some cases a single decision of the Crown may require consultation with many different Aboriginal groups, some of which may have overlapping claims or interests.

The scope of what consultation and potential accommodation is required varies and is proportionate to the strength of the case supporting the existence of the Aboriginal or treaty right and the degree of the potential adverse effect of the Crown's decision on that asserted or established right. Inadequate Crown consultation can lead to approvals or permits being delayed or called into question, community and investor relations' challenges or litigation for injunctions or damages, all of which can have serious impacts on project schedules and costs.

There is no stand-alone duty on the Crown or a project proponent to reach agreement with Aboriginal groups, but good faith consultation may give rise to a duty to accommodate. At law, accommodation can include mitigating, minimizing or avoiding adverse effects of actions or decisions on asserted or established Aboriginal or treaty rights. What amounts to appropriate Crown consultation and accommodation is a matter for legal analysis on a case-by-case basis.

Although the duty to consult is ultimately the responsibility of the Crown, the courts have stated that procedural aspects of this consultation may



be delegated to and carried out by project proponents and through regulatory processes. It is not uncommon for the Crown to pass on certain requirements associated with the duty to consult to project proponents who are seeking government approvals. In many cases, the proponent will have the greatest familiarity with the proposed project and will be best suited to engage with Aboriginal groups and to address any relevant concerns in a meaningful way.

Many Aboriginal groups have developed their own consultation policies and processes for engaging with proponents and the Crown, and many have capacity funding requirements. Proponents are frequently asked to fund third-party heritage and environmental assessments and studies to determine the extent of Aboriginal interests and the potential impact of proposed projects, and often a form of funding agreement is presented to a proponent.

Within the context of major resource projects, the Crown's duty to consult usually will be triggered at the formal commencement of the regulatory review process. However, many proponents choose to engage with Aboriginal groups from the earliest stages of project planning in order to build relationships with local communities. Early and effective consultation and engagement with Aboriginal groups has become one of the most critical factors affecting the viability and ultimate success of a project and therefore should be treated as an integral part of project planning and development. Experienced legal advice is required to guide the proponent through the consultation and approval process in order to ensure that all relevant Aboriginal groups are being consulted and that the Crown's duty is properly carried out and documented for evidentiary purposes.

Successful Agreements with Aboriginal Groups

There is currently no requirement at law for the Crown or proponents to enter into agreements with Aboriginal groups in order to fulfill the Crown's duty to consult or accommodate Aboriginal groups, and there is no requirement at law for accommodation to include economic compensation to Aboriginal groups. However, it is common for federal and provincial governments to promote agreements such as impact benefit agreements or participation agreements between project proponents and Aboriginal Peoples. In some cases, a province will also enter into an agreement where tax or other government revenue is shared



with interested Aboriginal groups. Reaching successful agreements can assist in addressing the concerns of Aboriginal groups, establish stable frameworks allowing development projects to move forward and provide an effective means of managing Aboriginal-related risks and establishing regulatory certainty for projects.

The scope and content of benefit and participation agreements vary widely among projects and Aboriginal groups. Understanding the specific interests and objectives of an Aboriginal group and having experience with the different types of agreements in use form a foundation towards the development of a successful relationship with Aboriginal groups and ultimate project approval. Agreements with Aboriginal groups can include a variety of benefits for the Aboriginal group, including employment opportunities, support for education and training initiatives, contracting and business opportunities, and capacity building, generally with corresponding assurances to the proponent that create certainty and facilitate the development of the project. In some cases, agreements will formalize engagement processes and include environmental monitoring and protection commitments.

Major projects increasingly provide for a range of economic benefits including equity participation, through a variety of financial models, for affected Aboriginal groups that are seeking to secure ownership interests and long-term revenues for their communities. Projects that involve Aboriginal equity participation often involve more sophisticated advice in order to ensure that the project is financeable and employs the most efficient tax structure for all parties.

Projects on Aboriginal Lands

Increasingly, projects and project assets are being located on lands held by Aboriginal groups themselves. There are different types of Aboriginal lands and political structures in Canada and a number of different regimes that may apply. Specific knowledge of the applicable regime is critical. Federal laws often do not adequately cover developments on Aboriginal lands and both federal and provincial regulators often have significant concerns regarding matters, such as the lack of applicable provincial environmental protection regimes, particularly on major projects. In some cases, these concerns are addressed contractually. In others, the federal *First Nations Commercial and Industrial Development Act* is used by Aboriginal groups, federal and provincial governments and project



proponents to voluntarily apply specified provincial laws to projects on Aboriginal lands where there otherwise would be a “regulatory gap” in the federal regime.

Conclusions

Projects in Canada that involve Aboriginal rights and interests require specialized legal knowledge and experience. The regulatory regimes and case law relating to Aboriginal rights and interests are constantly evolving and it is important to bring the most current information to any project where Aboriginal rights or interests may have an impact. Understanding the potential scope of the rights and interests and building successful relationships and agreements with Aboriginal groups from project inception through completion and implementation are key elements of any successful project.

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By Alfred Macchione and Dan Glover

INTELLECTUAL PROPERTY

The federal laws on patents, copyright and trade-marks provide the principal protection for intellectual property in Canada. Canada is a member of the World Trade Organization (WTO) agreement on *Trade-Related Aspects of Intellectual Property Rights* (TRIPS) and has agreed to the minimum standards of protection and reciprocal treatment provided in this treaty. In November 2015, Canada and eleven other member countries entered into the *Trans-Pacific Partnership Agreement* (TPP). The agreement requires ratification by the member countries before coming into force. Canada is also a party to the 2016 *Comprehensive Economic and Trade Agreement* with the European Union (CETA).

CANADA IS A MEMBER OF THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY AND THE PATENT COOPERATION TREATY.

Patents

Canada is a member of the *Paris Convention for the Protection of Industrial Property* (Stockholm Act) and the *Patent Cooperation Treaty* (PCT).

The *Patent Act* provides that any new, useful and unobvious invention that falls within the statutorily defined categories, namely, art, process, machine, manufacture or composition of matter (or any improvement of any of these) is patentable. Higher life forms per se are not patentable, but engineered genetic material and cell lines containing such genetic material typically are patentable. Algorithms per se are not patentable, but computer program products or methods that implement a tangible solution, or produce a discernable effect or change, generally are patentable.

In a landmark decision rendered in October 2010, the Federal Court overturned a rejection by the Commissioner of Patents and the Canadian Patent Appeal Board of a patent application by Amazon.com for its "one click" online product-ordering technology. The Commissioner of Patents had held that Amazon's application did not qualify as having patent eligible subject matter under the *Patent Act*. In overturning this finding, the court articulated a new test that does not preclude computer implemented innovations and business methods from being patented in Canada as long as they meet the general test of what constitutes an "invention" under s.2 of the *Patent Act*. In late 2011, the Federal Court of Appeal allowed the appeal of the Federal Court decision. One point

of difference with the reasoning in the decision at first instance was that the Court of Appeal dismissed the view that a business method may become patentable subject matter merely because it has a practical embodiment or a practical application. On the other hand, the Court of Appeal agreed with the judge at first instance in his determination that patentable subject matter must either be something with a physical existence or something that manifests a discernible effect or change. The Court of Appeal remanded the construction of the patent claims back to the Commissioner of Patents, and the application was issued by the Patent Office shortly thereafter. The Amazon.com decision is thought by many to herald a new era of increasing acceptance for patents directed to computer-implemented inventions and business methods in Canada.

Other patent decisions of note in Canada in recent years have included a unanimous decision of the Supreme Court of Canada which held that Pfizer Canada's patent describing and claiming sildenafil, the active ingredient for the prescription drug VIAGRA®, failed to satisfy the disclosure requirements of the *Patent Act*. The court came to this holding on the basis that the specification did not categorically indicate that sildenafil was the effective compound of interest and that the notional skilled person, on reading the patent, would be left to the prospect of further testing to determine which of two stated compounds in the specification would actually work. Another noteworthy decision included a judgment of the Federal Court that invalidated certain of the claims of a patent of Eurocopter for a helicopter landing gear structure, on account that the utility of the claimed structure was not demonstrated nor soundly predicted at the date of filing of the subject application. The result stems from a surprising application of the doctrine of sound prediction, one normally more prevalent in the chemical, pharmaceutical or biotechnology fields as opposed to the mechanical arts. The decision was upheld by the Federal Court of Appeal in September 2013. In July 2015, the Federal Court of Appeal held that the availability of a non-infringing alternative is to be taken into account in the assessment of damages for infringement. The decision involved Merck & Co.'s lovastatin prescription drug sold under the brand name MEVACOR®. Based on the facts at hand, however, the court found that the defendant would likely not have replaced its infringing sales with those of a non-infringing alternative, and the trial judge's award of damages to the scale of nearly C\$120 million, plus pre-judgement and

Copyright

Canada has acceded to the *World Intellectual Property Organization (WIPO) Copyright Treaty (WCT)* and the *WIPO Performances and Phonograms Treaty (WPPT)*. Many of the substantive provisions in the WCT and WPPT, such as the establishment of a “making available” right and the implementation of technical protection measures, were implemented in a major revision to the *Copyright Act* that came into force in November 2012. The legislation also provides a secondary liability remedy against those who “enable” digital infringements, as well as a series of new exceptions to copyright protection, including in respect of “reproduction for private purposes,” “timeshifting,” “technological processes,” “fair dealing for the purposes of education, parody or satire” and “user-generated content.” The legislation also contains safe harbours for Internet intermediaries, including for hosts and Internet location tool providers; however, providers should be aware these safe harbour provisions are subject to the “enablement” remedy and are also subject to a “notice and notice” regime requiring intermediaries to relay notices of claimed infringement to their customers and keep records of customers’ identities.

CANADA HAS ACCEDDED TO THE WIPO COPYRIGHT TREATY AND THE WIPO PERFORMANCES AND PHONOGRAMS TREATY.

Over recent years, there have been numerous important copyright decisions rendered by Canada’s highest court. In mid-2012, the Supreme Court of Canada released five new copyright decisions. The most important themes emerging from these decisions include an acknowledgement of the concept of technological neutrality (the idea that digital and non-digital uses should receive comparable treatment under copyright law) and the continued treatment of copyright exceptions as “user rights.” However, it should be noted that the decisions were made under the historical *Copyright Act*, and may not apply predictably to the new provisions passed in late 2012. In November 2012, the Supreme Court issued another important copyright decision in which it prohibited the creation of copyright-like rights by anybody other than Parliament, in this instance barring a broadcast regulator from imposing a “value for signal” levy on retransmitters of copyright programming. In late 2013, the Supreme Court issued another important decision establishing the test for when copyrights are infringed by way of imitation. The test

imposes a qualitative and holistic assessment of the similarities between works, which can be enhanced in certain settings by expert evidence, including for music and software copyrights. Lastly, in 2015 the Supreme Court issued a decision further clarifying the doctrine of technological neutrality as a guiding principle in the interpretation of the *Copyright Act* and applying it to the valuation of a collective rights society royalty.

Canada is a party to the *Berne Convention* and the *Universal Copyright Convention*. Depending on the nature of the work, the owner of copyright in a work has the sole right to reproduce, perform, publish or communicate the work. The *Copyright Act* provides that copyright arises automatically in all original literary, artistic, dramatic or musical works. The *Copyright Act* provides that registration is permissive rather than mandatory. However, registration does raise certain presumptions in favour of the registered owner that are useful in the context of litigation. In general, copyright lasts for the life of the author plus 50 years. Since 1993, computer programs have been expressly protected, under statute, as literary works.

The Canadian government has also recently passed amendments to the *Copyright Act*, *Trade-marks Act* and *Customs Act* that create significant anti-counterfeiting remedies tying to infringements of copyright or trade-marks. These amendments permit copyright holders and owners of registered trade-marks to submit a “request for assistance” to the Canada Border Services Agency. Through this system, rights holders may request that border officers detain commercial shipments suspected of containing counterfeit or pirated goods, thus enabling the rights holder to begin civil proceedings in court.

Trade-marks

The *Trade-marks Act* protects interests in words, symbols, designs, slogans or a combination of these to identify the source of wares or services. At present, rights in a trade-mark are created through use in Canada (or in the case of foreign owners, by use abroad and eventual registration in their home country). It is possible to reserve rights by filing based on an intent to use a trade-mark in Canada. Registration is permissive and not mandatory. Registration does, however, give the registrant the exclusive right to use the mark throughout Canada and facilitates enforcement. Without a registration, an owner’s rights are limited to the geographic area where the mark has been used. If the

trade-mark owner intends to license the mark for use by others, even by a subsidiary company, proper control over its use by the licensee is essential for proper protection. While a trade-mark endures for as long as the owner uses it to identify his or her wares or services, registrations can be attacked on the basis of non-use or invalid registration. The first term of a registration is for 15 years and is renewable for successive 15-year terms on payment of a renewal fee.

Canada is not a member of the *Madrid Agreement*, the *Madrid Protocol*, or the *Singapore Treaty*, but is taking steps toward accession through legislation that is expected to come into force as late as in 2018. These amendments will expand protection to novel “signs,” such as letters, colours, holograms, sounds, scents, tastes and textures. They will effectively remove the requirement for an applicant to have made “use” of a trade-mark in Canada or elsewhere before obtaining registration.

CANADA IS NOT A MEMBER OF THE MADRID AGREEMENT, THE MADRID PROTOCOL, OR THE SINGAPORE TREATY.

The amendments will implement the Nice Classification in respect of the description of goods and services in Canadian applications and will shorten the renewal term for registrations from 15 years to 10 years.

Pursuant to the CETA, Canada has introduced amendments to the *Trade-marks Act* that will provide significant new “geographical indication” rights for agricultural foods and products. These rights may impede the use or registration of similarly named products in the Canadian marketplace.

Domain Names

The Internet’s domain name system and the Internet-based practice of meta-tagging present the intellectual property system and especially trade-mark law with some interesting challenges. The conflict between the registered trade-mark system and a domain names registry is the result of domain name registrations following a “first-come, first-served” policy, without an initial, independent review of whether the name being registered is another person’s registered trade-mark. At the same time, a domain name in some respects is more powerful than a trade-mark, as there can only be one company name registered for each top-level domain.

To obtain a Canadian “.ca” registration, a would-be registrant must meet certain Canadian-presence requirements. These present certain

challenges for foreign entities that do not wish to incorporate in Canada.

While the ownership of a registered Canadian trade-mark suffices to meet the requirement, the owner may reserve only those domain names that consist of or include the exact word component of that registered trade-mark.

In Canada, some trade-mark owners have successfully used the doctrine of “passing off” in combating so-called “cybersquatters.” In other cases, they have argued trade-mark infringement under the *Trade-marks Act*. To gain control of a domain name, it might also be possible to argue “depreciation of goodwill” under Section 22 of the *Trade-marks Act* as well as misappropriation of personality rights.

The Canadian Internet Registration Authority (CIRA) Domain Name Dispute Resolution Policy (CDRP) is an online domain name dispute resolution process for the “.ca” domain name community. One- or three-member arbitration panels consider written arguments and render decisions on an expedited basis. Among other features, the CDRP permits a panel to award costs of up to C\$5,000 against a complainant found guilty of reverse domain name hijacking.

Other Intellectual Property

Patents, copyrights, trade-marks and domain names represent some of the most common types of intellectual property. However, in today’s economy, intellectual property protection takes many additional forms. The common law protects against the misappropriation of trade secrets, personality rights and passing off, among other things. It also protects privacy and personality rights to some degree. A broad range of particular rights and obligations also arise under more specific statutes such as the *Industrial Design Act*, the *Integrated Circuit Topography Act*, the *Personal Information Protection and Electronic Documents Act*, the *Plant Breeders’ Rights Act*, the *Competition Act*, the *Public Servants Inventions Act* and the *Status of the Artist Act*.

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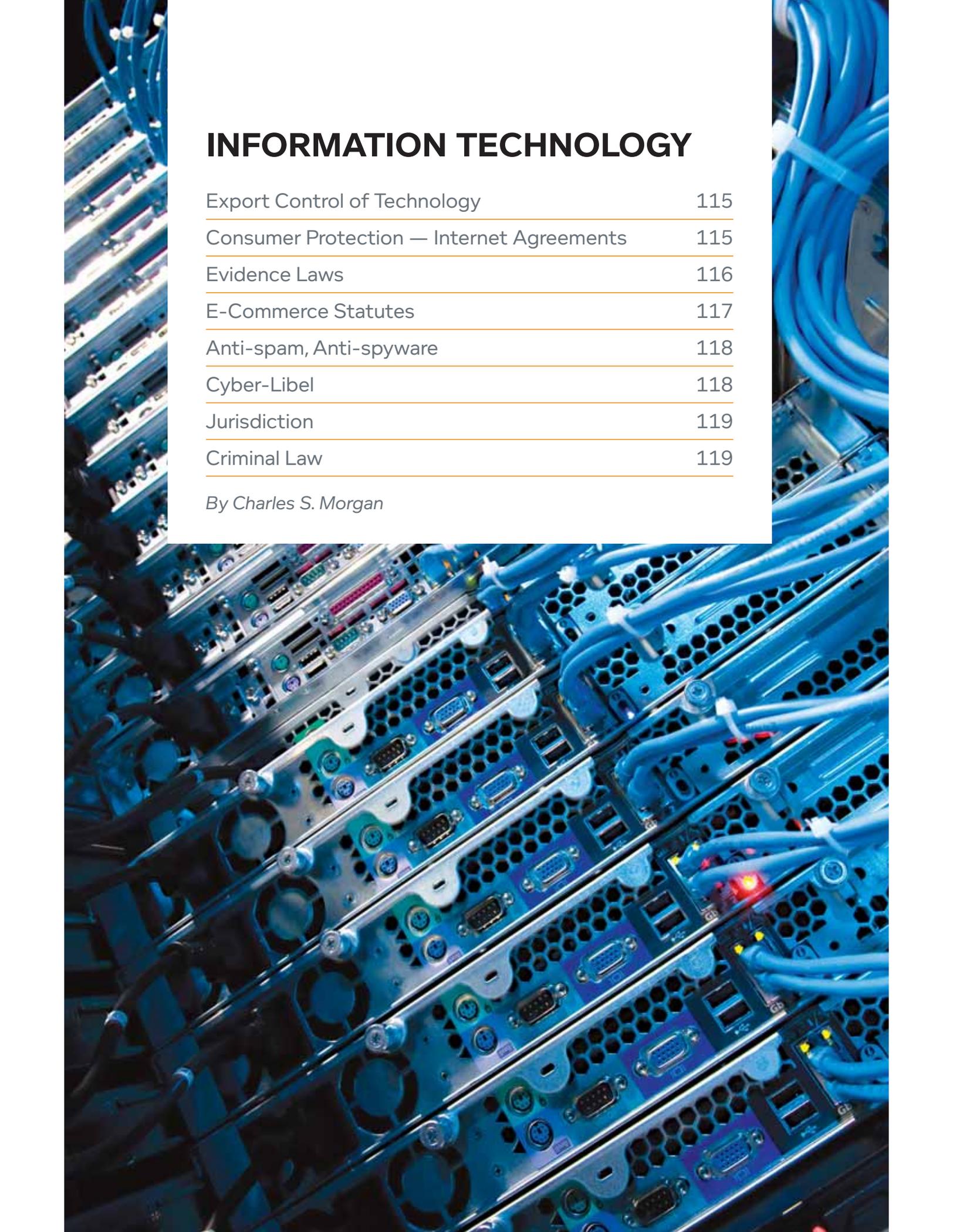
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The background of the page is a high-angle, close-up photograph of a server rack. The rack is filled with server units, each with a perforated metal front panel. Numerous blue Ethernet cables are plugged into the front of the servers, some bundled together. The lighting is dramatic, with strong highlights and deep shadows, emphasizing the metallic textures and the organized chaos of the network infrastructure.

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By Charles S. Morgan

INFORMATION TECHNOLOGY

Export Control of Technology

In Canada, the control of exports in technology falls within the mandate of the federal government. These controls apply not just to physical shipments, but also to transfers by intangible means, including through the provision of services or training, downloads or other electronic file transfers, e-mails, faxes, telephone conversations and face-to-face meetings. Export of certain computers, technology and other products may be controlled by means of the *Export and Import Permits Act* (EIPA), the *United Nations Act* (UNA), or the *Special Economic Measures Act* (SEMA). Under the UNA and the SEMA, Canada can restrict the export of goods, as well as the movement of people and money and the provision of services, to any country against which the United Nations or Canada has imposed economic sanctions.

The Export Control List (ECL) kept under the EIPA restricts certain high-tech goods, but is not product specific; instead, it provides a set of technical specifications that are technology-neutral for the most part and are functional in their description. The ECL also regulates the export of certain software (software generally available to the public is not usually restricted). Software and other items having cryptographic security features are generally covered by export controls, subject to certain limited mass market and public domain exceptions, unless the cryptography employs very low-key lengths. In addition, all U.S.-origin technology that is to be transferred to a destination other than the U.S. is subject to export controls.

Consumer Protection — Internet Agreements

Over the past decade, various legislative initiatives have provided more legal certainty to doing business online. In Ontario, for example, the *Consumer Protection Act, 2002* (CPA) overhauled various existing consumer protection legal regimes and brought them under one roof for consistency and ease of administration. Some important extensions of the law favour consumers. These extensions are particularly germane to online commerce, where a growing number of Canadian consumers buy and sell goods and services, though they apply generally outside e-commerce as well. See [Manufacture and Sale of Goods — Consumer Protection](#).



The creation of a new implied warranty, for example, requires that services supplied under a consumer agreement be of “a reasonably acceptable quality.” It also extends the implied warranties in the *Sale of Goods Act* to goods that are leased or traded. Another important change is a provision that prohibits contracting out of the class action proceedings regime. This is designed to counteract the practice of some merchants to provide arbitration as the contractually stipulated dispute resolution mechanism, precisely to avoid a class action scenario. Further, the CPA requires the merchant to provide the consumer with a fairly extensive list of disclosure information before concluding an Internet agreement. The CPA also requires that this information be disclosed to the prospective consumer in a manner that is “clear, comprehensible and prominent,” as well as “accessible.” In addition, a confirmation screen that summarizes the consumer’s purchase details just before the conclusion of the online purchase is mandatory, along with the requirement that the merchant provide a copy of the Internet agreement to the consumer within 15 days after the consumer enters into that agreement. Finally, recent amendments to the CPA set out rules for pre-paid cards such as gift cards, which comprise a growing segment of the consumer economy, especially online. These rules cover a number of requirements and limitations on issuers, such as whether a gift card can have an expiration date or whether the issuer can charge the consumer any fees, among other things. Similar provisions that regulate Internet agreements and pre-paid cards have been adopted in the majority of Canadian provinces.

Evidence Laws

Most jurisdictions in Canada have adopted rules of evidence that specifically address electronic documents. The statutes now also provide for the best-evidence rule to be satisfied in respect of electronic records, by proof of the integrity of the electronic records system by which the data was recorded or preserved. These provisions allow the integrity of the record-keeping system to be implied from the operation of the underlying computer-related devices. In short, the amendments support the admissibility of electronic evidence, while still permitting a party to challenge the reliability of the computer system or network that produced the evidence.

In the current era of electronic word processing coupled with e-mail, strict and literal compliance with litigation discovery rules, such as Rule

30 of the *Rules of Civil Procedure* (Ontario), would prove very expensive and largely of limited value to participating litigants. Therefore, judges in Canada are increasingly receptive to having parties to litigation follow e-discovery guidelines. These require, for example, that parties contemplating or threatened with litigation must consider e-evidence issues and, among other things, circumscribe the scope of e-discovery in order to comply with Rule 30. See **Dispute Resolution — Electronic Discovery**.

E-Commerce Statutes

The Canadian provinces have adopted electronic commerce statutes that address a variety of issues that arise in doing business electronically, such as the validity of using electronic messages to meet the writing requirements for legal documents. Ontario's *Electronic Commerce Act*, for example, provides that the legal requirement for a document to be in writing is satisfied by a document that is in electronic form — such as e-mail — if it is accessible so as to be usable for subsequent reference. The provincial electronic commerce statutes also stipulate that one can satisfy any legal requirement that a document be signed by an electronic signature. The definition of “electronic signature” is very broad and encompasses any electronic information that a person creates or adopts in order to sign a document and that is in, attached to or associated with the document. The federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) is somewhat narrower and focuses only on “secure electronic signatures,” which is currently taken by the government to mean, essentially, an authentication process based on public key type encryption.

In addition to writing and signature rules, most provincial electronic commerce statutes provide that an offer, an acceptance or any other matter material to the formation or operation of a contract may be expressed by electronic information or by an act intended to result in electronic communication, such as touching or clicking an appropriate icon or other place on a computer screen or even by speaking. These rules are useful because they confirm that contracts made over the Internet will not be unenforceable simply because they were concluded electronically. There is jurisprudence in Canada supporting the enforceability of “express-click consent” agreements. Where a user is not required to click “I agree” expressly, but rather where the terms say,

for example, that using the website denotes consent to the terms, there is less certainty as to enforceability.

Anti-spam, Anti-spyware

The federal government enacted Canada's *Anti-Spam Act* (CASL) in December 2010. CASL came into force in 2014. It is widely considered to be one of the most stringent anti-spam laws in the world. The legislation implements a broad range of requirements intended to reduce spam, identity theft, phishing and spyware. Unlike the U.S. *CAN-SPAM Act*, which allows businesses to send commercial electronic messages to individuals without prior consent so long as the message contains a valid unsubscribe mechanism, CASL requires businesses to obtain valid consent prior to sending even the first commercial message to intended recipients. Violations of CASL may be subject to administrative monetary penalties of up to C\$1 million for individuals and C\$10 million for other offenders. Commencing in 2017, CASL provisions that implement a private right of action will come into force pursuant to which businesses and consumers will be granted a right to take civil action against violators of the law to recover damages.

Many industry groups consider parts of the legislation to be overreaching because: a) the law governs all forms of "commercial electronic messages" (not merely misleading or bulk e-mails used for direct marketing); and b) the law imposes an "opt-in" consent requirement and detailed disclosure requirements to both the delivery of "commercial electronic messages" and to the installation of computer programs on another person's computer system (whether or not the computer program might be considered "spyware" or "malware").

Since coming into effect, the Canadian Radio-television and Telecommunications Commission (CRTC), which is responsible for enforcing the law, has received over 750,000 complaints from Canadians; although it has rendered very few enforcement decisions thus far.

Cyber-Libel

Cyber-libel is posting a publication onto the Internet that is calculated to injure the reputation of another without lawful excuse. Recent Canadian court decisions have awarded significant damages to plaintiffs who were libelled by defendants sending defamatory e-mails and making other similar online postings about plaintiffs. The case law is developing

to minimize potential liability of responsible hosts of online discussion forums.

Jurisdiction

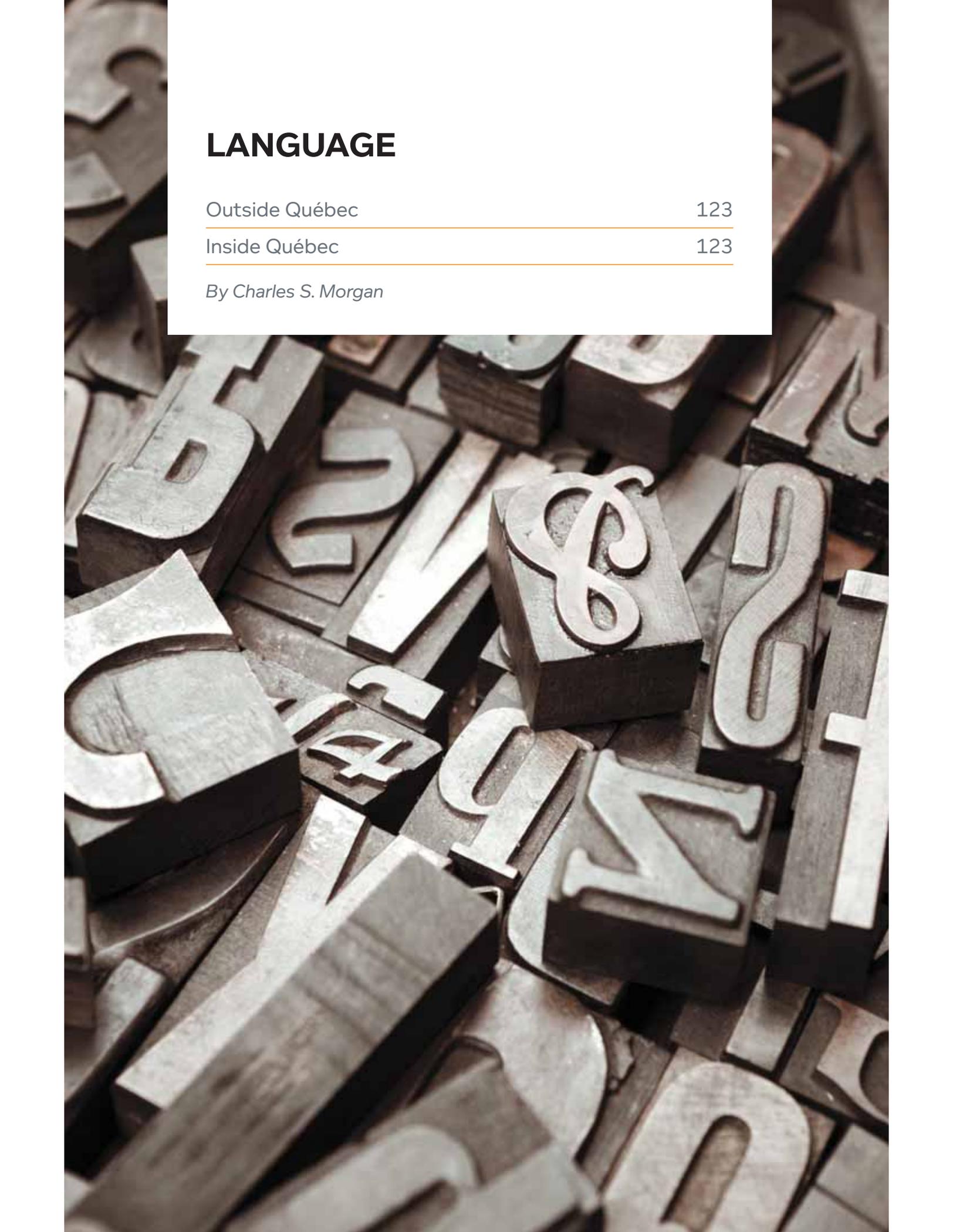
In the criminal, quasi-criminal and regulatory arenas, Canadian courts and regulators seem to have little hesitation assuming jurisdiction over foreign-originated Internet-related conduct they view as harmful to the public good, so long as there is a real and substantial connection to the court's or regulator's own jurisdiction.

Criminal Law

In general, the Canadian government has made useful strides in combating computer crime by continuously amending the *Criminal Code of Canada* over the past 20 years to keep pace with perpetrators of computer-related crime. However, the Internet and other computer-based technologies and business practices raise a number of novel questions under these amendments, as well as the older provisions of the *Criminal Code of Canada*, highlighting (among other challenges) the difficulty in enforcing a national criminal law in an increasingly global technology environment. As technology evolves, the applicability of the *Criminal Code of Canada* to certain harmful behaviour remains in question.

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LANGUAGE

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Inside Québec

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By Charles S. Morgan

LANGUAGE

Language rules in most of Canada apply primarily to government institutions, not private businesses. Canada's Constitution grants English and French equal status in Canada's Parliament and federal courts. Every law must be published in both English and French in some provinces, including Québec. The federal *Official Languages Act*, given additional profile by the *Canadian Charter of Rights and Freedoms*, requires that all federal institutions provide services in either language wherever there is demand for it, or wherever the travelling public is served. Public education is available in either official language, where numbers warrant.

CANADA'S
CONSTITUTION
GRANTS ENGLISH
AND FRENCH EQUAL
STATUS IN CANADA'S
PARLIAMENT AND
FEDERAL COURTS.

Outside Québec

Outside Québec, the main exception to this focus on the public sector is consumer packaging. Regulations under the federal *Consumer Packaging & Labelling Act* identify specific information with which pre-packaged consumer products sold in Canada must be labelled. That information must be set out in both English and French. Exceptions include religious, specialty-market and test products, and language-sensitive products, such as books and greeting cards.

Although Canada is bilingual at the federal level, other governments in Canada may apply their own language policies to matters within their jurisdiction. New Brunswick and the three northern territories are officially bilingual. Several provinces have adopted legislation to ensure that public services are available in French where warranted; but only Québec's language legislation regulates how businesses operate.

Inside Québec

Québec's *Charter of the French Language* (Charter) affirms French as that province's official language. The Charter grants French-language rights to everyone in Québec, both as workers and as consumers. Anyone who does business in Québec — anyone with an address in Québec and anyone who distributes, retails or otherwise makes a product available in Québec — is therefore subject to rules about how they interact with the public and how they operate internally inside the province.

In the Workplace

In Québec, written communications with staff must be in French, including offers of employment and promotion and collective agreements. No one may be dismissed, laid off, demoted or transferred for not knowing a language other than French — but knowledge of English or another language may be made a condition of hiring if the nature of the position requires it.

Businesses that employ at least 50 people within Québec for at least six months must register with a provincial regulator (the Québec French Language Office or OQLF) to obtain a francization certificate by demonstrating that the use of French is generalized at all levels of the business (including in relation to the use of information technology and in communications with clients, employees and investors). Businesses where the use of French is not generalized at all levels may be subject to a francization program in order to achieve this goal over time. In addition, businesses with at least 100 employees must establish an internal francization committee that monitors the use of French in the workplace.

In the Marketplace

Rules about how businesses communicate in Québec's marketplace differ according to whether the communication is in a public or private place. Billboards and signs visible from a public highway, on a public transport vehicle or in a bus shelter must be exclusively in French. Public signs, posters and commercial advertising located elsewhere may include other languages, but the French text must predominate. Non-French business names must be accompanied by a French version appearing no less prominently, unless the non-French name has been trade-marked and a French version has not. Moreover, anyone carrying on business at a Québec location must register a French language business name.

RULES ABOUT HOW BUSINESSES COMMUNICATE IN QUÉBEC'S MARKETPLACE DIFFER ACCORDING TO WHETHER THE COMMUNICATION IS IN A PUBLIC OR PRIVATE PLACE.

With respect to the "trade-mark" exception for public signs, pursuant to draft regulations published in 2016 (not in force, as at time of writing), any person having as part of its public signage a trade-mark that is only



in English will have to add one of the following three elements in French: (i) a generic term or a description of the products or services concerned; (ii) a slogan; or (iii) any other term or indication, favouring the display of information pertaining to the products or services to the benefit of consumers or persons frequenting the site. This new requirement, if adopted, is intended to address concerns expressed by certain francophone consumers in Québec to the effect that English-language trade-marks were dominating the urban commercial landscape in some cities.

Communications such as leaflets, catalogues, brochures, order forms, invoices, receipts, user manuals, warranties and product packaging must include French text that is no less prominent than any non-French text displayed. Because such communications are not displayed in a public place, however, the French text need not predominate. The latter rule applies not only to communications and product labelling, but also directly to certain products that use words. Subject to certain cultural exceptions, for example, the words on toys and games must be available in French alongside any other language version. In the case of software products, if a French-language version of the software exists and has been made commercially available somewhere in the world, then non-French versions may be sold in Québec only if a functionally equivalent French-language version is simultaneously made available in Québec on terms and conditions that are equally attractive to those applicable to the non-French version.

Québec courts have held that certain provisions of the Charter apply to websites. For example, product and service descriptions on websites may be subject to French-language requirements since they are akin to a commercial catalogue. Similarly, standard form contracts (such as website terms of use and privacy policies) as well as order forms must be drafted in French according to the Charter. In general, if a company has a physical address in Québec and its website advertises products or services sold in Québec, then the above-mentioned aspects of the website may be subject to French language requirements.

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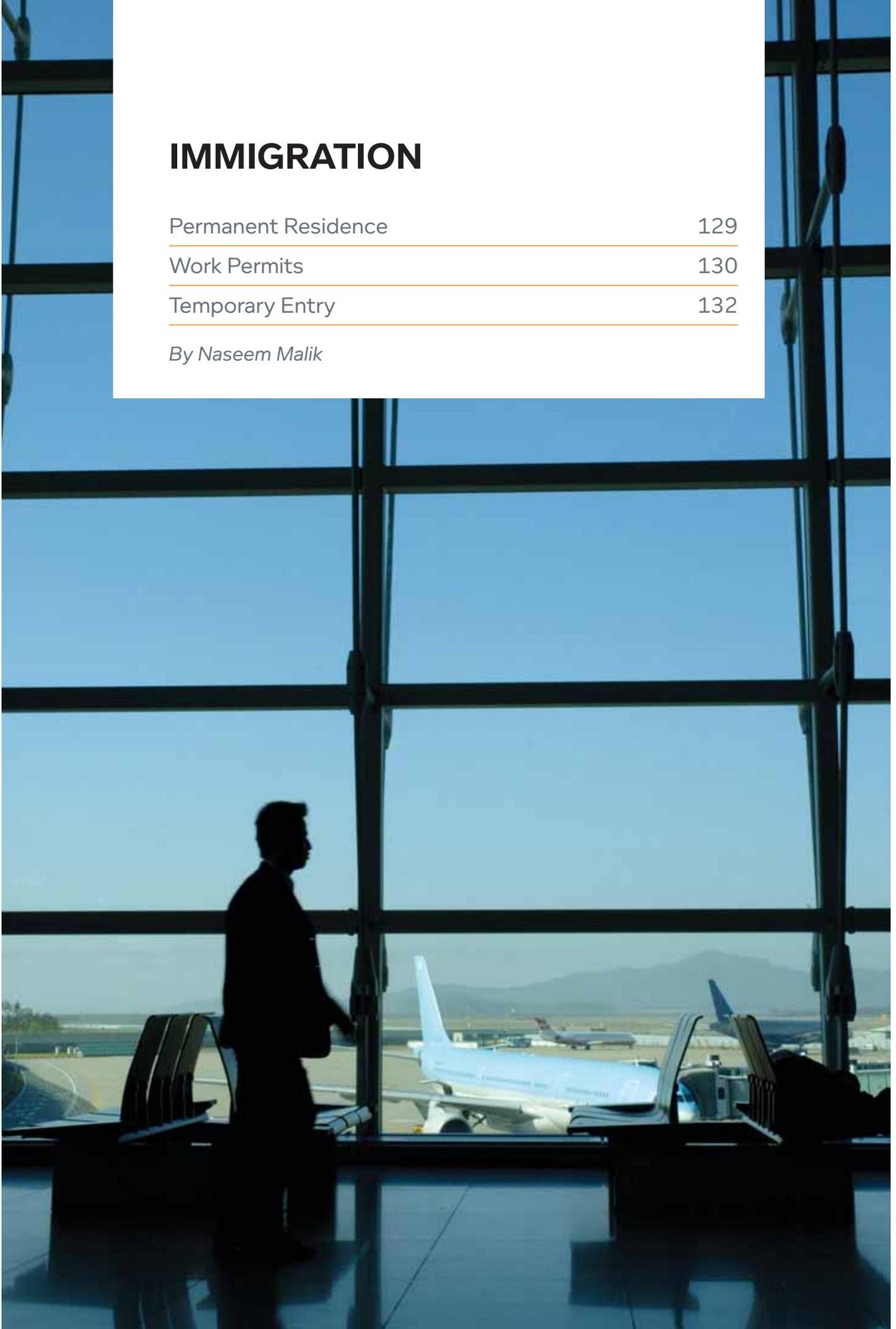
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IMMIGRATION

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By Naseem Malik



IMMIGRATION

The federal government is responsible for immigration, although some provinces have entered into agreements with the federal government enabling them to assume certain policy and procedural objectives. These agreements are called Provincial Nominee Programs. The federal statute governing Canadian immigration law is the *Immigration and Refugee Protection Act* (IRPA).

Permanent Residence

Any non-Canadian entering the country and planning to remain as a permanent resident must first apply for, and then be granted, a permanent resident visa. Starting in November 2016 the new mandatory Electronic Travel Authorization (ETA) came into effect. Foreign nationals other than American citizens and permit or visa holders must file and secure the ETA prior to travel to Canada.

Since January 2015, a system called Express Entry came into effect, which governs economic class applications for permanent residence. Under the Express Entry system, applicants must create an online profile and are scored using a set of criteria, which includes proficiency in English or French, education level, age, etc. Once the profile is created each candidate is placed into a pool and every month a select number of the top candidates are invited to apply for permanent residence in one of the various categories. The two most common categories are the Canadian Experience Class and the Federal Skilled Worker category. The various Provincial Nominee Programs also play an important role in the selection of immigrants. Provincial Nominee Programs are agreements between the federal government and some of the provinces whereby there is a delegation of authority from the federal government to the provincial government to allow a limited right to select immigrants destined to its province. Each Provincial Nominee Program has its own selection criteria.

Québec has an agreement with the federal government on immigration matters. The Québec agreement provides for a separate selection process for permanent residents, and some additional procedures for temporary entry that are administered by the government of Québec.

Work Permits

In 2015, Immigration, Refugees and Citizenship Canada introduced mandatory employer compliance guidelines for any work permit that is employer specific and belongs to a Labour Market Impact Assessment exempt category. The employer compliance filing must be done electronically in advance of the temporary foreign worker making a work permit application either through a Canadian consulate or embassy abroad or at the border/port of entry.

Generally, any business-related activity carried on in Canada on a temporary basis by a person who is neither a Canadian citizen nor a Canadian permanent resident, for which remuneration is received, or would reasonably be expected to be received, requires a work permit. There are, however, a number of work permit exempt categories that allow a foreign national, if eligible, to carry on prescribed business activities in Canada without need for a work permit. Work permit exempt categories include the NAFTA Business Visitor and the intracompany trainer.

WORK PERMIT EXEMPT CATEGORIES INCLUDE THE NAFTA BUSINESS VISITOR AND THE INTRACOMPANY TRAINER.

Under certain circumstances, multinational or other foreign companies carrying on business in Canada may transfer executive or senior managerial employees or workers with specialized knowledge to work in Canada on a temporary basis, subject to such employee or worker obtaining a work permit. Such employee or worker might be eligible for a work permit as an intra-company transfer pursuant to three separate and distinct international agreements — the *North American Free Trade Agreement* (NAFTA), the *Canada-Chile Free Trade Agreement* (CCFTA) and the *General Agreement on Trade in Services* (GATS). These three international agreements liberalized the rules respecting the temporary entry of business visitors, certain professionals and intra-company transferees who are citizens or permanent residents of the numerous countries that are GATS signatories or citizens of the United States or Mexico (in the case of NAFTA) or citizens of Chile (in the case of CCFTA).

In addition to certain prescribed work permit categories under these agreements, there are also a number of other exempt categories available



under the Regulations of the IRPA, including one for intra-company transfers.

In 2008, Immigration, Refugees and Citizenship Canada relaxed duration limits for young workers under the post-graduation work permit category, raising duration limits in some cases to three years from the typical 12 months. The post-graduation work permit was also shifted to an open work permit, which makes it non-employer-specific and allows more flexibility to young graduates to pursue employment options in the Canadian labour market.

If an employee is not eligible for any of the exempt categories, he or she can still obtain a work permit if his or her Canadian employer can first obtain a Labour Market Impact Assessment from Employment Skills Development Canada, a federal government agency. To do so, the Canadian employer must demonstrate that granting a work permit to the employee will result in the transfer of skills or technology to Canadians or will result in other types of positive benefits, such as job creation. Usually the employer must also show that there are no Canadians available to do the job.

Stricter rules for the maximum total duration of some work permits based on Labour Market Impact Assessments went into effect in April 2011, which cap the total duration at four years for some types of work. At that time, the foreign national will no longer be able to hold a lawful work permit until a subsequent four years has passed. Tougher new rules concerning penalties for employers who do not comply with immigration laws also came into effect on April 1, 2011, which can bar a company from bringing anyone into Canada to work for a mandatory two-year period should it be deemed to have breached Canadian immigration laws. The rules concerning the issuance of Labour Market Impact Assessments changed significantly in 2013. Some of the significant changes include a processing fee for each worker being requested and longer and more numerous types of advertising required in advance of a Labour Market Impact Assessment being filed to demonstrate that the Canadian labour

IN ADDITION TO CERTAIN PRESCRIBED WORK PERMIT CATEGORIES UNDER NAFTA, CCFTA AND GATS, THERE ARE ALSO A NUMBER OF OTHER EXEMPT CATEGORIES AVAILABLE UNDER THE REGULATIONS OF THE IRPA, INCLUDING ONE FOR INTRA-COMPANY TRANSFERS.



market was extensively searched prior to the hire of a foreign national.

Temporary Entry

With respect to temporary entry, nationals of certain countries may also be required to obtain a temporary resident visa (formerly, a visitor visa) to enter Canada, and may be required to undergo a medical examination before arriving for entry to Canada.

The rules and regulations governing both permanent and temporary entry to Canada are complex and ever changing. It is therefore prudent for any company wishing to establish a commercial presence in Canada to become familiar with Canadian immigration laws.

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By John W. Boscarol and Robert Glasgow

INTERNATIONAL TRADE AND INVESTMENT

Canada is a member of the World Trade Organization (WTO) and a party to the *North American Free Trade Agreement* (NAFTA), the *Canada-Korea Free Trade Agreement* (CKFTA), and numerous other regional trade and investment protection agreements. Recently, Canada has signed the *Comprehensive Economic and Trade Agreement* (CETA), a free trade agreement with the European Union. The implementing legislation for CETA has passed through two readings in the House of Commons. It is expected that CETA will come into force in 2017, with several exceptions largely related to the investor-state dispute settlement mechanism. In addition, Canada has signed the *Trans-Pacific Partnership* (TPP), which, together with CETA, will vastly expand Canada's free trade coverage. As such, Canada has rights and obligations in a wide range of areas addressed under these treaties.

Due of the broad scope of these trade and investment agreements and their binding dispute settlement mechanisms, foreign investors establishing a business in Canada should be cognizant of Canada's obligations and the remedies available to them, particularly where they are facing discriminatory or otherwise harmful government measures.

The World Trade Organization

As a member of the WTO, Canada is subject to a broad range of obligations that impact all sectors of the Canadian economy. These obligations govern Canadian measures concerning market access for foreign goods and services, foreign investment, the procurement of goods and services by government, the protection of intellectual property rights, the implementation of sanitary and phytosanitary measures and technical standards (including environmental measures), customs procedures, the use of trade remedies, such as anti-dumping and countervailing duties, and the subsidization of industry.

These WTO obligations apply to Canadian government policies, administrative and legislative measures, and even judicial action. They apply to the federal government and also in many cases to provincial and other sub-federal governments.

Canada is an active participant in the WTO's dispute settlement system, both as complainant and respondent. As a result of WTO cases brought





against Canada by other countries, Canada has had to terminate or amend offending measures in numerous sectors, including automotive products, magazine publishing, pharmaceuticals, dairy products, green energy, and aircraft. On the other hand, Canadian successes under the WTO dispute settlement system have increased access for Canadian companies to markets around the world.

The North American Free Trade Agreement

NAFTA came into effect on January 1, 1994, and provided for the elimination of trade barriers among Canada, the United States and Mexico. Between Canada and the United States, the process of tariff elimination initiated pursuant to the *Canada-United States Free Trade Agreement* that came into effect on January 1, 1989 was continued under NAFTA. On January 1, 1998, customs duties were completely eliminated with respect to U.S.-origin products imported into Canada, with the exception of certain supply managed goods (including dairy and poultry products). Effective January 1, 2003, virtually all customs tariffs were eliminated on trade in originating goods between Canada and Mexico.

While NAFTA eliminates tariff barriers among Canada, Mexico, and the United States, each country continues to maintain its own tariff system for non-NAFTA countries. In this respect, NAFTA differs from a customs union arrangement of the kind that exists in the European Union, whereby the participating countries maintain a common external tariff with the rest of the world. A system of rules of origin has been implemented to define those goods entitled to preferential duty treatment under NAFTA. Goods wholly produced or obtained in Canada, Mexico or the United States, or all three countries, will qualify for preferential tariff treatment, as will goods incorporating non-NAFTA components that undergo a prescribed change in tariff classification, and that in some cases satisfy prescribed value-added tests. Provided the NAFTA rules of origin are satisfied, investors from non-NAFTA countries may establish manufacturing plants in Canada through which non-NAFTA products and components

GOODS WHOLLY PRODUCED OR OBTAINED IN CANADA, MEXICO OR THE UNITED STATES, OR ALL THREE COUNTRIES, WILL QUALIFY FOR PREFERENTIAL TARIFF TREATMENT.



may be further processed and exported duty-free to the United States or Mexico.

NAFTA Chapter 11 imposes obligations on Canada concerning its treatment of investors of other NAFTA countries. It also contains an investor-state dispute settlement (ISDS) mechanism, which permits a private investor of one NAFTA country to sue the government of another NAFTA country for loss or damage arising out of that government's breach of its investment obligations. Under NAFTA Chapter 11, the federal government can be sued for damages arising out of provincial government measures that are inconsistent with NAFTA's investment obligations.

While NAFTA contains many obligations similar to those found in WTO agreements, it is sometimes referred to as "WTO-plus," because of enhanced commitments in certain areas, including foreign investment, intellectual property protection, energy goods (such as oil and gas), financial services, telecommunications, and rules of origin. NAFTA also establishes special arrangements for automotive trade, trade in textile and apparel goods, and agriculture.

The *Canada-European Union Comprehensive Economic and Trade Agreement*

On October 30, 2016, Canada and the European Union signed the final legal text of the EU-Canada CETA. With a final legal text in hand, Canada and the EU have begun the ratification and implementation process. In Canada, this process is well underway with the implementing legislation having been taken through two readings in the House of Commons in 2016, and Royal Assent is expected in the first quarter of 2017. Certain aspects of CETA will need to be implemented by the various provincial legislatures.

Because the European Commission has designated CETA as a "mixed agreement" it will need ratification by the individual member states. The EU has indicated that most of CETA, with the exception of the novel approach to investor-state dispute settlement and a few ancillary portions of the agreement, will go into force immediately upon ratification.

As Canada's broadest and most significant trade agreement to date, CETA significantly liberalizes trade and investment rules applicable to



economic relations between the two regions. CETA addresses trade in services (including financial services), movement of professionals, government procurement (including at the provincial and municipal levels), technical barriers to trade, investment protection and ISDS, and intellectual property protections (including for geographical indications and pharmaceuticals).

On the day CETA enters into force, 98% of all EU tariff lines will be duty-free for Canada. Canadian exporters will also benefit from clear rules of origin that take into consideration Canada's supply chains to determine which goods are considered "made in Canada" and eligible for preferential tariff treatment. Similar to NAFTA, CETA also aims to foster regulatory unification, co-operation, and information sharing between Canadian and EU authorities in order to put in place more compatible regulatory regimes. This will include co-operation on sanitary and phytosanitary measures for food safety, animal and plant life, and health. CETA also includes some sector-targeted provisions that recognize specific interests related to wines and spirits, biotechnology, forestry, raw materials, science, technology, and innovation. Underscoring the agreement's co-operative objectives, CETA also promises to implement greater transparency and information sharing with respect to subsidies and trade remedies provided by governments to their respective countries' industries.

Where a dispute arises under CETA, the parties have agreed to establish a permanent tribunal that utilizes the ISDS arbitration mechanism. The tribunal is to be comprised of 15 members: five nationals of Canada, five nationals of EU members states, and five nationals of third countries — each of which must be a jurist in their home jurisdiction. Cases will be heard by panels of three tribunal members (one for each party's state, and the third selected from a list of neutral members). CETA also establishes an appellate tribunal that may uphold, reverse, or modify a tribunal's award based on errors of law, manifest errors of fact, or on the basis that it has exceeded its jurisdiction. Because of objections of the Wallonia region of Belgium, this portion of CETA will not be in force until it has gone through further analysis.

The Trans-Pacific Partnership Agreement

The TPP is a trade agreement among 12 Pacific Rim countries, representing a market of 792 million people and a combined GDP of



C\$28.1 trillion, which is approximately 40% of the global economy. The agreement promises to provide significantly enhanced access to Pacific markets for Canadian business.

The agreement has been finalized, and was signed by ministers of Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam on February 4, 2016. It has not yet come into force. In Canada, enactment will require ratification by Parliament and the Canadian government appears to be waiting to see whether the United States Congress will pass TPP before proceeding further. Recent development in the United States suggest this is unlikely in the near future.

If it comes into force, the TPP will reduce trade barriers across a range of goods and services, which will, in turn, create new opportunities for businesses and consumers. The TPP addresses new trade issues and other contemporary challenges, such as labour and environmental issues. It reflects both tariff and non-tariff barriers to trade and investment, with the goal of facilitating the movement of people, goods, services, capital, and data across borders. The agreement also includes ISDS provisions to resolve disputes between parties and investors.

Other Free Trade Agreements

In addition to CETA, NAFTA, and the agreements of the WTO, Canada has also negotiated free trade agreements with Colombia, Chile, Costa Rica, Honduras, Jordan, Korea, Israel, Panama, Peru, Ukraine and the European Free Trade Association (Iceland, Liechtenstein, Norway, and Switzerland).

Canada is currently in talks regarding free trade deals with China, India, Japan, Turkey, Morocco, the Caribbean Community (CARICOM), the Dominican Republic, Singapore, the Andean Community (MERCOSUR), Philippines, Thailand, El Salvador, Guatemala and Nicaragua.

Bilateral Investment Treaties

Bilateral investment treaties (BITs) between Canada and 33 countries are currently in force. Like NAFTA Chapter 11, these BITs govern a range of foreign investment issues, including the treatment of foreign investors and their investments, performance requirements, expropriation and compensation, and government-to-government dispute settlement mechanisms.



To investors, perhaps the most important feature of these BITs is that they also contain private investor-state dispute settlement mechanisms that enable foreign investors to sue host governments, including Canada, for damages arising out of breaches of their investment treaty obligations. Foreign investors intending to establish a business in Canada are advised to determine whether their home state has a bilateral investment treaty with Canada. If so, their rights as an investor may be enhanced. Canadian-based businesses will also benefit from the BIT protections available for their foreign direct investment in developing countries.

Canada recently concluded negotiations of BITs with Bahrain, Guinea, Mongolia, Albania, Moldova, Madagascar, Nigeria, Zambia, and Cameroon. Canada is currently in the process of negotiating BITs with India, Kosovo, Pakistan, Ghana, Kazakhstan, Kenya, Macedonia, Tunisia, the United Arab Emirates, and a number of other countries.

Canada's Agreement on Internal Trade

The federal government of Canada has negotiated the *Agreement on Internal Trade* (AIT) with each of the governments of Canada's provinces and territories. The AIT contains obligations pertaining to: restricting or preventing the movement of goods, services and investment across provincial boundaries; investors of a province; the government procurement of goods and services; consumer-related measures and standards; labour mobility; agricultural and food goods; alcoholic beverages; natural resources processing; communications; transportation; and environmental protection. The AIT also provides for government-to-government and person-to-government dispute resolution.

The AIT came into force in 1995, and has been updated since that time through 14 protocols of amendment. Talks are currently underway between the provinces and the federal government to overhaul and renew the AIT to bring it into line with Canada's international commitments and expectations of a modern free trade agreement.

A March 2016 deadline to modernize the AIT was established under the previous government. Regulatory and procurement co-operation have been recently reported as key points of discussion between ministers. This deadline has passed and further attempts by Canada's provincial Premiers to finalize the modernization efforts have been unsuccessful to date.



Economic Sanctions

A number of nations, entities and individuals are subject to Canadian trade embargoes under the *United Nations Act*, the *Special Economic Measures Act*, the *Freezing Assets of Corrupt Foreign Officials Act*, and the *Criminal Code of Canada*. Canadian sanctions of varying scope apply to activities involving the following countries or regions: Burma (Myanmar), Central African Republic, Côte d'Ivoire, the Crimea Region of Ukraine, the Democratic Republic of the Congo, Egypt, Eritrea, Guinea Bissau, Iran, Iraq, Lebanon, Liberia, Libya, North Korea, Pakistan, Russia, Somalia, South Sudan, Sudan, Syria, Tunisia, Ukraine, Yemen, and Zimbabwe. Canada also maintains very significant prohibitions on dealings with listed "designated persons," terrorist organizations and individuals associated with such groups.

In a number of areas, these Canadian economic sanctions measures can be more onerous than those imposed by the United States and Europe.

Unlike the United States, Canada does not maintain a general trade embargo against Cuba. Indeed, an order issued under the *Foreign Extraterritorial Measures Act* makes it a criminal offence to comply with the U.S. trade embargo of Cuba, and requires that the Attorney General of Canada be notified of communications received in respect of these U.S. embargo measures.

CANADA, FOR REASONS OF BOTH DOMESTIC POLICY AND INTERNATIONAL TREATY COMMITMENTS, MAINTAINS CONTROLS ON IMPORTS, EXPORTS AND TRANSFERS OF CERTAIN GOODS AND TECHNOLOGY.

Export and Import Controls on Goods and Technology

Canada, for reasons of both domestic policy and international treaty commitments, maintains controls on imports, exports and transfers of certain goods and technology and, in the case of exports, their destination country. The federal *Export and Import Permits Act* (EIPA) controls these goods through the establishment of three lists: the Import Control List (ICL), the Export Control List (ECL) and the Area Control List (ACL).

Goods identified on the ICL require an import permit, subject to exemptions (including for goods from certain countries of origin). These include steel products, weapons and munitions, and agricultural and



food products such as turkey, beef and veal products, wheat and barley products, dairy products, and eggs.

The ECL identifies those goods and technology that may not be exported or transferred from Canada without obtaining an export permit, subject to exemptions for certain destination countries. Controlled goods and technology are categorized into the following groups: dual-use items, munitions, nuclear non-proliferation items, nuclear-related dual use goods, miscellaneous goods (including all U.S.-origin goods and technology, and certain medical products, forest items, agricultural and food products, prohibited weapons, nuclear-related and strategic items), missile equipment and technology, and chemical and biological weapons and related technology.

Export permits must also be obtained for the export or transfer of any goods or technology, regardless of their nature, to countries listed on the ACL. Until recently, there have been only two countries on the ACL, Belarus and North Korea. However, in May of 2016, Canada indicated it will remove Belarus from the ACL. Administrative provisions have been implemented for the issuance of permits for transfers to Belarus, and it is expected Belarus will be removed from the ACL entirely in 2017.

In addition to the EIPA, other Canadian legislation regulates import and export activity, including in respect of rough diamonds, nuclear-related goods and technology, cultural property, wildlife, food and drugs, hazardous products and environmentally sensitive items.

Controlled Goods Program

The Canadian government has established the Controlled Goods Program under the authority of the *Defence Production Act*. This program is a domestic industrial security regime for certain goods and technology that have a military application, including but not limited to items subject to the *U.S. International Traffic in Arms Regulations*. It provides for defence trade controls to regulate and control the examination, possession and transfer in Canada of controlled goods and technology.

Anyone who deals with controlled goods and technology in Canada must register with the Controlled Goods Directorate and comply with numerous employee screening, security and other requirements.



Anti-Corruption Legislation

The federal *Corruption of Foreign Public Officials Act* (CFPOA) makes it a criminal offence for any person to offer or pay a bribe to a foreign public official. The CFPOA prohibits Canadians from directly or indirectly (i.e., through an agent or other representative) giving, offering, or agreeing to give or offer a loan, reward, advantage, or benefit of any kind to a foreign public official in order to obtain or retain an advantage in the course of business. Canadian companies must therefore carefully scrutinize their activities abroad, including the actions of their agents and other business partners in other countries to ensure compliance with the CFPOA.

In recent years, Canadian corporate culture has been undergoing significant change in response to new and vigorous enforcement of the CFPOA by the RCMP and Crown prosecutors. The widely publicized criminal penalties against Niko Resources Ltd. in 2011 and Griffiths Energy in 2013, and ongoing RCMP investigations into the activities of a number of other Canadian companies, serve as stark warnings of the very significant costs of non-compliance. With an additional 35 or so RCMP investigations underway, many Canadian companies are moving quickly to design and implement anti-corruption policies and procedures as well as transactional risk mitigation strategies.

In addition, Canada has enacted sector-specific legislation to increase transparency and deter corruption for Canadian companies operating outside of its borders. The *Extractive Sector Transparency Measures Act* (ESTMA) was brought into force on June 1, 2015. ESTMA requires extractive entities active in Canada to publicly disclose, on an annual basis, specific payments made to all governments in Canada and abroad.

Similarly, the federal government has also put in place a series of integrity policies (collectively referred to as the “Integrity Regime”) to ensure that the government itself conducts its business with ethical suppliers both in Canada and abroad. The Integrity Regime ranks among the world’s most aggressive debarment programs for the disqualification of companies seeking to do business with the federal government. It aims to promote and enforce ethical business practices in government, ensure due process for the government’s suppliers and service providers, and to uphold trust in the public procurement process.

Under its Criminal Code, Canada also prohibits bribery and related



activities in respect of domestic officials and bribery in the context on non-government parties (i.e., secret commissions).

It is important to note that unlike the United States, Canada does not have a formal program or process for remediation by companies facing allegations of anti-corruption violations. In the United States, there is a well-established process that allows companies to voluntarily disclose *Foreign Corrupt Practices Act* violations and negotiate deferred or non-prosecution agreements with the U.S. authorities that provide for the payment of fines and the imposition of monitors who oversee remediation, all without there having to be a criminal conviction of the company. The U.K. has also adopted a similar process.

Canada currently has no such process. Accordingly, if the RCMP and Crown are of the view that a Canadian company should be punished for a CFPOA or *Criminal Code of Canada* violation in terms of a fine and/or probation order, they have no choice but to pursue a conviction, either through a guilty plea or a trial. This is the case even if the company has voluntarily disclosed the CFPOA violation.

Duties and Taxes on the Importation of Goods

Importers are required to declare imported goods upon entry into Canada and to pay customs duties and excise taxes, if applicable, to Canada's customs authority, the Canada Border Services Agency (CBSA). Goods are subject to varying rates of duties depending upon the type of commodity and its country of origin. As a member of NAFTA, Canada accords preferential tariff treatment to goods of U.S. and Mexican origin; in most cases, these goods may be imported duty-free.

The amount of customs duties payable is a function of the rate of duty (determined by the tariff classification and the origin of the goods, and as set out in the Schedule to Canada's Customs Tariff) and the value for duty. Canada has adopted the World Customs Organization's Harmonized System of tariff classification, as have all of Canada's major trading partners.

In accordance with Canada's obligations under the WTO's agreement regarding customs valuation, the value for duty of goods imported into Canada is, if possible, to be based on the price paid or payable for the imported goods, subject to certain statutory adjustments. This primary



basis of valuation is called the “transaction value method:”

- An example of an adjustment that would increase the value for duty of the goods is a royalty payment, if the royalty is required to be paid by the purchaser of the imported goods as a condition of the sale of the goods for export to Canada.
- An example of an adjustment that would allow for a deduction from the price paid or payable is the transportation cost incurred in shipping the goods to Canada from the place of direct shipment, if such costs are included in the price paid or payable by the importer.

If for one reason or another (e.g., where there has been no sale of the goods) the transaction value of the goods may not be used as a basis for the declared customs value, Canadian legislation provides alternative methods for valuation. These methods must be applied sequentially. In addition to customs duties, Goods and Services Tax (GST) in the amount of 5% is also payable upon the importation of goods. This GST rate is applied to the duty-paid value of the goods. Provided that they have acquired the goods for use in commercial activity, importers registered under the *Excise Tax Act* will be able to recover GST paid upon importation by claiming an input tax credit. See **Sales and Other Taxes — Federal Goods and Services Tax**.

Other Requirements for Imported Goods

Certain imported goods are required to be marked with their country of origin. These generally fall within the following product categories: goods for personal or household use; hardware, novelties and sporting goods; paper products; wearing apparel; and horticultural products. Certain types of goods, or goods imported under specific conditions, are exempt from the country-of-origin-marking requirement.

Pre-packaged products (i.e., products packaged in a container in such a manner that it is ordinarily sold to or used or purchased by a consumer without being re-packaged) imported into Canada are also subject to requirements under the federal *Consumers Packaging and Labelling Act*. Consumer textile articles are subject to the requirements of the federal *Textile Labelling Act*.

There are also significant legislative requirements relating to the importation of foods, agricultural commodities, aquatic commodities,



and agricultural inputs. They are all subject to the inspection procedures of the Canadian Food Inspection Agency (CFIA).

Counterfeit trade-mark or pirated copyright goods may be detained upon importation into Canada. In accordance with the *Copyright Act* and the *Trade-marks Act*, the owner of a valid Canadian copyright or a Canadian trade-mark holder registered with the Canadian Intellectual Property Office (CIPO) is eligible to file a Request for Assistance (RFA) application with the CBSA. This RFA provides an important enforcement tool for intellectual property rights. Using the RFA, the CBSA can identify and detain commercial shipments suspected of containing counterfeit trade-mark or pirated copyright goods. When the CBSA detects such goods, the CBSA can use the information contained in the RFA to contact the rights-holder. The rights-holder may then pursue a court action if necessary. The Royal Canadian Mounted Police (RCMP) is responsible for undertaking any criminal investigations related to commercial scale counterfeiting and piracy.

Certain goods are prohibited from being imported into Canada. These include: materials deemed to be obscene under the *Criminal Code of Canada*; base or counterfeit coins; certain used or second-hand aircraft; goods produced wholly or in part by prison labour; used mattresses; any goods in association with which there is used any description that is false in a material respect as to their geographical origin; certain used motor vehicles; certain parts of wild birds; certain hazardous products; white phosphorous matches; certain animals and birds; materials that constitute hate propaganda; and certain prohibited weapons and firearms.

Trade Remedies

Canada maintains a trade remedy regime that provides for the application of additional duties and/or quotas to imported products, where such products have injured or threaten to injure the production of like goods in Canada.

The federal *Special Import Measures Act* provides for the levying of additional duties on “dumped” products (i.e., products imported into Canada at prices lower than the comparable selling price in the exporting country) if they have caused or threaten to cause injury to Canadian industry.

Duties may also be levied in instances of countervailable subsidies being provided by the government in the country of export, and if such subsidized products injure or threaten to injure Canadian industry. Further, Canada may apply safeguard surtaxes or quantitative restrictions on imports where it is determined that Canadian producers are being seriously injured or threatened by increased imports of goods into Canada. These measures may be applied regardless of whether the goods have been dumped or subsidized.

Government Procurement of Goods and Services

Given recent increases in government spending and the passage of stimulus legislation in Canada, the United States and other countries around the world, the disciplines imposed by trade agreements on government procurement have become particularly relevant. Among other things, these agreements restrict the extent to which governments may favour domestic goods and services in their procurement processes.

NAFTA (Chapter 10), the *WTO Agreement on Government Procurement* and the AIT (Chapter Five) all set out numerous requirements for procurement of goods and services that must be satisfied by the parties to those agreements, including Canada. These requirements include provisions that address technical specifications; the qualification of suppliers; the design and issuance of requests for proposals; selective tendering procedures; tender documentation; negotiations that may occur during the tender; the process of submitting, receiving and opening tenders and awarding contracts; limited tendering procedures; and bid challenges. They apply to federal government departments and entities, as well as to various government enterprises and Crown corporations. In certain circumstances, they also apply to provincial government entities, including municipalities, municipal organizations, school boards and publicly funded academic, health and social service entities.

Pursuant to its NAFTA, WTO, and AIT obligations, Canada's bid challenge authority for federal procurement is the Canadian International Trade Tribunal (CITT). Where the CITT finds that a procurement complaint is valid, it may recommend that a

**PURSUANT TO ITS
NAFTA, WTO AND
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INTERNATIONAL
TRADE TRIBUNAL.**





new solicitation be issued, the bids re-evaluated, the existing contract terminated and the contract awarded to the complainant or the complainant compensated for its loss of the contract. The CITT may also award costs incurred by the complainant in preparing a response to the solicitation.

As noted above, CETA contains significant government procurement obligations that apply not only at the federal level, but also at the provincial and municipal levels of government. See [Government Procurement](#).

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EMPLOYMENT

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By Trevor Lawson



EMPLOYMENT

Employment in Canada is a heavily regulated area governed by either federal or provincial legislation. The majority of employers are covered by provincial legislation, with the exception of “federal works or undertakings,” which include businesses involved in banking, shipping, railways, pipelines, airlines and airports, inter-provincial transportation, broadcasting and telecommunications industries.

The types of employment-related legislation with which employers operating in Canada should be familiar include legislation dealing with:

- employment standards;
- labour relations;
- human rights;
- occupational health and safety;
- federal and provincial privacy rules; and
- employment benefits, including pension, employment insurance and workers’ compensation.

The employment relationship in Canada is governed by a broad array of legislation and common law principles. Employers need to be aware of the various legal considerations to avoid attracting liability in the workplace.

Employment Standards

All jurisdictions in Canada have enacted legislation that establishes certain minimum employment standards. Generally, employment standards acts (ESAs) are broad and apply to employment contracts, whether oral or written. The standards defined in the ESAs are minimum standards only, and employers are prohibited from contracting out of or otherwise circumventing the established minimum standards. These laws spell out which classes of employees are covered by each minimum standard and which classes of employees are excluded. Although standards vary across jurisdictions, many topics covered are common to all ESAs, including minimum wages, maximum hours of work, overtime hours and wages, rest and meal periods, statutory holidays, vacation periods and vacation pay, layoff, termination and severance pay and leaves of absence. The leaves of absence protected by ESAs vary across provinces, but may include sick leave, bereavement leave, maternity/paternity/parental/adoption leave,

reservist leave, compassionate care/family medical leave, organ donor leave, personal emergency leave, family responsibility leave and crime-related death and disappearance leave.

Unlike employers in the United States, Canadian employers may not terminate employees “at will.” Generally, employers must provide required notice of termination, unless they have just and sufficient cause (Cause) to terminate an employee without notice. The length of the required notice period varies among jurisdictions, but generally increases with an employee’s length of service. In Alberta, for example, employees with a minimum of three months of service are generally entitled to at least one week’s notice of termination, with a maximum eight-week notice period for employees with 10 or more years of service. Employers are required either to give “working notice” of an employee’s job termination or provide pay in lieu of notice.

**UNLIKE EMPLOYERS
IN THE UNITED
STATES, CANADIAN
EMPLOYERS MAY
NOT TERMINATE
EMPLOYEES “AT WILL.”**

An employer is not required to give notice or pay in lieu of notice if the termination is for Cause. Cause is a high standard and includes, for example, willful misconduct or serious disobedience.

Certain classes of employees, including construction workers, employees on a temporary lay-off and employees terminated during or as a result of a strike or lockout may, on certain conditions, be exempted from the termination notice provisions of the legislation depending on the jurisdiction.

In most jurisdictions, special provisions apply where a significant number of employees are terminated within a specified period of time. These provisions include, at the very least, advance written notice to the Director of Employment Standards or an equivalent governmental authority.

Some jurisdictions provide for severance pay as an additional benefit to employees. For example, under the federal rules, all employees who have been employed for 12 consecutive months are entitled to severance pay equal to the greater of: five days of regular pay or two days of regular pay for each completed year of service.

In Ontario, an employee with five or more years of service may be entitled



to severance pay if the employer, as a result of the discontinuation of all or part of its business, terminates 50 or more employees in a six-month period or if the employer has an annual payroll of C\$2.5 million or more. Severance pay is calculated on the basis of an employee's length of service and may reach a maximum of 26 weeks of regular pay. As with pay in lieu of notice of termination, employees may be disqualified from receiving severance pay if they have engaged in willful misconduct or disobedience or if they fall within other exceptions specified in the legislation.

In addition to minimum statutory termination and severance pay entitlements, a terminated non-union employee may be entitled by common law (or civil law in Québec) to additional notice of termination or pay in lieu of notice. This right may be enforced before the courts. The amount of notice will depend on the employee's individual circumstances, including length of service, age, the type of position held and the prospect for future employment. In most jurisdictions, an employer can limit its liability to the statutory minimum in an employment contract. Employers who wish to avoid or limit liability for common law pay in lieu of notice should therefore have clear terms in written contracts. The manner in which an employer treats an employee at the time of dismissal is also important, because an employer may be liable to compensate an employee for any actual damages caused by tortious conduct.

The *Canada Labour Code* does not permit federally regulated employers to dismiss employees without Cause (with the legislated exceptions of employees with less than 12 months' service, managerial employees and dismissals that occur due to lack of work or elimination of a position). Accordingly, a federally-regulated employer may also face a complaint of unjust dismissal under the *Canada Labour Code* if it dismisses an employee to whom this protection applies without Cause. If an adjudicator finds that the employee's complaint is valid, the remedy can include an award for lost wages and benefits and reinstatement of employment.

Similarly, in Québec, an employee with at least two years of uninterrupted service to whom *An Act respecting Labour Standards* is applicable may make a complaint for dismissal without good and sufficient cause. Upon finding that the complaint is valid, the adjudicator may also order reinstatement, the payment of lost wages and any other order that he or she believes to be fair and reasonable, taking into account all the circumstances of the matter.



In Québec, the ESA specifically provides all employees — unionized or not — with a right to a psychological harassment-free workplace and creates a special recourse for employees who believe they have been victims of such harassment. Employers are required to take reasonable steps to prevent psychological harassment and, should such harassment occur, take reasonable steps to put an end to it.

Labour Relations

The federal government and each province have enacted legislation governing the formation and selection of unions and their collective bargaining procedures. In general, where a majority of workers in an appropriate bargaining unit are in favour of a union, that union will be certified as the representative of that unit of employees. An employer must negotiate in good faith with a certified union to reach a collective agreement. Failure to do so may result in penalties being imposed. Most workers are entitled to strike if collective bargaining negotiations between the union and the employer do not result in an agreement; however, workers may not strike during the term of a collective agreement.

Human Rights

The *Canadian Charter of Rights and Freedoms* (Charter) is a constitutional charter that governs the content of legislation and other government actions. It contains anti-discrimination provisions that may be enforced by the courts. In addition, all Canadian jurisdictions have enacted human rights codes or acts that specifically prohibit various kinds of discrimination in employment, including harassment. Whereas the Charter applies only to the actions of government, human rights legislation applies more broadly to the actions of private individuals and corporate entities, including employers of virtually every description. Beginning in January 2012, Ontario started enforcing a rolling set of compliance deadlines relating to the implementation of the *Accessibility for Ontarians with Disabilities Act, 2005* (AODA). The AODA creates significant obligations for public and private sector organizations in Ontario with respect to accessibility for persons with disabilities, including specific obligations relating to accessibility and accommodation in employment. Manitoba has recently enacted similar accessibility legislation with rolling compliance deadlines, which commenced in 2016.

Human rights legislation states that persons have a right to equal



treatment and a workplace free of discrimination on the basis of any of the prohibited grounds. These vary somewhat from one jurisdiction to another, but generally include race, ancestry, place of origin, colour, ethnic origin, religion, gender (including pregnancy), sexual orientation, gender identity, gender expression, age, marital status, family status and physical or mental disability (which may include a diagnosed dependency), among others. In some jurisdictions, discrimination on the basis of a criminal record that is not related to the individual's ability or fitness to perform the job is also prohibited. The law prohibits direct discrimination on such grounds and also constructive or systemic discrimination, whereby a policy that is neutral on its face has the effect of discriminating against a protected group. However, employers may maintain qualifications and requirements for jobs that are bona fide and reasonable in the circumstances.

HUMAN RIGHTS LEGISLATION STATES THAT PERSONS HAVE A RIGHT TO EQUAL TREATMENT AND A WORKPLACE FREE OF DISCRIMINATION ON THE BASIS OF ANY OF THE PROHIBITED GROUNDS.

The first step in the analysis of discrimination is for an employee to demonstrate that discrimination has occurred, or that he or she has been treated differently in a term or condition of employment on the basis of one of the enumerated grounds. Once an employee or former employee can demonstrate that discrimination has likely occurred on the basis of one of the enumerated grounds, the employer has the burden of proof to establish that the offending term or condition of employment is a bona fide occupational requirement (BFOR). The duty to accommodate arises when considering whether a workplace requirement or rule is a BFOR. An employer must demonstrate that the workplace rule was adopted for a rational purpose and in a good faith belief that it was necessary, and that it is impossible to accommodate individuals without undue hardship. "Undue hardship" is a high standard, requiring direct, objective evidence of quantifiable higher costs, the relative interchangeability of the workforce and facilities, interference with the rights of other employees or health and safety risks. The employer must assess each employee individually to determine whether it would be an undue hardship to accommodate his or her particular needs.

Occupational Health & Safety

The federal government and all provincial jurisdictions have enacted



laws designed to ensure worker health and safety, as well as to provide compensation in cases of industrial accident or disease. Employers must set up and monitor appropriate health and safety programs. In provinces such as Alberta, Saskatchewan, Manitoba and Ontario, occupational health and safety legislation requires a workplace violence and/or harassment policy. The purpose of occupational health and safety legislation is to protect the safety, health and welfare of employees, as well as the safety, health and welfare of non-employees entering work sites.

THE FEDERAL GOVERNMENT AND ALL PROVINCIAL JURISDICTIONS HAVE ENACTED LAWS DESIGNED TO ENSURE WORKER HEALTH AND SAFETY, AS WELL AS TO PROVIDE COMPENSATION IN CASES OF INDUSTRIAL ACCIDENT OR DISEASE.

Occupational health and safety officers have the power to inspect workplaces. Should they find that work is being carried out in an unsafe manner or that a workplace is unsafe, they have the power to order the situation to be rectified and to make “stop-work” orders if necessary. Contraventions of the acts, codes or regulations are treated very seriously, and may result in fines or imprisonment. Recent changes to the Criminal Code have also increased potential employer liability for failing to ensure safe workplaces.

Privacy

Employers in Canada must be aware that Canada has privacy laws governing the collection, use, disclosure, storage and retention of personal employee information, as well as an employee’s right to access such information. This is especially important in Québec, Alberta and British Columbia, which have already enacted privacy legislation separate from the federal legislation. See [Privacy Laws](#).

Employment Benefits

The Canada Pension Plan is a federally created plan that provides pensions for employees, as well as survivors’ benefits for widows and widowers and for any dependent children of a deceased employee. All employees and employers, other than those in the Province of Québec, must contribute to the Canada Pension Plan. The employer’s contribution is deductible by the employer for income tax purposes. Québec has a similar pension plan that requires contributions by employers and employees within Québec.



In addition to the Canada Pension Plan, both employees and employers must contribute to the federal Employment Insurance Plan, which provides benefits to insured employees when they cease to be employed, when they take a maternity or parental leave and in certain other circumstances. The employer's contribution is deductible for income tax purposes. Québec also has its own Parental Insurance Plan, which provides benefits to insured employees when they take a maternity or parental leave and to which both employers and employees in Québec contribute. All provinces provide comprehensive schemes for health insurance. These plans provide for medically necessary treatment, including the cost of physicians and hospital stays. They do not replace private disability or life insurance coverage.

Funding of public health insurance varies from one provincial plan to another. In some provinces, employers are required to pay premiums or health insurance taxes. In other provinces, individuals pay premiums or the entire cost of health insurance is paid out of general tax revenues.

Employers commonly also provide supplemental health insurance benefits through private insurance plans to cover health benefits not covered by the public health insurance plan.

Employers may be required to provide sick or injured worker benefits in the form of workers' compensation, a liability and disability insurance system that protects employers and employees in Canada from the impact of work-related injuries. This benefit compensates injured workers for lost income, health care and other costs related to their injury. Workers' compensation also protects employers from being sued by their workers if they are injured on the job.

Other laws in Canada address additional benefits such as private pensions and private benefit plans. For example, most Canadian jurisdictions have pension standards legislation that establishes minimum requirements for private pension plans.

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PRIVACY LAWS

By Charles S. Morgan



PRIVACY LAWS

All businesses in Canada are subject to legislation that regulates the collection, use and disclosure of personal information in the course of commercial activity. “Personal information” generally means information about an identifiable individual. The collection, use and disclosure of personal information by private sector organizations and entities within the provinces of British Columbia, Alberta and Québec is regulated by legislation enacted by each of those provinces. Manitoba adopted private sector privacy legislation in 2013, but it is not yet in force. The federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) governs the collection, use and disclosure of personal information in provinces and in the territories that have not yet adopted substantially similar privacy legislation, as well as in the course of inter-provincial and international commercial activities. PIPEDA also applies (regardless of the province) to all federally regulated undertakings (such as banks and telecommunications service providers).

**ALL BUSINESSES
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ACTIVITY.**

These statutory regimes are all generally built upon the following 10 principles that govern the collection, use and disclosure of personal information:

- accountability;
- identifying purposes;
- consent;
- limiting collection;
- limiting use, disclosure and retention;
- accuracy;
- security safeguards;
- openness;
- individual access; and
- challenging compliance.

Unless certain exceptions apply, an individual’s knowledge and consent are required to collect, use or disclose his or her personal information. Explicit consent may be required for more sensitive personal information

(e.g., medical or financial information), while implicit consent may be sufficient for non-sensitive personal information (e.g., mailing address). Pursuant to amendments to PIPEDA adopted in 2015, the consent of an individual is only valid if it is reasonable to expect that an individual to whom the organization's activities are directed would understand the nature, purpose and consequences of the collection, use or disclosure of the personal information to which they are consenting. Exceptions to the "consent" requirement include disclosures of personal information in the context of certain business transactions, as defined in the law.

Currently, Alberta's *Personal Information Protection Act* (PIPA) and Manitoba's *Personal Information Protection and Identity Theft Prevention Act* (PIPITPA) are the only general private sector privacy laws in Canada that impose a statutory obligation on private sector organizations to report privacy breaches. Under Alberta's PIPA, organizations must only report (to the Information and Privacy Commissioner of Alberta) privacy breaches that could pose a "real risk of significant harm to an individual." The Information and Privacy Commissioner of Alberta in turn determines whether an organization needs to notify the individuals affected. By contrast, under Manitoba's PIPITPA, an organization is obligated to notify an individual directly (as opposed to notifying a regulator) if his or her personal information is lost, accessed or disclosed without authorization; no specific "harm" threshold applies. Manitoba's PIPITPA is not yet in force. Pursuant to amendments to PIPEDA adopted in 2015 (expected to come into force in 2017), PIPEDA now also contains a breach notification requirement, pursuant to which an organization must report to the Federal Privacy Commissioner any breach of security safeguards involving personal information under its control if it is reasonable in the circumstances to believe that the breach creates a real risk of significant harm to an individual.

With respect to transfers of personal information to service providers located outside Canada, the "openness" principle under PIPEDA has been held by federal privacy regulators to require that notice of such transfers should be provided to affected individuals. Alberta's PIPA requires that organizations notify individuals if they transfer personal information to a service provider located outside Canada. Québec's privacy legislation requires organizations to take all reasonable steps to ensure that personal information that is transferred cross-border for processing will not be used for new purposes or communicated to third parties without the consent of the individuals concerned.

In addition to general private sector privacy laws, Alberta, Manitoba, New Brunswick, Newfoundland and Labrador, Ontario and Saskatchewan also have specific health privacy legislation to protect personal health information. For example, Ontario's *Personal Health Information Protection Act, 2004* establishes rules for the collection, use and disclosure of personal health information by health information custodians in Ontario.

Whether PIPEDA or similar provincial legislation is the applicable privacy regime, immediate priorities for most organizations that establish a business in Canada should include:

- the adoption of a privacy compliance strategy that identifies the organization's compliance with the applicable regulatory regimes;
- the adoption of a privacy policy, and personal information management practices, to ensure compliance with applicable privacy laws;
- the appointment of an individual who will be responsible for the administration and oversight of the organization's personal information management practices and who will be prepared to implement any changes required by applicable legislation;
- a review of the current personal information practices of the organization outside Canada and proposed information practices within Canada, including determining what personal information is collected, and from where; what consents are obtained and what purposes are identified when collecting personal information; where personal information is stored; how personal information is used; when and to whom personal information is disclosed; and how current personal information practices of the organization may need to be changed for the collection, use and disclosure of personal information in Canada;
- a review of the organization's data management infrastructure to ensure that the infrastructure is adequately flexible and robust to facilitate implementation of the organization's privacy policies and data management practices;

IMMEDIATE
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- the implementation of consent language in contracts, forms (including Web forms) and other documents utilized when collecting personal information from individuals (including customers and employees); and
- the requirement, where there are contracts with third parties to whom personal information will be disclosed (or where the third party is granted access to the personal information), that the third party agree to appropriate contractual terms, such as: specifying the ownership of the data and ensuring that the third party will provide adequate security safeguards for the information; ensuring that the personal information will be used only for the purposes for which it was disclosed to the third party; ensuring that the third party will cease using (and return or destroy) the personal information if requested; and providing for indemnification by the third party for any breach of such terms.

Implementation of such initial steps may require several months, depending on the size and maturity of the organization.

Compliance with privacy laws needs to be considered in any business transaction involving the disclosure or transfer of personal information, such as purchases or sales of businesses, outsourcing transactions and securitization transactions. For example, when contemplating the purchase of a business in Canada, it is essential that a review of the privacy policies and practices of the target form part of the due diligence process. If personal information of employees or customers has to be disclosed to the purchaser during the due diligence process, it is also essential that an appropriate confidentiality regime be established for the process. It is recommended that only personal information that is necessary or likely to affect the decision to proceed with a transaction or its terms (including price) be disclosed.

Failure to comply with privacy laws can result in complaints to the relevant Privacy Commissioner, orders and fines. An organization with deficient privacy practices may risk adverse publicity for failure to comply with privacy laws.

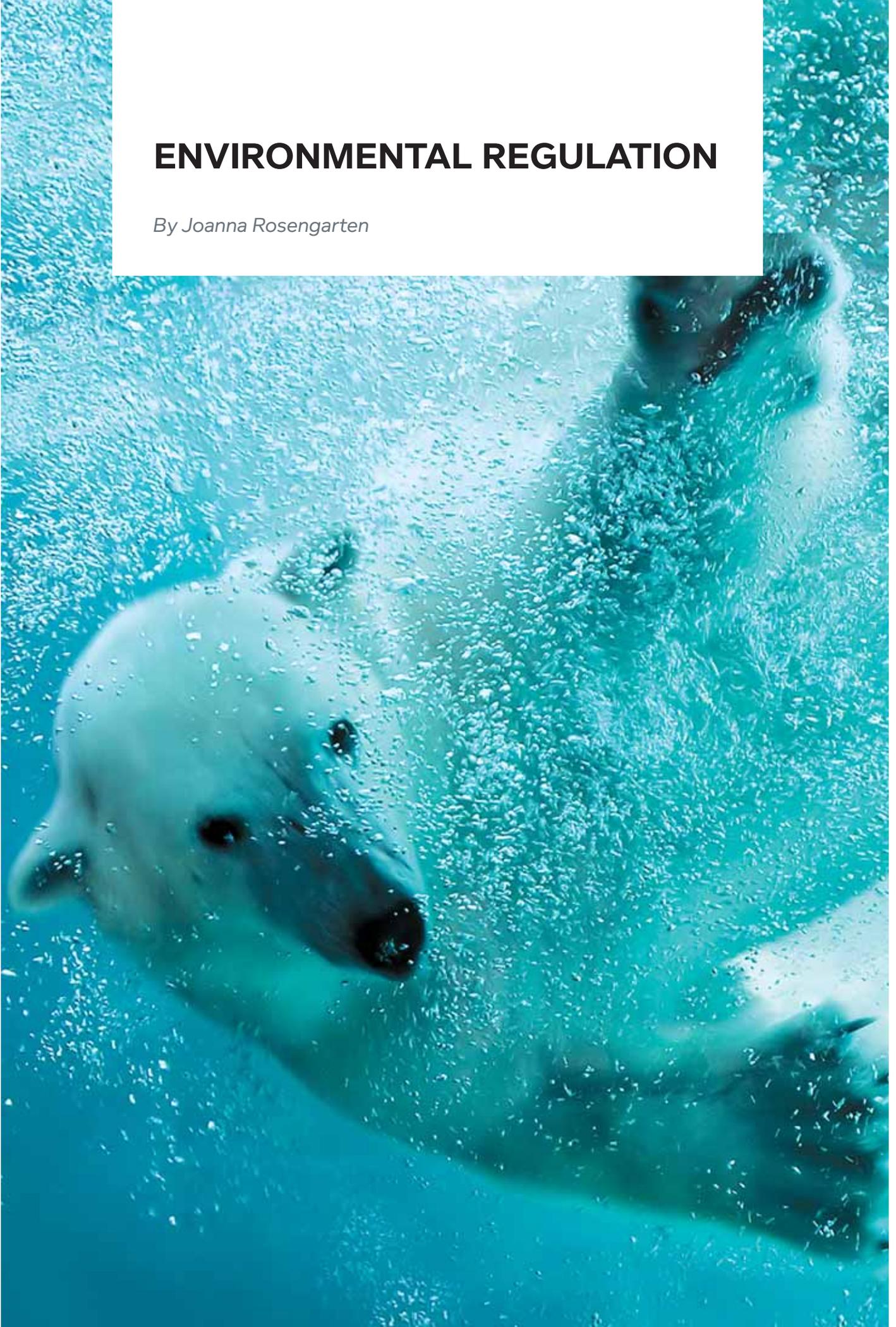
In light of the complexity of privacy laws and the differences between the various laws that may apply to an organization or to a particular business unit, ensuring privacy compliance across an organization's departments may be challenging, particularly for organizations that operate globally.

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ENVIRONMENTAL REGULATION

By Joanna Rosengarten



ENVIRONMENTAL REGULATION

Environmental regulation in Canada is an area of shared responsibility between the federal government and the provincial governments, which, in turn, have delegated certain matters to municipal governments.

Both the federal and provincial governments have enacted legislation, regulations, policies and guidelines that affect industry on environmental matters such as pollution or contamination of the air, land and water, toxic substances, hazardous wastes, and transportation of dangerous goods and spills. In addition, there are requirements for approvals and environmental impact assessments in many areas affecting both the public and private sectors.

Environmental regulators have broad monitoring and inspection powers and use a wide range of enforcement mechanisms. These powers and mechanisms extend not only to the businesses involved, but also to corporate directors, officers, employees and agents. For example, the federal *Canadian Environmental Protection Act* includes provisions for warnings, significant fines, imprisonment, injunctions and compliance orders. Canadian courts are also now holding companies, as well as their officers, directors and employees liable for environmental offences.

Liability for contaminated sites is an important issue in Canada. The law in this area places liability on those persons who cause the pollution and, depending on the particular situation, on those persons who own, occupy, manage or control contaminated sites, or who owned or occupied such sites in the past. Such liability now extends to past owners and occupiers. Consequently, a “buyer-beware” philosophy prevails, making it critical in business and real estate transactions that either the buyer or the lender knows about all past and potential environmental problems associated with a particular business or property and, in some cases, formerly-owned businesses and properties.

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As a result of stringent environmental legislation and the regulatory bodies' vigorous approach to investigating and prosecuting environmental concerns, it is prudent for businesses to seek proper advice concerning environmental due diligence.

Federal and provincial governments are starting to develop and, in some cases, implement legislation aimed at reducing greenhouse gas emissions. For example, British Columbia has a carbon tax in effect, while Québec and Ontario have implemented cap-and-trade systems with a declining absolute cap on greenhouse gas emissions in these provinces. The federal government has announced its intention to implement a carbon pricing system in provinces and territories that do not have one by 2018. In December 2016, the federal government published the *Pan Canadian Framework on Clean Growth and Climate Change*, which outlines how Canada will reach its greenhouse gas emissions reduction targets and which has been signed by most Canadian provinces and territories. Climate change law is a developing area across Canada and businesses should ensure they are up-to-date on current and developing requirements in the provinces where they operate.

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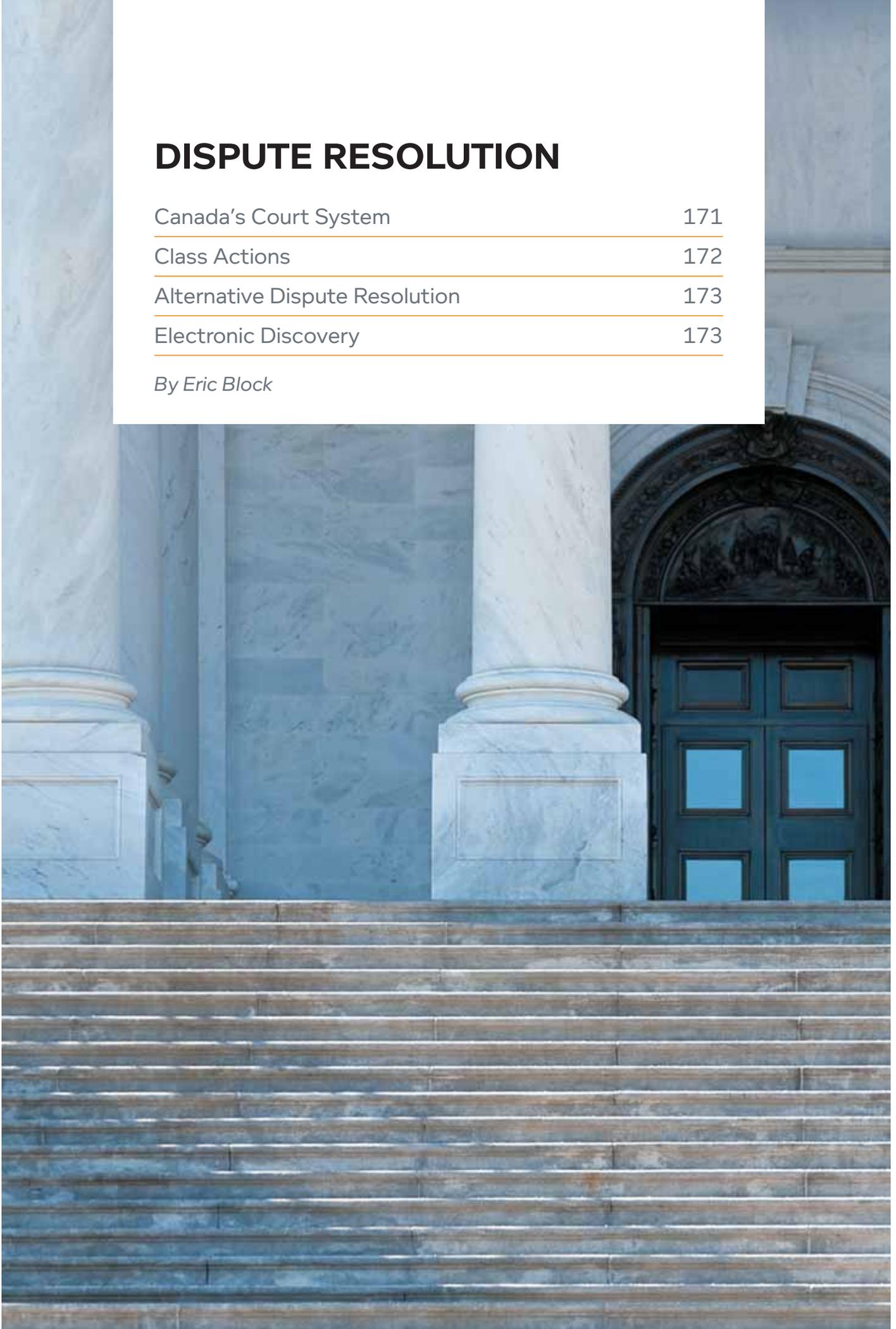
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By Eric Block



DISPUTE RESOLUTION

Canada's Court System

Under the *Constitution Act, 1867*, the judiciary is separate from and independent of the executive and legislative branches of government. Judicial independence is a cornerstone of the Canadian judicial system. Judges make decisions free of influence and based solely on fact and law. Canada has provincial trial courts, provincial superior courts, provincial appellate courts, federal courts and a Supreme Court. Judges are appointed by the federal or provincial and territorial governments, depending on the level of the court.

Each province and territory (with the exception of Nunavut) has a provincial court. These courts deal primarily with criminal offences, family law matters (except divorce), traffic violations and provincial or territorial regulatory offences. Private disputes involving limited sums of money are resolved in the small claims divisions of the provincial courts. The monetary ceiling for the small claims division in British Columbia, Alberta and Ontario, for instance, is currently C\$25,000.

The superior courts of each province and territory try the most serious criminal cases, as well as private disputes exceeding the monetary ceiling of the small claims divisions of the provincial courts. Although superior courts are administered by the provinces and territories, the federal government appoints and pays the judges of these courts.

In the Toronto Region of the Province of Ontario, the Superior Court of Justice maintains a Commercial List. Established in 1991, the Commercial List hears certain applications and motions in the Toronto Region involving a wide range of business disputes. It operates as a specialized commercial court that hears matters involving shareholder disputes, securities litigation, corporate restructuring, receiverships and other commercial disputes. Matters on the Commercial List are subject to special case management and other procedures designed to expedite the hearing and determination of complex commercial proceedings. In addition, judges on the Commercial List are experienced in commercial and insolvency matters.

Each province and territory has an appellate court that hears appeals from decisions of the superior courts and the provincial and territorial courts. Ontario also has a Divisional Court that serves as a court of first instance

for the review of administrative action. It also hears appeals from provincial administrative tribunals, interlocutory decisions of judges of the Superior Court and appeals from the Superior Court involving limited sums of money (currently C\$50,000).

The Federal Court of Canada has limited jurisdiction. Its jurisdiction includes inter-provincial and federal provincial disputes, intellectual property proceedings, citizenship appeals, *Competition Act* cases, and cases involving Crown corporations or departments or the government of Canada. The Federal Court, Trial Division hears decisions at first instance. Appeals are heard by the Federal Court of Appeal.

The Supreme Court of Canada is the final court of appeal from all other Canadian courts. It hears appeals from the appellate courts in each province and from the Federal Court of Appeal. The Supreme Court of Canada has jurisdiction over disputes in all areas of the law, including constitutional law, administrative law, criminal law and civil law. There is a right of appeal in certain criminal proceedings, but in most cases leave must first be obtained. Leave to the Supreme Court of Canada may be granted in cases involving an issue of public importance or an important issue of law.

Class Actions

Class proceedings are procedural mechanisms designed to facilitate and regulate the assertion of group claims. Almost all Canadian provinces have class proceedings legislation. In provinces without such legislation, representative actions may be brought at common law.

Canadian class action statutes are modeled closely on Rule 23 of the United States Federal Court Rules of Civil Procedure, which, together with its state counterparts, governs class action litigation in the United States. Unlike ordinary actions, a proceeding commenced on behalf of a class may be litigated as a class action only if it is judicially approved or “certified.” Generally, the bar for certification in Canada is lower than in the United States.

In Canada, common targets of class actions include product manufacturers, insurers, employers, companies in the investment and financial industries and governments. Class actions may involve allegations of product liability, misrepresentation, breaches of consumer and employment laws,



competition law (e.g. antitrust) breaches, securities fraud and breaches of public law.

Class actions are becoming an increasingly prominent aspect of business litigation in Canada. Businesses may benefit from the fact that individual damage awards tend to be lower in Canada than in the United States. In addition, the availability of punitive damages is limited in Canada.

Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) refers to the various methods by which disputes are resolved outside the courtroom. Such methods include mediation (an independent third party is brought in to mediate a dispute) and arbitration (the dispute is referred to a third party for a binding decision).

In Ontario, the Rules of Civil Procedure mandate and regulate mediation in civil cases commenced in Toronto, Windsor and Ottawa. Mediation remains common in other parts of Ontario, and parties to a dispute will often agree to non-binding mediation by mutually selecting a mediator. Arbitration may be pursued on an ad hoc basis under a structure provided for in the local jurisdiction or under local statutory provisions.

Alternatively, arbitration may be conducted under the administrative and supervisory powers of one of the recognized international arbitration institutes, such as the International Court of Arbitration of the International Chamber of Commerce in Paris, the London Court of International Arbitration or the American Arbitration Association. These bodies do not themselves render arbitration awards, but they do provide a measure of neutrality and an internationally recognized system of procedural rules.

One advantage of arbitration compared to domestic court procedure is the confidentiality of arbitration proceedings. The arbitration process is normally private; hearings are not public and written transcripts of proceedings are not generally available to the public. In addition, the arbitration process may be faster than the court system, and there is generally no right of appeal from an arbitration award. This may lead to disputes being resolved more quickly.

Electronic Discovery

The discovery and production of electronically stored information,



commonly called e-discovery, has become an increasingly significant issue in litigation across Canada. A national committee has produced the Sedona Canada Principles to establish national guidelines for electronic discovery. These guidelines are thought to be compatible with the rules of procedure in each of the Canadian territories and provinces.

In Ontario, parties are now required to formulate and adhere to a discovery plan to address all aspects of the discovery process, including the exchange of electronic documents. The parties are required to consult and have regard to the Sedona Canada Principles when preparing their discovery plan. The following principles are among the most significant recommendations of Sedona Canada:

- Once litigation is reasonably anticipated, the parties must take good-faith steps to preserve potentially relevant electronic information.
- As early as possible in the litigation, the parties should meet and confer regarding e-discovery issues, and should agree upon the format in which electronically stored information will be produced.
- In any proceedings, the parties should ensure that the steps taken in the e-discovery process are proportionate to the nature of the case and the significance of the electronic evidence in the case.

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THE DISCOVERY AND PRODUCTION OF ELECTRONICALLY STORED INFORMATION, COMMONLY CALLED E-DISCOVERY, HAS BECOME AN INCREASINGLY SIGNIFICANT ISSUE IN LITIGATION ACROSS CANADA.



BANKRUPTCY AND RESTRUCTURING

Regulations and Product Standards

Under Canadian constitutional law, the federal government has exclusive legislative control over bankruptcy and insolvency matters. Insolvency proceedings in Canada may take a variety of different forms. When a corporation becomes insolvent, two options are generally available: (i) liquidate the corporation's assets for the benefit of its creditors, or (ii) restructure the affairs of the corporation.

Although several different legislative regimes are available to effect either a liquidation or a restructuring of a corporation, the *Bankruptcy and Insolvency Act* (BIA) and the *Companies' Creditors Arrangement Act* (CCAA) are the two most common federal statutes employed for these purposes. The BIA provides for both restructurings (via BIA proposals) and liquidations (via bankruptcies) of insolvent businesses, while the CCAA is used primarily for the restructuring of more complex corporate businesses, although it can also be used to conduct a sale or liquidation.

Bankruptcy and Insolvency Act (BIA)

Bankruptcy

The term "bankruptcy" refers to a formal procedure under the BIA to effect the liquidation of a debtor's assets by a trustee in bankruptcy. A bankruptcy can either be voluntary or involuntary and can be brought in respect of any insolvent person that has an office, assets or carries on business in Canada, with the exception of banks, insurance companies, trust or loan companies, and railway companies (for which other insolvency legislation exists).

A voluntary bankruptcy under the BIA commences when a debtor files an assignment in bankruptcy with the Office of the Superintendent of Bankruptcy.

WHEN A CORPORATION BECOMES INSOLVENT, TWO OPTIONS ARE GENERALLY AVAILABLE: (I) LIQUIDATE THE CORPORATION'S ASSETS FOR THE BENEFIT OF ITS CREDITORS, OR (II) RESTRUCTURE THE AFFAIRS OF THE CORPORATION.



An involuntary bankruptcy under the BIA commences when a creditor with a debt claim of at least C\$1,000 files an application for a bankruptcy order with the court. This proceeding is brought on behalf of all creditors, although it is not necessary for more than one creditor to join in the application. In order to obtain the bankruptcy order, the creditor must establish that the debtor has committed an “act of bankruptcy” within six months preceding the commencement of the bankruptcy proceedings. The most common act of bankruptcy is failing to meet liabilities generally as they become due. In addition to being placed into bankruptcy pursuant to a court order made upon application by a creditor, a debtor can also be placed into bankruptcy under the BIA if its proposal (discussed below) is rejected by its unsecured creditors or is not approved by the court.

The practical effect of a bankruptcy is the same whether it is commenced voluntarily or involuntarily: the debtor’s assets vest in its trustee in bankruptcy, subject to the rights of the debtor’s secured creditors. The trustee in bankruptcy is a licensed insolvency professional or firm that is appointed by the bankrupt or the bankrupt’s creditors.

There is an automatic stay of proceedings by unsecured creditors of the debtor upon the commencement of the debtor’s bankruptcy proceedings. However, the stay does not affect secured creditors, who are generally free to enforce their security outside the bankruptcy process unless the court otherwise orders (which is exceedingly rare).

THERE IS AN AUTOMATIC STAY OF PROCEEDINGS BY UNSECURED CREDITORS OF THE DEBTOR UPON THE COMMENCEMENT OF THE DEBTOR’S BANKRUPTCY PROCEEDINGS. HOWEVER, THE STAY DOES NOT AFFECT SECURED CREDITORS.

The bankruptcy trustee has many duties. The most important is to liquidate the assets of the debtor for the benefit of its creditors. In addition, the trustee in bankruptcy is responsible for the administration of claims made against the bankrupt estate in accordance with the relevant provisions of the BIA. If appropriate, the bankruptcy trustee may also investigate the affairs of the debtor to determine whether any fraudulent conveyances, preferences, transfers at undervalue or improper dividends were effected by the debtor prior to the bankruptcy.

The creditors will generally meet shortly after the debtor becomes

bankrupt, and appoint a group of up to five individuals known as “inspectors” to work with and supervise the trustee in bankruptcy. With the approval of the inspectors, the trustee in bankruptcy may sell the assets of the bankrupt estate.

A corporation may not be discharged from bankruptcy unless all of the provable claims against it have been satisfied, which may occur by payment in full or pursuant to a successful BIA proposal.

BIA Proposals

Generally speaking, the restructuring provisions under the BIA are most commonly used for smaller, less complicated restructurings. This means small- and medium-sized corporations tend to use the BIA process, as opposed to the CCAA process (discussed below). A restructuring under the BIA is commenced by a debtor either filing a proposal (e.g., its restructuring plan) or filing a notice of intention to make a proposal (NOI).

Upon the filing of an NOI or the filing of the proposal itself, the BIA imposes a stay of proceedings against the exercise of remedies by creditors against the debtor’s property or the continuation of legal proceedings to recover claims provable in bankruptcy. The specific stay language is set out in the BIA. Provisions in security agreements providing that the debtor ceases to have rights to use or deal with the collateral upon either insolvency or the filing of an NOI have no force or effect. The BIA also provides that, upon the filing of an NOI or the filing of a proposal, no person may terminate or amend any agreement with the insolvent person or claim an accelerated payment under any agreement with the insolvent person simply because the person is insolvent or has filed an NOI or a proposal. The court can lift a stay in a BIA restructuring if the creditor is able to demonstrate that it will be “materially prejudiced” by the stay or if it is equitable on other grounds that the stay be lifted.

It is more common for a debtor to start the process by filing an NOI, rather than by filing a proposal immediately. If the debtor files an NOI, a copy of the written consent of a licensed trustee in bankruptcy, consenting to act as the proposal trustee in the proposal proceedings, must be attached to the NOI. If an NOI is filed, the debtor must file cash flow statements for its business within 10 days and must file its proposal within 30 days.

The court can extend the time for filing a proposal for up to a maximum

of five additional months, although the court can only grant extensions for up to 45 days at a time.

During the process, the debtor normally carries on its business as usual, subject to monitoring by its proposal trustee and the supervision of the court. Ultimately, the debtor may table a proposal to its creditors. The BIA requires certain terms in the proposal for the court to approve it, including: (i) the payment of preferred claims (such as certain types of employee claims) in priority to claims of ordinary creditors; (ii) the payment of all proper fees and expenses of the proposal trustee relating to the proceedings; (iii) the payment of certain tax remittances, such as employee source deductions, within six months of the approval of the proposal; and (iv) the payment to the proposal trustee of all consideration to be paid out under the proposal, for distribution to creditors.

A proposal must be made to the unsecured creditors generally, either providing for all unsecured creditors to be placed into one class or providing for separate classes of unsecured creditors. A proposal may also be made to secured creditors in respect of any class or classes of secured claims. A proposal that provides for payment of equity claims cannot be approved by the court unless it provides that all claims that are not equity claims are to be paid in full.

A proposal is deemed to be accepted by the creditors if all classes of unsecured creditors vote for the acceptance of the proposal by a “double majority” — a majority in number and two-thirds in value of the unsecured creditors of each class (other than equity claims). Parties related to the debtor cannot vote in favour of the proposal. In practice, a proposal is typically only directed at the unsecured creditors. Secured creditors are usually dealt with by individual negotiation, since there must be a commonality of interest to group creditors together into a class and there are seldom multiple secured creditors that can be grouped together as a class on this basis. Therefore, there is often little practical benefit to addressing secured claims within the proposal.

If the proposal is approved by the creditors, it must then be approved by the court. When deciding whether to approve the proposal, the court must be satisfied that, among other things, the proposal is reasonable, calculated for the benefit of creditors and meets the technical requirements of the BIA. If a BIA proposal is not approved by the requisite

“double majority” of unsecured creditors or not approved by the court, the debtor is automatically placed into bankruptcy.

Finally, if after receiving court approval of the proposal the debtor defaults in its performance of the proposal, the court may annul the proposal, which then leads to an automatic assignment of the debtor into bankruptcy.

Companies’ Creditors Arrangement Act (CCAA)

Generally speaking, the CCAA is most commonly used for larger, more complicated restructurings. This means larger sized corporations tend to use CCAA proceedings to restructure.

To qualify to use the CCAA, a company (as defined in the CCAA) must be insolvent, bankrupt, or have committed an act of bankruptcy and must have outstanding liabilities of C\$5 million or more. To initiate the proceedings, the company brings an initial application to the court for an order (referred to as the Initial Order), imposing a stay of proceedings on creditors (i.e., a freeze on the payment of indebtedness) and authorizing the company to prepare a plan of arrangement to compromise its indebtedness with some or all of its creditors. The materials presented to the court include a proposed form of Initial Order and an affidavit prepared by the company describing its background, its financial difficulties and the reasons why it is seeking the protection of a court order made under the CCAA.

After reviewing the materials and hearing submissions from counsel, the judge exercises his or her discretion whether to make an Initial Order and, if so, on what terms. There is significant judicial discretion, and therefore flexibility, as to the scope of the stay of proceedings and other terms in the Initial Order since specific language for such terms are not prescribed in the CCAA. Usually, the Initial Order is made in the form of the order requested by the company, with little or no input from creditors and other stakeholders. In most jurisdictions, there is a form or order that has been adopted as a model upon which Initial Orders in that jurisdiction are based with a view to creating greater consistency in CCAA proceedings. Certain relief can only be granted on notice to secured creditors likely to be affected thereby (for example, interim financing) and in any event affected parties have the right to apply to court to vary the Initial Order after it is made.

Typically, an Initial Order does the following things:

- authorizes the company to prepare a plan of arrangement to put to its creditors;
- authorizes the company to stay in possession of its assets and to carry on business in a manner consistent with the preservation of its assets and business;
- prohibits the company from making payments in respect of past debts (other than any specific exceptions allowed by the court, such as amounts owing to employees) and imposes a stay of proceedings by secured and unsecured creditors: (i) preventing creditors and suppliers from taking action in respect of debts and payables owing as at the filing date; and (ii) prohibiting the termination of most types of contracts by counterparties;
- appoints a monitor (a licensed bankruptcy trustee) as an officer of the court, to monitor the business and financial affairs of the company during the proceedings;
- authorizes the company, if necessary, to obtain interim financing to ensure that it can fund its operations during the proceedings, including setting limits on the aggregate funding and the priority of the security (commonly known as “DIP financing”); and
- authorizes the company to disclaim unfavourable contracts, leases and other agreements, subject to some limited exceptions.

The CCAA provides that an Initial Order may only impose a stay of proceedings for a period not exceeding 30 days. Once an Initial Order has been made, the company may apply for a further order or orders extending the stay of proceedings. The intention is to have the stay of proceedings continue until the company’s plan of arrangement has been presented to the creditors and approved by the court. As a general matter, the duration of proceedings under the CCAA usually ranges between six to 18 months from the commencement of proceedings to the sanctioning of a plan of arrangement. However, the proceedings can be much quicker if the terms of the plan of arrangement have already been worked out in advance of the filing. The court may terminate the proceedings under the CCAA, upon application of an interested party, if the court believes that it is unlikely that a consensual arrangement will be achieved or that the continuation of the proceedings is otherwise not

appropriate. However, such orders are rare, at least at the initial stages of a restructuring.

In recent years, the CCAA has also been used as a means by which a sale of particular assets of the company, or the entire business and assets of company, is conducted. The sale process runs on a parallel, alternate track to the restructuring process with a view to maximizing value for the stakeholders. In such circumstances, approval of the sale must be sought from the court on notice to the affected secured creditors, among others, in a process similar to a court receivership sale.

During CCAA proceedings, the debtor company typically continues to carry on business as usual. Significant transactions out of the ordinary course of the debtor's business are usually submitted to the court for approval. The role of the CCAA monitor is generally limited to monitoring and reporting to creditors and to the court regarding the debtor's business and operations. When a CCAA plan of arrangement is developed, it ordinarily will divide the creditors into classes and will provide for the treatment of each class (which can be substantially different between classes). The classification of creditors must be approved by the court prior to any creditor meeting on the plan. In this regard, the guiding legal principle set out in the CCAA and applied by the courts in considering classification issues is whether there is a commonality of interest among the creditors in the class.

WHEN A CCAA PLAN OF ARRANGEMENT IS DEVELOPED, IT ORDINARILY WILL DIVIDE THE CREDITORS INTO CLASSES AND WILL PROVIDE FOR THE TREATMENT OF EACH CLASS.

For a plan of arrangement to be approved by the affected creditors, a majority in number of the creditors representing two-thirds in value of the claims of each class (other than equity claims), present and voting (either in person or by proxy) at the meeting or meetings of creditors, must vote in favour of the plan of arrangement. Parties related to the company cannot vote in favour of the plan. If the plan of arrangement is approved by the creditors, it must then be approved by the court. In doing so, the court must determine that the plan of arrangement is "fair and reasonable." Upon approval by the creditors and court, the plan of arrangement is binding on all of the creditors of each class affected by the plan.

The court cannot sanction a plan if it does not provide for the payment in full of certain Crown claims and certain employee and pension liabilities, or if it does not in effect subordinate “equity claims” to the claims of creditors. A plan may include releases in favour of non-debtor third parties in certain cases.

Additionally, if a debt restructuring involves a reorganization of the share capital of a company, it is possible to reorganize the share capital of the company by way of the CCAA court sanctioned order without a shareholder vote. In recent years, this device has been used, in effect, to extinguish the existing share capital and issue new shares to creditors in satisfaction of their claims or to a new equity investor (whose investment may fund distributions to the creditors).

If a CCAA plan is not approved by the requisite “double majority” of creditors, there is no automatic assignment of the debtor company into bankruptcy. Typically, what may lead to the bankruptcy of the debtor is the court’s refusal to extend, or a decision to terminate, the stay of proceedings against the debtor company, thereby allowing creditors to exercise their lawful remedies against the debtor company. If a sale of the assets occurs before the filing of a plan and meeting of creditors, consideration would be given to the benefits of proceeding toward a plan (presumably, to distribute the proceeds of the sale) as opposed to terminating the CCAA proceedings, for example, by commencing bankruptcy liquidation proceedings.

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GOVERNMENT RELATIONS

By Awanish Sinha



GOVERNMENT RELATIONS

In Canada, legislative power is divided between Parliament (the federal legislature) and provincial legislative assemblies. Each of these branches of government is based on the British parliamentary model, where the political party with the most members elected to Parliament or to the provincial legislative assembly forms the government. See [Canada](#).

For the most part, the governing party that forms the federal or provincial government holds a majority of the seats in the federal or provincial legislature and governs through a Cabinet of appointed “ministers.” This usually reduces the relative influence of individual elected members of the legislature, as it is rare that members of the governing party vote against a government-supported initiative. However, at the federal level there were a series of “minority governments,” between 2004 and 2011, where the governing party held more seats than any other party in Parliament, but did not hold a majority of the seats. As a result, the relative influence of Members of Parliament increased during that time. Coalition governments between two or more parties have not yet occurred in Canada.

Given the significant role of the federal and provincial governments in the Canadian economy, every enterprise operating in Canada should consider a government relations strategy. Companies may also engage with government through industry associations. This may be a necessity for companies active in industries that are heavily regulated (such as telecommunications, pharmaceuticals, transportation and energy); that can be greatly affected by government policy (such as manufacturing and agriculture); or that sell to the government (such as defence and IT companies).

Government relations work, which includes lobbying, is generally focused on outreach to government employees, the ministers who form the executive council (i.e., Cabinet) in each province and federally, and members of the legislature who are part of the governing party. Depending on the concern, enterprises may also choose to lobby members of opposition parties in order to have matters raised in the legislature or at a committee of the legislature. This can be particularly important when a minority government is in power.

Government relations work is needed when an enterprise seeks to initiate, support or oppose legislation initiatives, or seeks a change in regulation or





policy. A number of government ministries and regional/political interests may be involved with any given initiative or change, and the enterprise will seek out meetings with all the responsible senior government employees and ministers. For example, enterprises involved in inter-provincial trucking work within a regulatory environment that includes provincial and federal ministries of transportation, industry and commerce, and labour. Likewise, private development of hydro-electric power projects usually requires contact with provincial ministries of energy, lands and environment, as well as the federal ministries of fisheries and oceans, and environment. It also may be necessary to engage the senior elected member of the governing political party who is “politically responsible” for a given region, as any given initiative or change can affect regions differently.

Two areas of notable interest for government relations are relationships with Aboriginal Peoples and the Canadian system of environmental assessment (EA), which is required for major projects approvals.

In the case of the group of Aboriginal Peoples known as First Nations (the other two groups are the Métis and the Inuit), the First Nations themselves will likely need to be consulted when major projects are planned, as they may retain some claim to Aboriginal title or hold traditional Aboriginal rights to the land. These rights vary across Canada, depending on historical and legal developments. Where First Nations interests are involved, both the federal and provincial governments will also have to be advised and consulted. See [Aboriginal Law](#).

In the area of EA, Canada requires comprehensive environmental assessments when projects involving land use reach a certain threshold of invested capital or when certain types of projects are involved. If the project is under federal jurisdiction (such as inter-provincial pipelines), the federal EA system will be invoked. If the project is strictly within a single province and federal jurisdiction is not involved, generally only the provincial EA process will be invoked. In some cases, both federal and provincial EA processes are invoked. There are dramatic differences in the complexities and timelines of the EA processes imposed by the various provinces and the federal government. As such, most enterprises considering investments above the applicable EA threshold in any Canadian jurisdiction should develop an early and positive relationship with the appropriate levels of government so their eventual EA application does not come as a surprise or become controversial. See [Environmental Regulation](#).



Investors in Canada should be aware that, compared to the United States, Canada's federal and provincial governments are much more active in the delivery of certain services such as health care, utilities, infrastructure and broadcasting. Investors should seek advice on the attitudes of government toward investments in these and other fields before proceeding, as coordination and co-operative relationships with government will lead to much more effective and efficient decision-making.

Lobbying is legal in all Canadian jurisdictions, but is also subject to strict reporting and registration laws. Scrutiny of lobbying activities has been a particularly sensitive political issue in Canada over the past few years. Enterprises need to be mindful of the high standards expected of those engaged in lobbying efforts.

Codes of conduct for public officials generally regulate the public officials and not those interacting with them. Such codes of conduct govern what activities a public official may engage in, as well as the hospitality he or she may accept, if any. An enterprise should, for example, avoid inadvertently placing public officials in a conflict-of-interest position that could impede that official from being involved with a given issue and also bring negative attention to the enterprise's government relations effort.

The regulation of those in the private sector who interact with public officials in Canada is generally governed by lobbying legislation. Such legislation provides that businesses and their employees may need to register their government relations activities with a central registry. This central registry is available to the public (usually through the Internet). Federal and provincial lobbyist legislative schemes distinguish between in-house lobbyists (both for businesses and for organizations) and external consultant lobbyists and impose a "significant duties" test on in-house lobbyists.

The registration of lobbyists has come under increasing scrutiny in almost every jurisdiction in Canada. The Parliament of Canada and most provincial legislatures, including British Columbia, Alberta, Ontario, Québec, Manitoba, Nova Scotia and Newfoundland and Labrador, have enacted lobbyist legislation. On November 6, 2013, the provincial legislature of New Brunswick introduced lobbying legislation, but these laws are not yet in force. On December 16, 2013, the provincial legislature of Saskatchewan introduced lobbyist legislation, which would require persons who are



paid to lobby elected officials to register their lobbying activities with a proposed government registry. On July 1, 2016, Ontario's new lobbying rules took effect, lowering the time threshold for lobbyist registration; requiring the highest ranking paid officer of an enterprise to sign off on lobbyist registrations; and prohibiting consultant lobbyists from receiving results-based payments, among other changes.

Some cities, such as Toronto and Ottawa, also have bylaws requiring individuals that lobby municipal politicians and government employees to register. Lobbying activities in other cities, such as St. John's, in the Province of Newfoundland and Labrador, and Montréal and Québec City, in the Province of Québec, are regulated by provincial lobbying legislation.

The types of communication that may require registration vary from jurisdiction to jurisdiction. Broadly speaking, they include: communications with public officials (which includes not only politicians, but also many government employees) with respect to the development of legislative proposals; the introduction, passage, defeat or amendment of legislation; the making or amending of any legislation; the development or amendment of any policy or program; the awarding of any grant, contribution or other financial benefit; and, in some cases, the awarding of contracts and the arrangement of meetings with public officials.

A well-planned government relations strategy can lead to a productive and professional relationship with responsible decision-makers in government. Both industry and public officials benefit from such relationships because they ensure that all the facts relevant to a government decision are expressed, understood and taken into account. Governments in Canada will generally do their best to be responsive, transparent and effective in addressing the needs of enterprises. However, when engaging public officials, it is essential for an enterprise to know and follow the rules.

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By John Boscariol and Robert Glasgow



GOVERNMENT PROCUREMENT

Each year, federal, provincial, territorial and municipal governments in Canada purchase more than C\$150 billion in goods and services.

Federal Procurement

Procurement by the federal government is subject to the requirements of the *WTO Agreement on Government Procurement* and Chapter 10 of the *North American Free Trade Agreement*. The leading legislation and policies that apply to federal contracts for goods and services include the *Financial Administration Act*, the *Government Contracting Regulations*, the Treasury Board Contracting Manual, the *Department of Public Works and Government Services Act*, and the Standard Acquisition Clauses and Conditions (SACC) Manual. Most purchasing for line departments is done by Public Works and Government Services Canada (PWGSC).

PROCUREMENT BY THE FEDERAL GOVERNMENT IS SUBJECT TO THE REQUIREMENTS OF THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT AND CHAPTER 10 OF THE NORTH AMERICAN FREE TRADE AGREEMENT.

The contracting practices and contract awards of federal, provincial, and municipal, academia, school boards and hospitals are subject to the requirements of the *Agreement on Internal Trade*. Its purpose is to provide equal trade opportunities to domestic suppliers regardless of their province or territory of origin. It does not apply to foreign suppliers, although foreign suppliers with offices in Canada, Canadian subsidiaries, or their Canadian distributors can take advantage of this Agreement.

Provincial and Territorial Procurement

Provincial and territorial government tendering practices and contract awards are subject to the obligations and procedural protections set out in the *Canada-United States Agreement on Government Procurement*. Each province and territory has its own separate legislation, with varying degrees of complexity and formality. For example, in Ontario, the *Ministry of Government Services Act* requires the provincial government to follow the policies and directives established by the Management Board of Cabinet when undertaking procurements relating to the construction, renovation or repair of a public work. The Ministry



of Government Services is responsible for developing the procurement policy framework for the Government of Ontario, including guidelines. Procurement policies in Ontario include an electronic tendering system, no preference for local vendors and a conflict of interest policy. Further, procurements by broader public sector entities including school boards and hospitals are subject to the requirements of the Ontario Broader Public Sector Directive, which includes a Supply Chain Code of Ethics and 25 mandatory requirements.

Municipal Procurement

Municipal contracting processes are generally governed by common law and codified in municipal purchasing bylaws, contracting policies and purchasing procedures. Some provincial legislation such as the *Ontario Municipal Act* requires municipalities to maintain policies related to the procurement of goods and services.

Comprehensive Economic and Trade Agreement and the Trans-Pacific Partnership

Canada has recently signed the *Canada EU Comprehensive Economic and Trade Agreement* (CETA), which has significantly opened up provincial, utility and municipal procurements to European suppliers. This improved access will also apply to all Canadian suppliers, including Canadian suppliers that are subsidiaries or affiliates of foreign entities. The CETA imposes significant standards on the conduct of tendering processes and contract awards for federal, provincial and municipal procurements. The primary procurement obligations common to all the trade agreements include: non-discrimination based on country and/or province of origin; an open, transparent tendering process; a competitive procurement; and a fair procurement process. The CETA has been thoroughly vetted by both Canada and the EU and is expected to be implemented into Canadian law in early 2017.

THE PRIMARY PROCUREMENT OBLIGATIONS COMMON TO ALL THE TRADE AGREEMENTS INCLUDE: NON-DISCRIMINATION BASED ON COUNTRY AND/OR PROVINCE OF ORIGIN; AN OPEN, TRANSPARENT TENDERING PROCESS; A COMPETITIVE PROCUREMENT; AND A FAIR PROCUREMENT PROCESS.



Canada has also recently signed, but not yet ratified, the *Trans-Pacific Partnership Agreement* (TPP), which imposes further standards on the procurement process. A central aim of the TPP is to prevent procuring entities from discriminating between suppliers in the 11 Pacific Rim member countries. If ratified, the TPP would require Canadian governments to, among other things, use electronic procurement measures, ensure that notices of intended procurement are widely accessible, and provide suppliers with minimum time periods to respond to such notices. Suppliers should note that Canadian governments are not required to follow standardized procurement procedures when contracts fall below certain prescribed monetary thresholds, or when the subject matter of the contract is exempt from these procedures. The monetary thresholds are different for each of the trade agreements, may fluctuate year to year, and vary depending on the type of contract and in some cases the identity of the procuring entity.

Defence Procurement and the Controlled Goods Program

With regard to Canadian defence procurement, the *Defence Production Act* (DPA) gives the Minister of PWGSC the responsibility to administer the DPA and the exclusive authority to buy or otherwise acquire defence supplies and construct defence projects required by the Department of National Defence. There are security requirements for individuals, facilities and controlled goods and technology. The Industrial Security Program provides security screening services for government contractors before they are entrusted with protected and classified information and assets of the government. The Controlled Goods Program is Canada's national domestic industrial security program and prevents the proliferation of tactical and strategic technology and assets, including missile technology, military equipment and related intellectual property. McCarthy Tétrault LLP is registered to receive controlled goods and technology under the Controlled Goods Program. The Joint Certification Program protects unclassified military critical technical data from common adversaries but allows the data to be transmitted to private U.S. and Canadian entities that have a legitimate need for them.

Tendering Formats

There are a myriad of procedures available

**THERE ARE A MYRIAD
OF PROCEDURES
AVAILABLE
FOR FEDERAL
PROCUREMENT
RANGING FROM
FORMAL TENDERING
TO NEGOTIATED
PROCUREMENTS.**



for federal procurement ranging from formal tendering to negotiated procurements. Practically speaking, the leading forms of procedure are requests for proposals, standing offers and supply arrangements. Short listing by way of requests for qualifications may be used in more complex, high-value solicitations. Specifications should be drafted in such a manner that competition is maximized, unless a restrictive requirement is necessary to meet the government's legitimate operational needs. Procurement laws generally provide that to be considered for an award, a bid must comply with all mandatory requirements in the request for proposal. In general, an award is to be made to the qualified bidder whose bid is responsive to the terms of the request for proposal or solicitation and is more advantageous to the government considering only price and the non-price related factors included in the bid document. Bidders who are debarred, suspended or declared ineligible may not receive a contract award.



The Integrity Regime

In order to be eligible to do business with the federal government, bidders must comply with PWGSC's Integrity Regime (Integrity Regime). Under the Integrity Regime, suppliers are ineligible to bid on contracts when they, or their board members, have been convicted or discharged in the last three years for any of the following offences under Canadian law or a similar foreign offence:

- payment of a contingency fee to a person to whom the *Lobbying Act* applies;
- corruption, collusion, bid-rigging or any other anti-competitive activity under the *Competition Act*;
- money laundering;
- participation in activities of criminal organizations;
- income and excise tax evasion;
- bribing a foreign public official;
- offences in relation to drug trafficking;
- extortion;
- bribery of judicial officers;
- bribery of officers;

- secret commissions;
- criminal breach of contracts;
- fraudulent manipulation of stock exchange transactions;
- prohibited insider trading;
- forgery and other offences resembling forgery; and
- falsification of books and documents.

All suppliers are required to provide a certification on bidding that the company, its directors, and its affiliates, and their directors, have not been charged, convicted, or absolutely/conditionally discharged of any of the above offences or similar foreign offences in the past three years. As part of this certification, all suppliers will be required to provide a disclosure of all foreign offences similar to the above listed offences that they or their affiliates and their directors have been convicted of in any foreign jurisdiction. This is a disclosure requirement that necessitates rigorous diligence and monitoring systems to allow for speedy disclosure at the time of bidding. Providing false or misleading certifications is, in and of itself, cause for debarment.

Suppliers who are debarred from bidding are ineligible to bid for 10 years from the date of determination. However, if a debarred supplier addresses the root cause of the offence or co-operates with government authorities fully, it can obtain a reduction in this debarment time. The length of the debarment may be reduced by up to five years, but will also require an administrative agreement whereby law enforcement may monitor the supplier's ongoing behaviour.

The debarment period runs in perpetuity for those suppliers that are convicted of committing fraud against the federal government under either the *Criminal Code of Canada* or the *Financial Administration Act*. All such suppliers will be permanently debarred until a record suspension is obtained.

The federal government also has the ability to suspend a supplier for up to 18 months immediately upon that supplier being charged with or admitting guilt to any of the above listed offences or a similar foreign offence or until charges or pleas resolve such offences. The Integrity Regime does not explicitly extend this suspension provision to violations by affiliates of the supplier.



The Integrity Regime prohibits suppliers from subcontracting with debarred entities. Knowingly entering into such a subcontract will debar the supplier for five years. This prohibition is likely to be assessed on the basis of strict liability, and as such all contractors should implement due diligence procedures specifically directed at the compliance of any potential subcontractor with the Integrity Regime.

If an affiliate of a supplier has committed one of the above listed offences or a similar foreign offence, PWGSC can debar the supplier. The Integrity Regime requires that the affiliate be assessed by an independent third party retained by the supplier to determine whether the supplier had any participation or involvement in the underlying offence. If the supplier can show that it had no such involvement, it will not be debarred. Entities are deemed to be affiliates when one controls the other, when both entities are controlled by a common third party, or where direct control does not exist between the entities, but various prescribed indicia of control are present.

The federal government retains the ability to grant limited Public Interest Exceptions to the requirements under the Integrity Regime. These can only be granted where a debarred supplier must be retained and no other reasonable options exist. Factors that influence the granting of a Public Interest Exception include the inability of other suppliers to actually perform the contract, emergent circumstances, national security concerns, or potential material injury to the financial interests of the government if the exception is not granted. A permanently debarred supplier is not eligible for this exception.

If, during the course of an ongoing supply contract, the supplier is convicted of one of the above listed offences or a similar foreign offence, the federal government is entitled to terminate the contract. The federal government is not obligated to terminate the contract, and suppliers are entitled to submit arguments as to why the contract should not be terminated. In the event that the federal government chooses not to terminate the contract, it must put in place an administrative agreement providing for independent third party monitoring of the contract.

Bid Challenges and Complaints

Purchasing undertaken by the federal government is subject to Canada's bid challenge regime under the jurisdiction of the Canadian International



Trade Tribunal (CITT), which is authorized to investigate compliance of federal purchasing entities with the trade agreements. The CITT requires that a complaint be filed within 10 working days of the date the complainant knew of, or should have known of, the grounds for the complaint.

If the CITT determines that a solicitation, proposed award or contract award does not comply with statute or an international trade treaty requirement, it may recommend that the contracting entity, usually PWGSC, implement any combination of the following remedies: terminate the contract, issue a new solicitation, award a contract or award damages for lost profits. It may also recommend that the contracting agency pay all of the complainant's bid and proposal preparation costs and all costs associated with filing and pursuing the protest.

Provincial and municipal authorities have their own bid protest mechanisms. Federal and provincial superior courts may also hear claims by bidders that the solicitations have been carried out in breach of their common law rights in contract or tort. All procurements by federal, provincial and municipal entities are subject to the jurisdiction of the courts and to the concept of "Contract A" and "Contract B" under common law. The courts have held that when a compliant bidder responds to a tender call, a notional contract called "Contract A" is formed. One of the terms of "Contract A" is that the bidder, if selected, is required to honor the terms of its bid by entering into "Contract B," which is the contract to perform the work in question. However, during the bidding process, the parties are governed by the explicit rules in the tendering documents. The purchasing government entity is also subject to a number of implied duties to "Contract A" bidders, including to conduct a fair competition, provide proper disclosure, reject non-compliant tenders, award the contract to the winning bidder and award the contract as tendered.

In recent years purchasing entities have increasingly attempted to avoid forming "Contract A" by drafting "non-Contract A" bid solicitations. If no "Contract A" is formed, the resulting duties do not arise and no breach of contract claim for damages can be brought. In addition, this process gives more latitude for bidders and purchasers to engage in a negotiated RFP process. While such a process would usually seem to eliminate a major source of liability bidders should be aware of two points. First, even if there is an express disavowal of "Contract A" courts have found



that, under certain circumstances “Contract A” can be formed. Second, where no “Contract A” is formed there is an increased likelihood that the procurement may be challenged via an administrative judicial review process.

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MCCARTHY TÉTRAULT PROFILE

McCarthy Tétrault actively listens to its clients to understand their needs, their business and their industry, and then develops the best solutions and strategies to achieve successful outcomes. With this approach, the firm has established a position as one of Canada's leading full-service law firms.

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With offices in Canada's major commercial centres and in London, U.K., McCarthy Tétrault delivers integrated business law, litigation, tax law, real property law, and labour and employment law services nationally and globally. McCarthy Tétrault lawyers work seamlessly across practice groups, representing diverse Canadian and international clients, such as businesses and public institutions from a wide range of sectors, including — among many others — financial services, power, oil & gas, private equity (including Canadian pension plans), insurance, pharmaceutical, mining, technology, telecommunications, life sciences, retail, hospitality, infrastructure and construction.

McCarthy Tétrault has also helped structure the largest investment projects in Canadian history and has extensive experience in complex cross-border corporate financings and mergers & acquisitions, as well as the development and financing of major international projects.

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From its earliest days, McCarthy Tétrault pioneered advances in the practice of law and law firm management to adapt to changing client needs. Continuing this tradition of legal service innovation, McCarthy Tétrault is leading the charge among Canadian firms to rethink and restructure the way it delivers legal services, building upon the firm's promise to clients of better results — and a better experience. Our range of innovative solutions includes alternative, customized fee arrangements,



creative staffing arrangements, and process re-engineering. Our solutions and pricing structures are underpinned by the first and most mature project management platform among Canadian law firms, and supported by a team of legal project management professionals.

Please contact any of the lawyers in our firm to assist you in providing a detailed analysis of the issues relevant to your specific proposed investment.

PLEASE CONTACT ANY OF THE LAWYERS IN OUR FIRM TO ASSIST YOU IN PROVIDING A DETAILED ANALYSIS OF THE ISSUES RELEVANT TO YOUR SPECIFIC PROPOSED INVESTMENT.



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