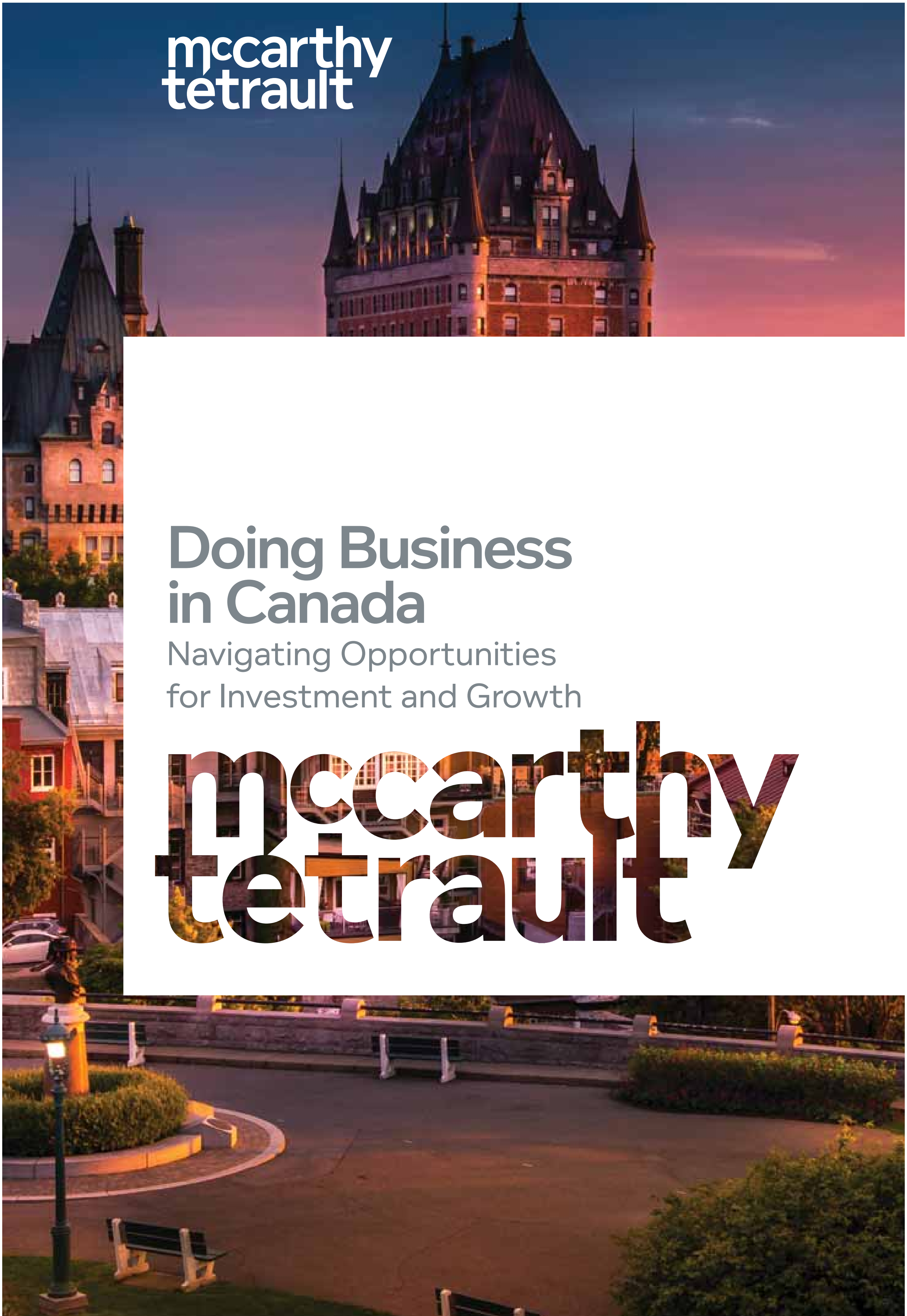

Doing Business in Canada

Navigating Opportunities for Investment and Growth

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.

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.

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 June 2019.

CANADA

CANADA

Canada is the second-largest country in the world, with an area of approximately 10 million square kilometres and a population more than 37 million. The vast majority 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.

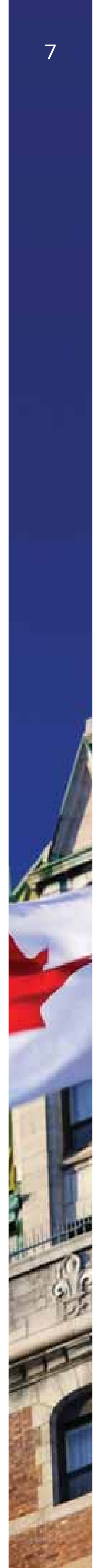
As one of the 10 largest economies of the industrialized countries, Canada is a member of the world's Group of Seven (G7) industrialized nations. Currently, approximately three quarters of Canada's exports go to the United States, and under 5% to each of the European Community, the United Kingdom and China. Canada is the largest importer of goods and services from the United States, with imports from the U.S. comprising approximately half of all Canadian imports.

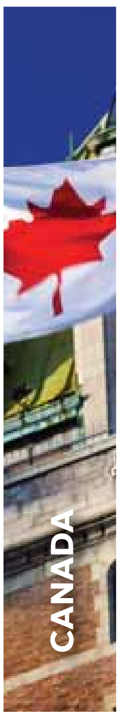
The Toronto Stock Exchange (TSX) and the TSX Venture Exchange rank third among North American exchanges and ninth among world stock exchanges in terms of market capitalization. More resource company stocks are listed on the TSX than anywhere else in the world.

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*.

CANADA IS A FEDERAL STATE, WITH GOVERNMENTAL JURISDICTIONS DIVIDED AMONG A NATIONAL GOVERNMENT, 10 PROVINCIAL GOVERNMENTS AND THREE TERRITORIAL GOVERNMENTS.

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





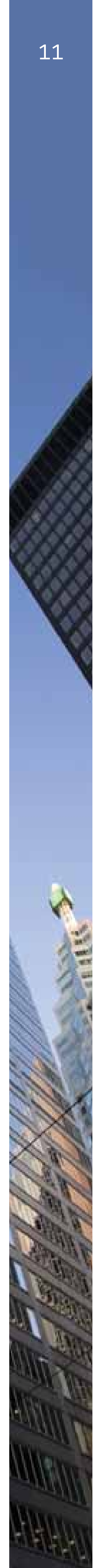
bankruptcy and insolvency, intellectual property, criminal law and national defence. The provincial governments have legislative jurisdiction over, among other matters, real and personal property, civil rights, education, health care and intra-provincial trade and commerce. Certain aspects of these provincial 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.

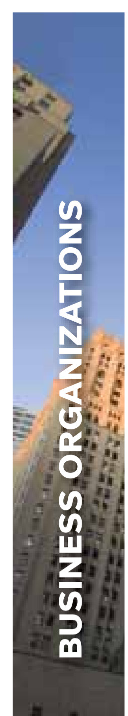
The principal federal corporate statute is the *Canada Business Corporations Act* (CBCA), which is modeled on modern business statutes in the United States. Most provinces and territories in Canada also have their own corporate legislation, based largely on the CBCA. There are minor differences between 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.

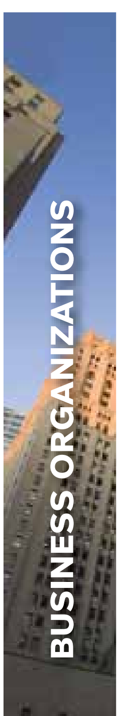
THERE ARE MINOR DIFFERENCES BETWEEN THE VARIOUS FEDERAL AND PROVINCIAL CORPORATE STATUTES THAT CAN AFFECT THE CHOICE OF JURISDICTION OF INCORPORATION, DEPENDING UPON THE PARTICULAR CIRCUMSTANCES.

- 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.
- 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, subject to the below, 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. A corporation governed by the CBCA is required to maintain a register of individuals who, directly or indirectly, have significant control over the corporation. The register is available to the Director appointed by the Minister under the CBCA and shareholders and creditors of the corporation upon request. Provincial and territorial governments have agreed to introduce similar record-keeping requirements.
- 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.

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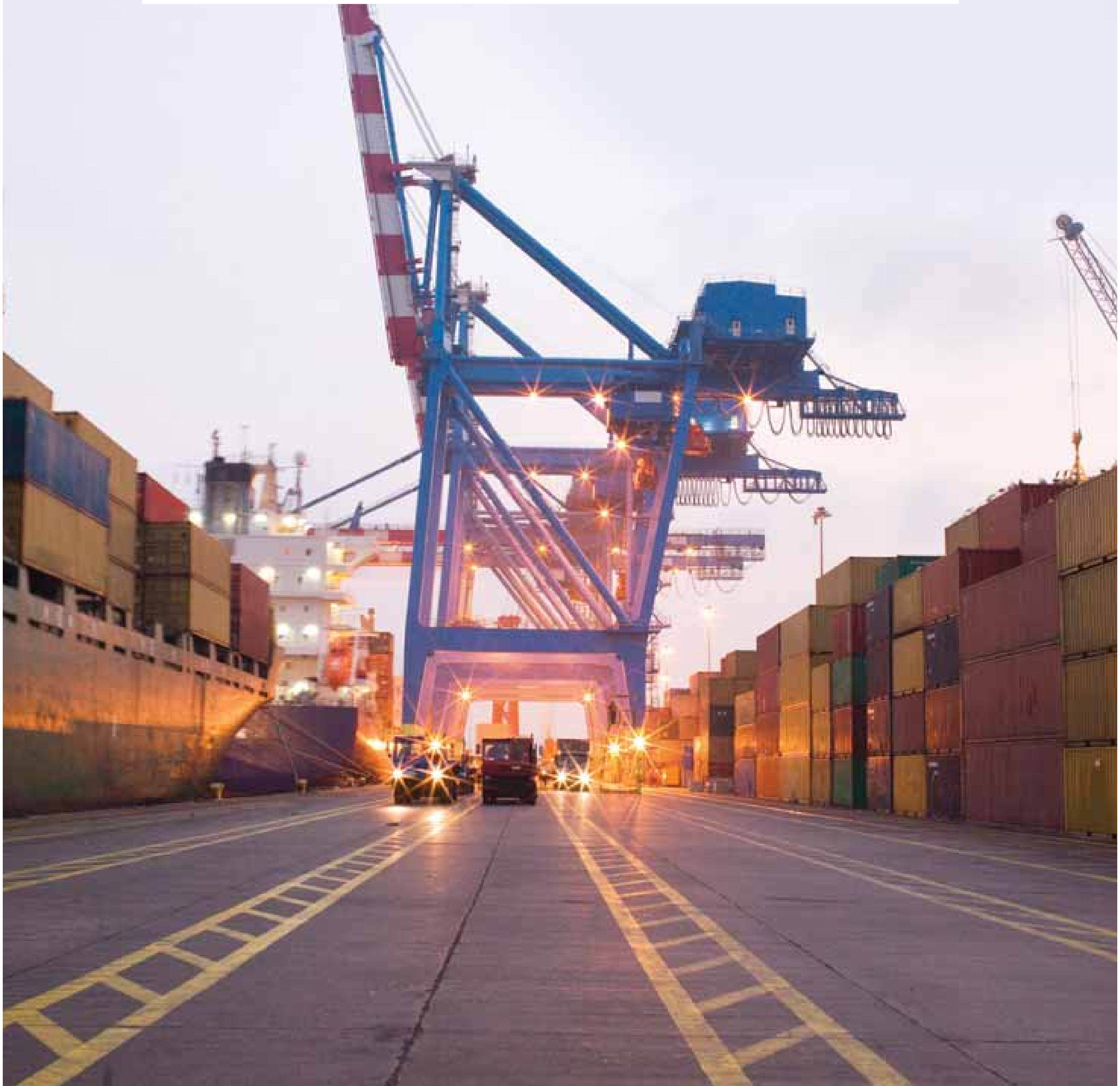
FOREIGN INVESTMENT LAW & NATIONAL SECURITY

By Oliver Borgers and Michele Siu



FOREIGN INVESTMENT LAW & 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).

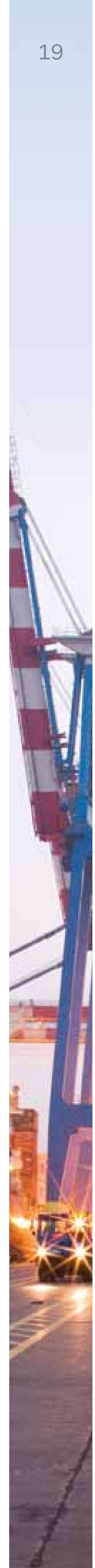
WHETHER A NON-CANADIAN INVESTOR ACQUIRES A BUSINESS WITH A PRESENCE IN CANADA OR ESTABLISHES A NEW CANADIAN BUSINESS, THE INVESTMENT MAY BE SUBJECT TO FOREIGN INVESTMENT REVIEW OR NOTIFICATION REQUIREMENTS OF THE INVESTMENT CANADA ACT (ICA).

One of three thresholds will apply to most direct acquisitions of control of a Canadian business by non-Canadian, non-state-owned enterprise (SOE) investors from World Trade Organization member countries:

- C$1.568 billion (2019) in enterprise value of the target where the acquirer or the target is a non-SOE "trade agreement investor,"
- C$1.045 billion (2019) in enterprise value of the target where the non-SOE acquirer or target are controlled in other WTO member states, or
- C$5 million in asset value of the target if the target carries on a cultural business.

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 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.

The ICA provides the Canadian government with the power to review any equity and asset investment by a non-Canadian involving a Canadian entity on national security grounds. Such transactions, can be blocked or unwound by the government. The ICA's national security provisions apply to a broader set of investments by non-Canadians than the "net benefit" provisions, including acquisitions of entities that do not constitute "Canadian businesses," non-control investments and most corporate reorganizations where there is no change in ultimate control.

Investments by investors whom the Canadian government considers foreign 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.

- One of two thresholds will apply to the direct acquisition of control of a non-cultural 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) by non-Canadian, non-SOE investors from WTO member countries:
    - C$1.568 billion (2019) in enterprise value of the target where the acquirer or the target is a non-SOE "trade agreement investor," or
    - C$1.045 billion (2019) in enterprise value of the target where the non-SOE acquirer or target are controlled in other WTO member states (such as investors controlled in China).
- 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.

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.

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$416 million (2019) 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

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 CANADIAN GOVERNMENT HAS ALSO ISSUED GUIDELINES FOR THE REVIEW OF INVESTMENTS BY FOREIGN STATE-OWNED ENTERPRISES.

- 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 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 (regardless of size and whether control was acquired) that involve a non-Canadian — where the responsible Minister has "reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security." Review can occur before or after closing and may apply to corporate reorganizations where there is no change in ultimate control. A national security review may take up to 200 days (subject to any agreed-on extensions). There is no definition of "national security," however, certain industries are likely to attract greater scrutiny, such as technology, critical infrastructure and defence. The Canadian government's Guidelines on the National Security Review of Investments set out a non-exhaustive list of activities that may relate to national security. Although these guidelines provide some insight as to when a national security review may occur, there are notable gaps and foreign investors often receive limited transparency during the national security review process. If the Canadian government believes that a transaction may be injurious to national security, the transaction can be blocked, subjected to conditions, or, if already implemented, subject to remedies, which can include divestiture. Since 2012[1], four transactions have been blocked and various others have been subjected to conditions or were abandoned[2]. The majority of the national security reviews that have been ordered were in respect of investors from China (10 orders) and Russia (2 orders). In this geo-political climate, national security considerations will be crucial for investors and targets in deal planning and risk allocation.

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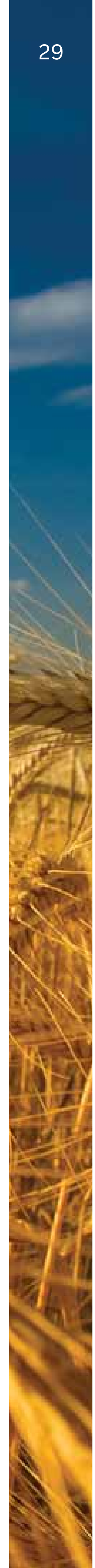
1. Aggregated statistics regarding the national security review process were first published in 2012.
2. Since the implementation of a formal national security review process in 2009, 15 national security review orders were issued between 2012 and 2018. In all 15 cases, the transaction was blocked, abandoned, or subjected to conditions.

COMPETITION LAW

By Oliver Borgers and Michele Siu



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 anti-competitive impact. Reviewable practices include mergers, agreements among competitors, abuse of dominant position, 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

The Commissioner of Competition can review and challenge all mergers (meaning the acquisition of control over a significant interest in the whole or a part of a business), whether or not they are subject to pre-merger notification requirements under the Act (as described below), within one year of closing. If the Commissioner 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

> THE COMMISSIONER OF COMPETITION CAN REVIEW AND CHALLENGE ALL MERGERS, WHETHER OR NOT THEY ARE NOTIFIABLE, WITHIN ONE YEAR OF CLOSING.

different. The Act also provides a uniquely Canadian "efficiencies defence" to anti-competitive mergers, which applies in cases where the efficiencies from the merger are likely to be greater than and offset the transaction's anti-competitive effects.

Certain types of transactions that exceed prescribed thresholds require pre-merger notification and the filing of information with the Commissioner. Generally, pre-notification of such transactions is required if both (i) the parties to the transaction (together with their affiliates) have combined aggregate assets in Canada, or combined gross revenues from sales in, from and into Canada, exceeding C$400 million and (ii) the aggregate assets in Canada of the target (or of the assets in Canada that are the subject of the transaction) or the annual gross revenues from sales in or from Canada generated by those assets, exceeds C$96 million (2019; this threshold is adjusted annually). Equity investments are also notifiable if the financial thresholds are met and the applicable equity thresholds are exceeded (more than 20% in the public company context, more than 35% in the private or non-corporate entity context or an acquisition of more than 50% of a public company voting shares or private entity equity if a minority interest is already owned by purchaser).

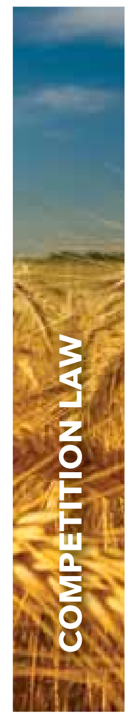
In general, and with certain exceptions, these asset and revenue values are calculated using book values based on the most recent audited financial statements for the relevant entity. Pre-merger notification involves the filing of a notification form with the Commissioner of Competition. A transaction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

The filing of both parties' complete notification forms triggers an initial 30-day suspensory waiting period. If, within this initial period, the Commissioner of Competition issues a supplementary information request (SIR), which is an extensive request for documents and data similar to a Second Request under the U.S. *Hart-Scott-Rodino Act*, 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 legally 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 formal 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.

> IT IS POSSIBLE IN SOME CIRCUMSTANCES TO OBTAIN AN ADVANCE RULING CERTIFICATE FROM THE COMMISSIONER OF COMPETITION AND THEREBY AVOID THE FORMAL NOTIFICATION PROCESS.

A C$73,584 (2019) filing fee applies to companies filing a pre-merger notification and/or requesting an ARC. The filing fee is subject to an annual consumer price index adjustment.



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 in and of itself; 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 anti-competitive 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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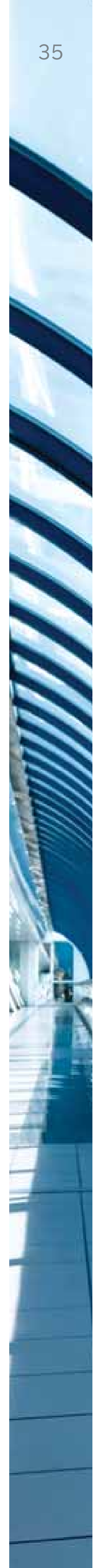
CORPORATE FINANCE, MERGERS & ACQUISITIONS AND PRIVATE EQUITY

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.

> 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.

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.

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.

In Canada, unlike in the United States, it is not permissible to make a take-over bid conditional on arranging financing. Before a bidder makes a cash take-over bid, it must have made "adequate arrangements" for its financing. Typically, the bidder will have signed a binding commitment letter with a bank or other source of funds prior to launching its take-over bid. The bidder will seek to have the conditions to the availability of the financing set out in the bank commitment letter as similar as possible to the conditions in the take-over bid circular that is sent to the target company's shareholders. The law requires that the bidder must be confident that if the conditions to the bid are satisfied, the financing will be available.

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 ⅔% 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 ⅔% 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.

> 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.

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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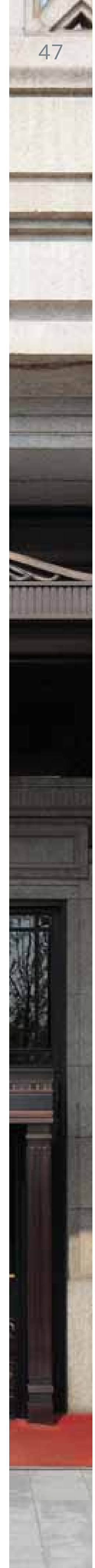
BANK LOANS AND OTHER LOAN CAPITAL

By Ana Badour and Shauvik Shah



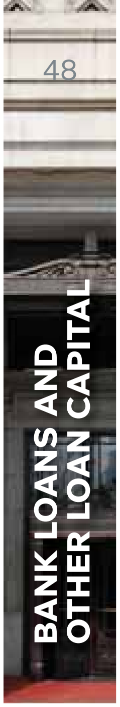
BANK LOANS AND OTHER LOAN CAPITAL

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 FEDERAL AND PROVINCIAL PROGRAMS AND AGENCIES PROVIDE GRANTS AND/OR LOANS TO CANADIAN BUSINESSES.

All provinces and territories in Canada 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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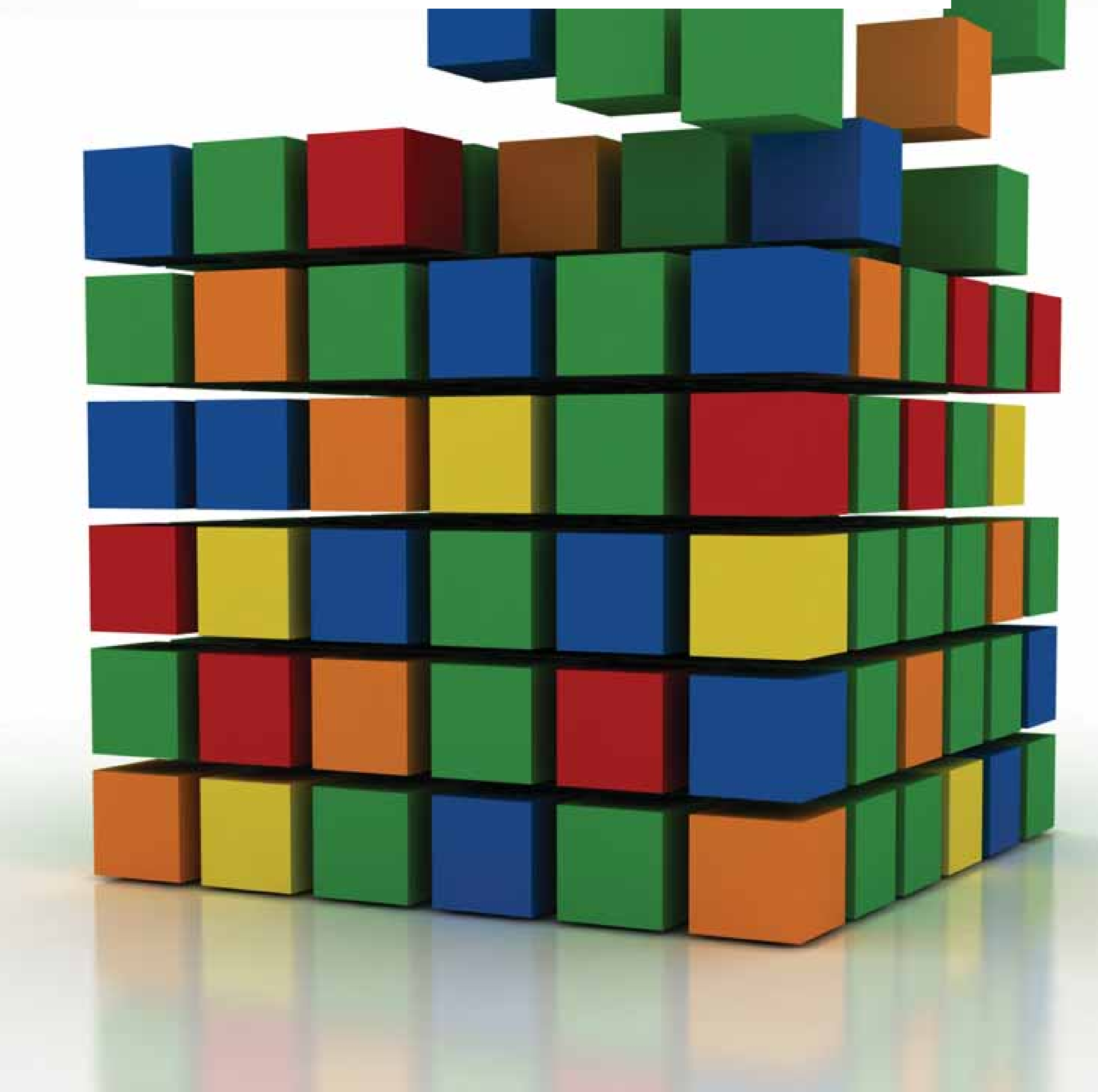
TAXATION

By Patrick McCay



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 2019, 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 26.5%. 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 2019, 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 47.5%.

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.

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

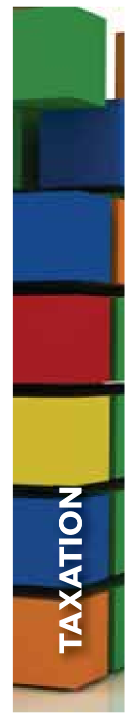
The combined federal and provincial/territorial income tax rate to which the subsidiary is subject will depend on the provinces and territories in which it conducts business, the nature of the business activity carried on and other factors.

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 or a partnership 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.

Canada signed the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (MLI) in June 2017. The federal legislation to ratify the MLI in Canada is contained in Bill C-82, which received Royal Assent on June 21, 2019. The most significant treaty modification to be implemented through the MLI will be the addition of a broad anti-avoidance rule into the applicable tax treaties, referred to as the principal-purpose test. Under the principal-purpose test, a treaty benefit may be denied where it is reasonable to conclude that one of the principal purposes of an arrangement or transaction was to gain such benefit, unless it is established that granting the benefit would be in accordance with the object and purposes of the relevant provisions of the treaty.

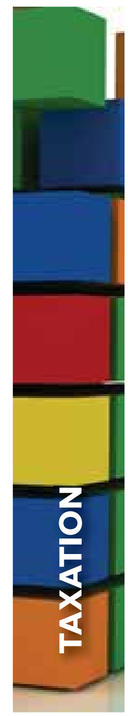
Carrying on Business in Canada Through a Branch Operation

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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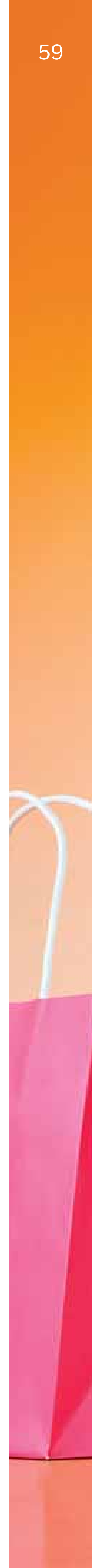
SALES AND OTHER TAXES

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 Prince Edward Island has 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, until March 31, 2021.

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, 2019, 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 6% 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 CONSUMER GOODS

By Christopher Hubbard and Katherine Booth

MANUFACTURE AND SALE OF CONSUMER GOODS

The manufacture, importation, distribution, and sale of consumer goods are the subject of heavy regulation in Canada. Various statutes impose often stringent obligations on manufacturers and grant regulators broad powers to enforce compliance, including through compliance audits, and to impose fines and penalties. Goods that fail to comply with the statutory requirements may not lawfully be sold in Canada and may be subject to recall. Manufacturers are also potential defendants in individual and class action product liability litigation relating to allegedly defective products.

Regulation of Consumer Products

The *Canada Consumer Product Safety Act* (CCPSA) came into force in 2011. It applies to "consumer products" and prohibits the manufacture, importation or sale of consumer products that pose a "danger to human health or safety." The CCPSA gives the federal government the power 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 product safety "incidents" directly to Health Canada within short timeframes.

"Consumer products" subject to regulation under the CCPSA are all products that may reasonably be expected to be obtained by an individual to be used for non-commercial purposes, with the exception of the products listed in Schedule 1 of the CCPSA. Generally, the excluded products are those covered by other specific legislation, including food, cosmetics, drugs, natural health products, medical devices, pest control products, firearms, and vehicles.

CONSUMER GOODS ARE THE SUBJECT OF HEAVY REGULATION IN CANADA, AND REGULATORS HAVE BROAD POWERS TO COMPEL COMPLIANCE AND IMPOSE PENALTIES.

Regulations made under the CCPSA may also impose additional compliance requirements for many specific types of products, including: candles; carbonated beverage glass containers; carriages and strollers; cellulose and fibre insulation; charcoal; children's jewelry; children's sleepwear; consumer products containing lead; consumer chemicals and containers; cribs, cradles and bassinets; corded window coverings; face protectors for ice hockey and box lacrosse players; glass doors and enclosures; glazed ceramics; ice hockey helmets; infant feeding bottle nipples; kettles; lighters; matches; mattresses; pacifiers; phthalates; playpens; residential detectors; restraint systems and booster seats for motor vehicles; tents; textiles (flammability); and toys.

In addition to the CCPSA, 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 manufacturers whose consumer products are sold in Canada. Goods that do not 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.

For some consumer products (e.g., toys that are operated electrically), certification that a product meets standards set by the Canadian Standards Association (CSA) is mandatory. The CSA is an agency accredited by the Standards Council of Canada and the American National Standards Institute, and it both develops standards and conducts tests to certify that products meet the CSA's published standards. A CSA certification mark signifies that a product meets a basic level of conformity to the product features deemed essential by the published standard.

The CCPSA grants Health Canada sweeping powers to audit businesses to assess compliance with their obligations under the legislation. Health Canada also conducts its own product testing and engages in a cyclical enforcement program in which products in various product categories are tested for compliance with various CCPSA regulations. Health Canada may also require a manufacturer or importer of a product to conduct testing on the product to confirm compliance with the CCPSA and regulations.

A comprehensive regulatory review for all products is beyond the scope of this text, so manufacturers should familiarize themselves with the statutes and regulations applicable to the particular products they sell, including products such as food, drugs and natural health products and other products regulated by legislation other than the CCPSA.

Consumer Protection

A principal regulator of consumer products is Health Canada and a number of statutes impose consumer protection requirements in relation to the sale of goods. The CCPSA gives the federal government authority to deal with products that may pose a danger to human health and safety. Manufacturers must report safety incidents to Health Canada within very strict timelines (two days for the initial report and 10 days for a follow up report). The definition of what constitutes a reportable "incident" is broad. Even if an event did not result in actual harm, it is a reportable incident under the CCPSA if the event did or "may reasonably have been expected" to cause a serious health effect or injury. Manufacturers, importers and retailers are also required to report recalls or similar measures involving the product anywhere in the world. Health Canada also receives reports directly from consumers.

Health Canada has the power to conduct compliance inspections to verify that manufacturers and suppliers are, among other things, familiar and complying with their incident-reporting obligations. Inspectors have the power to inspect a company's place of business and documents to carry out a compliance audit. Health Canada compliance audits can be triggered by a consumer report or report from someone else in the supply chain, and 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. To ensure that consumers are not misled, the *Competition Act* contains 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

The sale of products alleged to be defective or to have caused injury or damage can give rise to litigation against product manufacturers as well as others in the supply chain. Claims may be based on breach of a contract, negligence or both. Product liability claims are also popular subjects for class action litigation in Canada. See Dispute Resolution — Class Actions.

Contract claims are strict liability claims and the absence of negligence is not a defence. All provinces and territories have a *Sale of Goods Act* that implies warranties of fitness for purpose and of merchantable quality into contracts between buyers and sellers for the sale of goods. Parties can contract out of the statutorily implied terms, except in the case of consumer or retail sales.

Often, no contractual relationship will exist between a product manufacturer and the ultimate purchaser or user. In such cases, a buyer of a product generally cannot rely on the implied warranties under the *Sale of Goods Act* in a claim against the manufacturer. As a result, many claims against manufacturers are framed in negligence, as discussed below. 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. As well, even where a consumer only has a breach of contract claim against the seller and not against the manufacturer, the seller may still seek contribution and indemnity from the manufacturer in relation to that claim.

Manufacturers may also be exposed to negligence claims arising from an alleged defect in a product. Generally, a manufacturer's duty is to take reasonable care to avoid causing either personal injury or damage to property. However, in Canada, liability can arise even where there is no actual personal injury or damage to property caused. For example, consumers may be entitled to recover economic loss associated with repairing a defective product where a manufacturer's negligence resulted in defects that pose a real and substantial risk of actual physical injury or property damage.

In order to succeed in a negligence claim, claimants must generally 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. Whether there is a "defect" in a product is a fact-specific inquiry, and includes reference to the reasonably expected and foreseeable uses of the product. The mere presence of a defect in a product can justify an inference of negligence in the design or manufacturing process. Often, a product recall is used as a basis for alleging a defect and commencing litigation.

In some circumstances, there may also be a common law duty to warn customers about a product defect or to initiate remedial action, such as a recall. The duty to warn is a continuing duty and can be triggered by information that becomes known after the product is in use. The existence and content of any duty on a manufacturer to warn or take remedial action are fact specific enquiries and depend on the circumstances of the case.

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.

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FRANCHISE LAW

By Adam Ship

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 75,000 franchised units, employing directly or indirectly more than 1.8 million Canadians and generating approximately C$96 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 franchises 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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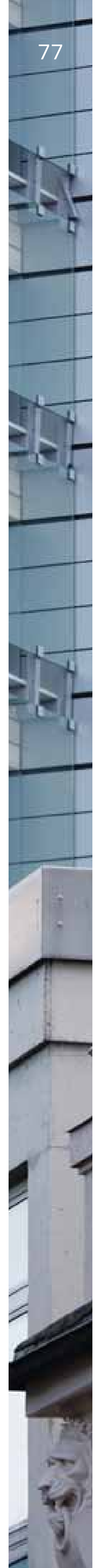
REAL PROPERTY

By Paul Galbraith



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.

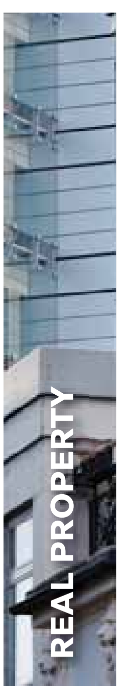
At the provincial level, the subdivision of land is restricted by statute in a number of Canadian provinces. In Ontario, the *Planning Act* is the main statute that controls subdivision. In British Columbia and many other provinces, the *Land Title Act* of that province is the main statute that controls 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 passed by the Ontario government directly impact how development-approval applications are prepared, submitted, processed and appealed. The cumulative effect of these changes has been to put greater control of the development approval process in the hands of municipalities and the province itself. However, there is an appeal process for most applications to the Local Planning Appeal Tribunal, which has broad jurisdiction, so prudence requires applicants to look farther down the road, past the municipal process, to eventual appeals, and to take careful steps to put their applications on an appeal-ready footing from the outset. For this reason, engaging experienced legal counsel as early as possible in the development process is advisable.

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.

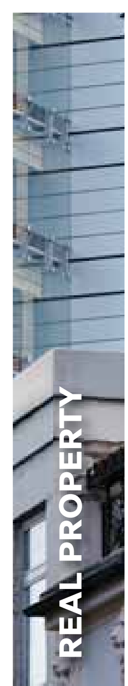
Title Opinions and Title Insurance

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

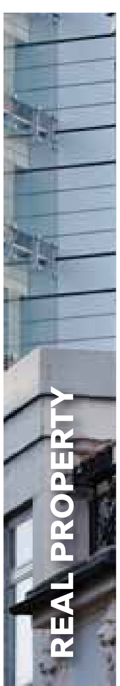
In Canada, there is a legislative framework at both the provincial and federal level that governs the duties of land owners with respect to the storage, discharge and disposal of contaminants and other hazardous materials connected with real property. The liability for improper environmental practices 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.

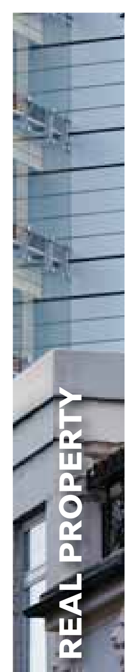
Proceeds of Crime Legislation and Real Estate Developers

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).

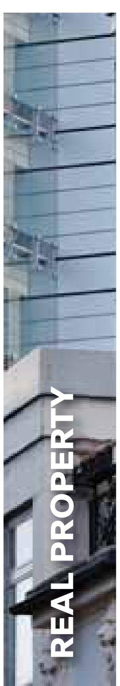


Unless (i) the purchaser has no reason to believe, after making reasonable inquiries, that the vendor is not a non-resident of Canada; (ii) the purchaser concludes after reasonable inquiry that the non-resident person is resident in a country with which Canada has a tax treaty, the property disposed 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.

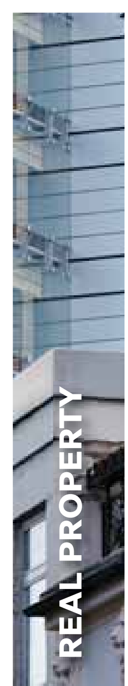
The same self-assessment rules that apply for GST purposes apply for HST purposes.

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.

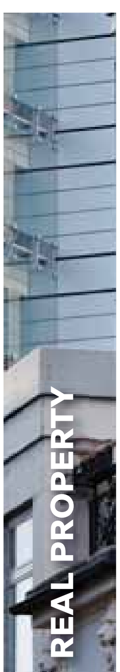
Common Forms of Ownership/Interest

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**.

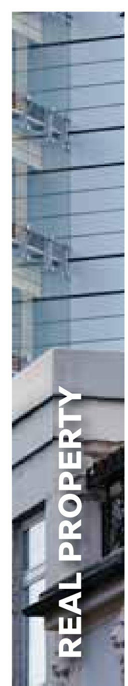
Each of these vehicles has its own nuances and with careful planning and legal advice, investors in the Canadian real property market can structure their investments so as to take maximal advantage, for tax purposes or otherwise, of the available alternatives. A real estate investment trust (REIT) is 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.

THERE ARE VARIOUS AVENUES FOR INVESTMENT IN REAL PROPERTY IN CANADA, INCLUDING CORPORATIONS, PARTNERSHIPS, LIMITED PARTNERSHIPS, TRUSTS, CO-OWNERSHIPS AND CONDOMINIUMS.

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 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

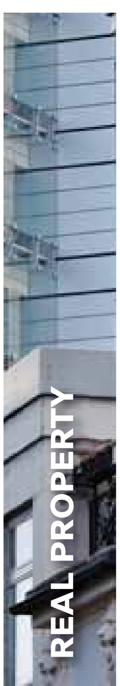
Condominium ownership is a form of real estate ownership where the owner receives title to a particular unit and has a proportionate interest in certain common areas. Legal advice is needed to ensure that condominium projects satisfy all local policies and legislative requirements, including:

- 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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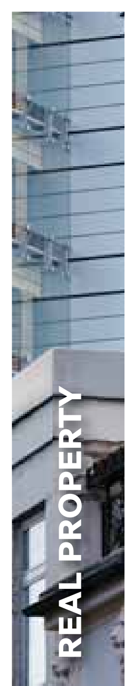

PUBLIC-PRIVATE PARTNERSHIPS

By Jim Janetos and Morgan Troke

PUBLIC-PRIVATE PARTNERSHIPS

Canadian governments utilize Public Private Partnerships (PPPs or P3s) 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 PPPs, are a key component of Canada's and every province's economic stimulus packages.

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.

Canada now enjoys a mature and robust PPP market with Canadian PPP projects in various industry sectors, including light rail and other mass transit, roads, bridges, hospitals and health care, justice and corrections, 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 and consistent "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 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 generally strong at both the federal and provincial level (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 PPPs to achieve the completion of infrastructure projects. These agencies include Infrastructure Ontario, Partnerships BC, Infrastructure Québec, SaskBuilds, Nova Scotia’s Department of Transportation and Infrastructure Renewal and Partnerships New Brunswick. Also, the Government of Canada has established the Canada Infrastructure Bank, a Canadian Crown corporation operating at arm’s length from the government. The Canada Infrastructure Bank is to work with provincial, territorial, municipal, federal, Indigenous and private sector investor partners to build infrastructure across Canada (with a focus on large, transformative projects such as regional transit plans, transportation networks and electricity grid interconnections), by providing federal support to such partners to ensure the commercial viability of their projects. 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 PPPs, 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 proposed the Réseau express métropolitain project (REM) in Montréal, a 67-km, light rail, high-frequency network 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;
- construction costs are primarily financed by debt and equity, and 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.

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.

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 PPPs share a desire to utilize an efficient PPP procurement process followed by a short closing period. 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 the selection of the successful bidder to closing, based on the settled documents and committed financing at bid submission.

The Canadian PPP market is expected to remain active in the coming years as all levels of government have witnessed the benefits of using PPPs to deliver infrastructure projects and related public services.

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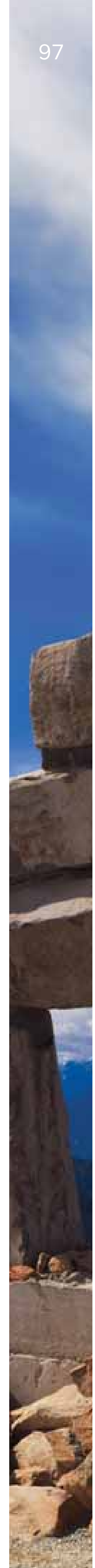
ABORIGINAL LAW

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 particularly the case for energy, mining, forestry and transportation projects which often have the potential to impact lands and waters 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 and among 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. Business practices relating to Aboriginal communities often change to keep up with developments in the law, government policies and the expectations of Aboriginal communities, which can exceed what is required by law. In addition, Aboriginal groups are becoming increasingly active in the commercial marketplace as service providers/suppliers, 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, Métis 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 and is discussed further below, following a general overview of Aboriginal and treaty rights.

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. This issue has not been judicially considered to date in Canada, although there is currently a trial underway in Ontario in which the Aboriginal groups are claiming Aboriginal title to the lakebed of a portion of Lake Huron and Georgian Bay.

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. This is a constitutional duty and the obligations imposed by the Crown's duty can often be significant and 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 establish right. Where the claim is weak and the impacts will be minor, the Crown may only be required to consult at the low end of the spectrum by giving notice, providing information, and discussing issues raised in response. In other cases, where the claim is strong or there are established rights and the impacts will be significant, deep consultation may be required, which may entail the opportunity to make submissions and participate in the decision-making process, accommodation, and the provision of written reasons.

Regardless of what level of consultation is required, it must be conducted in good faith and be meaningful. The duty to consult is not intended to simply provide a process to exchange information or an opportunity for Aboriginal groups to "blow off steam." Serious consideration needs to be given to concerns raised and the Crown must be prepared to make changes based on the input received. 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. Inadequate Crown consultation or accommodation 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.

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 provide capacity funding to Aboriginal groups, including funding third-party Aboriginal knowledge and land-use studies to determine the extent of Aboriginal interests and the potential impact of proposed projects.

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.

Project Related and Government Revenue Sharing 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 groups, and certain governments are increasingly expecting agreements to be in place before issuing an approval. 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 is important when working in this area. 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 in some cases financial benefits, such as an annual royalty payment or equity interest with corresponding assurances to the proponent that create certainty and facilitate the development of the project. In some cases, agreements will formalize future engagement processes for the life of a project 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, particularly for developments on reserve land. 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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INTELLECTUAL PROPERTY

By Alfred Macchione, Dan Glover and Benjamin Lai

INTELLECTUAL PROPERTY

The federal laws on patents, copyright and trademarks 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 January 2018, Canada and 10 other member countries entered into the Comprehensive and Progressive Agreement for *Trans-Pacific Partnership Agreement* (CPTPP), which Canada ratified and which came into force on December 30, 2018. 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), the *Patent Cooperation Treaty* (PCT) and the *Patent Law Treaty* (PLT).

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 the judgment of the Supreme Court of Canada in *AstraZeneca Canada Inc. v. Apotex Inc.* 2017 SCC 36, where our highest court unanimously rejected the so-called "promise doctrine" to assess the utility of a patent. The doctrine requires reviewing the patent as a whole to identify "promises" associated with the disclosed invention, and then determine whether the identified promises are met. Under this approach, a patent would have been held to lack utility even if it failed to meet all but one of the identified promises. The Supreme Court found this doctrine to be "unsound" and "not good law" for determining whether the utility requirement under s.2 of the *Patent Act* is met. Instead, the Supreme Court set out a two-step test that involves first identifying the subject matter of the invention as claimed in the patent, and then asking whether the subject matter is capable of a practical purpose. As to the degree of usefulness necessary to meet the utility requirement, the Court reaffirmed that "a scintilla of utility will do."

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 post-judgement interest, was thereby maintained. Leave to appeal to the Supreme Court of Canada was denied in April 2016. In another recent patent infringement decision, namely *Dow Chemical Company v. Nova Chemicals Corporation*, 2017 FC 637, the patentee elected to pursue the infringer's profits rather than seeking damages. In this decision, the Federal Court of Appeal awarded the largest patent infringement remedy in history, at nearly C$645 million. This amount included the infringer's profits during the life of the patents, legal costs and pre-judgement interest. In determining the infringer's profits, the Federal Court of Appeal, for the first time, also took into account so-called "springboard" profits earned by the infringer during a period of time after the expiration date of the patent to account for the accelerated market entry enjoyed by the infringer by making the infringing product prior to the patent's expiration. The magnitude of the remedy awarded by the Federal Court of Appeal, together with the foregoing decisions of the Supreme Court, may elevate the attraction of filing and enforcing patents in Canada.

A patent grants its owner the exclusive right in Canada to make, sell or use the invention for a fixed term. In general, the first inventor to file for patent protection will be entitled to a patent. There is no requirement that the invention be made in Canada. The application in Canada must generally be filed before the invention is made available to the public anywhere in the world. A grace period of one year is permitted for disclosures originating directly or indirectly from the inventor, but an application by another inventor with an earlier filing date will effectively prevent the grant of a patent. It is therefore important to

THE APPLICATION IN CANADA MUST GENERALLY BE FILED BEFORE THE INVENTION IS MADE AVAILABLE TO THE PUBLIC ANYWHERE IN THE WORLD.

file as early as possible in Canada or in a *Paris Convention* country, and not rely on the grace period. The making of an invention available to the public includes publication (e.g., by publication of an earlier patent application or by distribution of a product embodying the invention). Pending patent applications will be published by the Canadian Intellectual Property Office 18 months after the earliest filing date claimed by the applicant. The patent will last for a maximum of 20 years from the date of filing in Canada, provided all annual maintenance fees are paid in a timely manner.

Recent amendments to Canada's patent legislation herald some significant changes. On December 13, 2018, certain amendments to the *Patent Act* under Bill C-86 came into force which included the implementation of "prosecution history estoppel," or "file wrapper estoppel," in the context of patent litigation. Under this amendment, a patentee's representations regarding the interpretation of patent claims during prosecution are admissible to rebut assertions or representations about the construction of the patent claims made by the patentee during litigation. Another noteworthy change that affects the scope of protection available to Canadian patents is with the introduction of a new provision that codifies an "experimental use" exception to shield certain experimental uses of patented inventions from patent infringement liability. The provision also enables the establishment of regulations in respect of factors that should be considered in assessing whether a particular use can benefit from this exception. The scope of this exception remains to be seen, as no regulations have been introduced and the provision itself has not been considered judicially.

Pursuant to the CETA, the *Patent Act* has been amended to provide for the issuance of Certificates of Supplementary Protection, which effectively extend the term of an eligible patent by up to two years to assist in compensating patentees for the effective loss of patent term as a result of pursuing regulatory approval for drugs in Canada. The CETA also introduced other changes to the *Patented Medicines (Notice of Compliance) Regulations*, which brought in significant changes to the pharmaceutical industry in Canada, including replacement of current Notice of Compliance summary proceedings with full actions that will result in final determinations of patent infringement and validity. The CETA implementations came into effect on September 21, 2017.

As part of the Canadian government's efforts towards ratification of the

PLT, amendments to the *Patent Rules* come into force on October 30, 2019, which will significantly affect Canadian patent practice. Some of the changes expected include the restoration of priority claims, allowing an applicant a two-month grace period to claim priority if the applicant unintentionally failed to meet the 12-month priority deadline. This change aligns Canadian practice with existing restoration of priority mechanisms available under the PCT. Filing requirements will be relaxed under the amended *Patent Rules*, allowing an applicant to obtain a filing date even if the filing fee is not paid on the date of filing. However, under the new regime, applicants will no longer be entitled to an extended 42-month national phase entry (i.e. standard 30-month deadline plus a 12-month extension with payment of a late fee) as of right. While a late national phase entry is still available, the applicant will have the onus to show that the failure to meet the set deadline was unintentional. Prosecution deadlines will be shortened under the new *Patent Rules* as well. For example, the deadline to request examination of a patent application will be reduced from five years to four years from the filing date, and the standard deadline to respond to an Examiner's Report will be shortened from six months to four months from the date of the Report.

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

Copyright

Canada has acceded to the *World Intellectual Property Organization Copyright Treaty* (WCT) and the *World Intellectual Property Organization 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.

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*, *Trademarks Act* and *Customs Act* that create significant anti-counterfeiting remedies tying to infringements of copyright or trademarks. These amendments permit copyright holders and owners of registered trademarks 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. The Canadian Parliament also passed amendments to the collective licensing regime under the *Copyright Act* to encourage more timely decisions in the tariff setting.

Trademarks

The *Trademarks 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 trademark 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 trademark 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 trademark 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 trademark 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 10 years and is renewable for successive 10-year terms on payment of a renewal fee.

On June 17, 2019, various amendments to the *Trademarks Act* came into force to align Canada's trademark regime with international standards set out in the *Singapore Treaty*, the *Madrid Protocol* and the *Nice Agreement*. These amendments expand trademark protection to include a broader array of novel "signs," namely letters, colours, holograms, sounds, scents, tastes and textures. The amendments effectively remove the requirement for an applicant to have made "use" of a trademark in Canada or elsewhere before obtaining a registration. While the amendments have removed the requirement of "use" as a prerequisite for trademark registration, the *Trademarks Act* now includes provisions enabling cancellation of applications or expungement of registrations that were made in bad faith (e.g. by trademark squatters).

With respect to prosecution of trademark applications, divisional applications are now available under the amended *Trademarks Act*. For instance, where certain goods or services have been objected to by an Examiner or have been opposed by a third party. the objected to or opposed goods and services can be "carved" out and allocated to a divisional application. In this manner, the remaining goods and services of the original trademark application, which are not subject to objection or opposition, can proceed separately to registration. When a trademark that is the subject of an application that has been previously divided proceeds to registration, it may be merged with other registrations of the trademark that stem from the same original application, provided that the trademarks in question are the same and are registered to the same owner. The amendments also implemented the Nice Classification system in respect of the description of goods and services in Canadian applications. Under the new regime, trademark application filing fees charged by CIPO are now calculated on a per-class basis at $330 for the first class and $100 for each additional class. Renewal fees charged by CIPO are also calculated on a per-class basis, set at $400 for the first class and $125 for each additional class.

Pursuant to Canada's ratification of the CETA, the *Trademarks Act* now provides significant "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 trademark law with some interesting challenges. The conflict between the registered trademark 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 trademark. At the same time, a domain name in some respects is more powerful than a trademark, 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 trademark 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 trademark.

In Canada, some trademark owners have successfully used the doctrine of "passing off" in combating so-called "cybersquatters." In other cases, they have argued trademark infringement under the *Trademarks Act*. To gain control of a domain name, it might also be possible to argue "depreciation of goodwill" under s.22 of the *Trademarks 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.

Industrial Designs

The *Industrial Design Act* protects the features of shape, configuration, pattern or ornament or any combination of the foregoing in a finished article that appeal to and are judged solely by the eye. Any of the foregoing aspects can be protected as long as it is original or novel. In Canada, an applicant has 12 months to file an industrial design application covering a given ornamental or visual feature from the date of its public disclosure. The term of exclusivity lasts for a period of 10 years from the date of registration in Canada or 15 years from the date of application, whichever is later, provided that maintenance fees are paid at the prescribed times.

On November 5, 2018, amendments to Canada's industrial design legislation came into force, which enabled Canada to accede to the Hague Agreement Concerning the International Registration of Industrial Designs (the Hague System) and modernize Canada's industrial design regime. The Hague System enables applicants to designate multiple countries, including Canada, for which industrial design protection is desired through a single international application. The modernization amendments provide more flexibility for applicants of industrial design registrations including the option to file divisional applications for any design that was originally disclosed, and relaxed rules in respect of the formalities associated with an application.

Other Intellectual Property

Patents, copyrights, trademarks 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 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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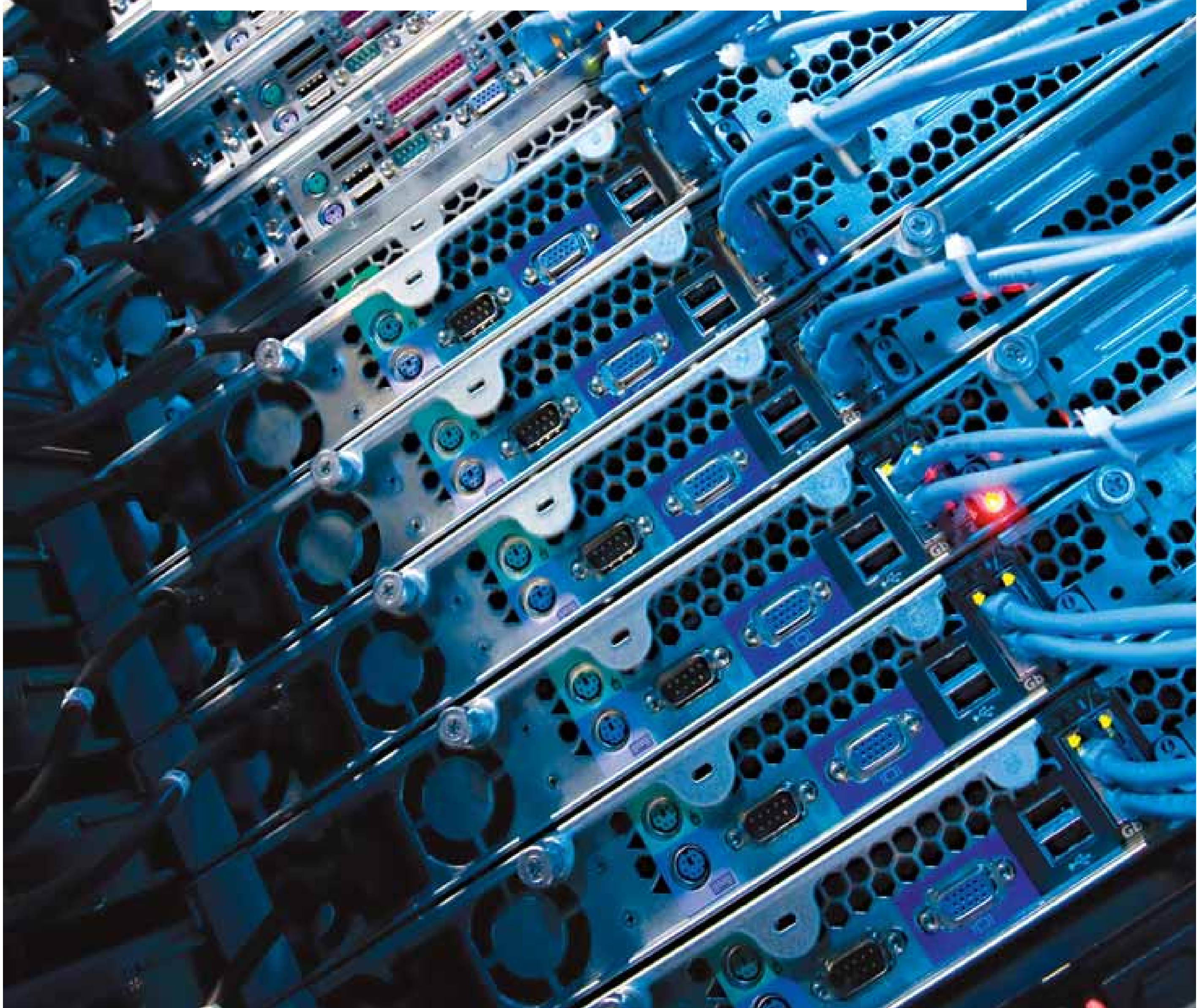
INFORMATION TECHNOLOGY

By Charles Morgan and Emily Hutchison



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

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 which invalidates any requirement in a consumer contract compelling disputes to be submitted to arbitration. This is designed to counteract the practice of some merchants to provide arbitration as the contractually stipulated dispute resolution mechanism in order 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, amendments to the CPA in 2018 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.

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"). In 2019, a matter contesting the constitutionality of CASL was brought before the Federal Court of Appeal. As of writing, no judgement has yet been delivered and the law remains in force.

Since coming into effect, the Canadian Radio-television and Telecommunications Commission (CRTC), which is responsible for enforcing the law, has received numerous complaints from Canadians; although it has rendered very few enforcement decisions thus far. In April 2019, the CRTC imposed an administrative monetary penalty (AMP) of $100,000 on a director of a corporation in relation to commercial electronic messages sent to recipients in Canada. In coming to this decision, the CRTC assessed the director's ability to pay, his experience with email distribution platforms, and the importance of this method of marketing to his business. The CRTC emphasized that the purpose of a penalty is to promote compliance with CASL, and imposed the $100,000 fine to ensure this specific director's future compliance with CASL in any of his future endeavours.

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.

Organizations must be transparent about their personal information handling practices. This includes advising customers that their personal information may be sent to another jurisdiction for processing, and that while the information is in another jurisdiction, it may be accessed by the courts, law enforcement, and national security authorities.

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

By Charles Morgan and Emily Hutchison

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 trademarked 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 "trademark" exception for public signs, pursuant to amendments to the *Regulation respecting the language of commerce and business of the Charter of the French language* (which came into force on November 24, 2016), any person having as part of its public signage a trademark that is in a language other than French 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 is intended to address concerns expressed by certain francophone consumers in Québec to the effect that English-language trademarks were dominating the urban commercial landscape in some cities. To ensure a sufficient presence of French on a public sign, the terms and messages must: (i) give French permanent visibility, similar to that of the trademark displayed; (ii) be legible and in the same visual field as that mainly covered by the trademark; and (iii) be well-lit at all times, if this is also the case for the trademark. Under the new rules, for example, the following information does not count as "ensuring the sufficient presence of French": opening hours, phone numbers, addresses or email addresses; numbers, prices, or percentages; definite or indefinite articles; and a French addition that is easily removable. Non-compliance with the Charter and its regulations remain up to $6,000 for individuals and up to $20,000 for businesses for initial offences, with fines doubling for subsequent offences.

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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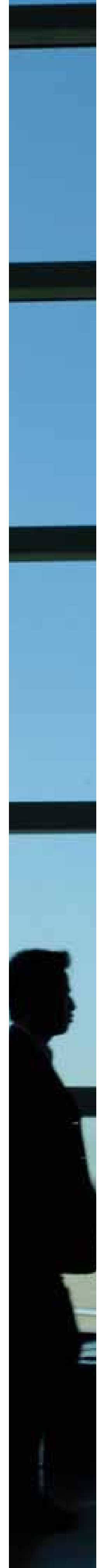
BUSINESS IMMIGRATION

By Stéphane Duval



BUSINESS IMMIGRATION

Business immigration and global mobility have become important factors in the Canadian economy. More companies are using temporary foreign workers to address labour or skill shortages. In recent years, the number of temporary foreign workers in Canada has continued to grow. According to statistics published by Immigration, Refugees and Citizenship Canada (IRCC), this number has increased from about 100,000 in 1988 to over 365,000 in recent years, and is still growing.

In its current state, Canadian immigration law (made up of both federal and provincial laws, associated regulations and ministerial instructions) governs the ability of individuals who are neither Canadian citizens nor permanent residents of Canada to lawfully be admitted temporarily or permanently in Canada, either to visit, study, work or settle permanently. The immigration regime also sets out the obligations of Canadian employers to both the foreign nationals working in Canada and to the associated regulatory schemes that monitor the relationship between employers and foreign nationals.

The immigration legislation was recently amended and imposes a rigorous compliance regime, which is designed to ensure that Canadian employers consistently respect the wage and working conditions of foreign nationals, and imposes serious penalties (including a period of ineligibility for hiring foreign nationals and penal charges) for non-compliance.

Working in Canada

As a general principle, any foreign national who is neither a Canadian citizen nor a permanent resident of Canada cannot work in Canada unless authorized to do so. For Canadian immigration purposes, work is defined as an *activity giving rise to the payment of a salary or commission, or that competes directly with activities of Canadian citizens or permanent residents in the Canadian labour market*.[1]

If the foreign national is considered to be seeking to work in Canada, the immigration officer will then determine whether: (i) a work permit is required; or (ii) the work in question falls into one of the categories of work for which a work permit is not required (work permit exempt).

1. Immigration of Refugee Protection Regulation (SOR /2002-227), section 2.

Work That is Work Permit Exempt

Generally, foreign nationals entering Canada on business visits do not require work permits. Under Canadian immigration legislation, "business visitor" is defined as *foreign nationals who intend to enter Canada to engage in business or trade activities*.

In order for foreign nationals to be admitted into Canada as business visitor and benefit from any applicable work permit exemptions, they must meet the following criteria:

- There must be no intent to enter the Canadian labour market, that is, no gainful employment in Canada;
- The activity of the foreign worker must be international in scope, that is there must be a presumption of an underlying cross-border business activity. This presumption will be implied if:
    - the primary source of the worker's remuneration remains outside Canada;
    - the principal place of the worker's employer is located outside Canada; and
    - the accrual of profits of the worker's employer is located outside Canada.[2]

In addition, Canadian immigration authorities[3] have outlined specific situations in which work completed in Canada will be work permit exempt, including after sales/lease services, acting under a warranty or service agreement, installation supervisors, intra-company training and installation activities, board of directors' meetings, short-term work visits for highly skilled workers, researchers and foreign students studying in Canada.

Work That Requires a Work Permit

As a general rule, work that is not work permit exempt requires a work permit under one of two programs in Canada, namely the *Temporary Foreign Worker Program (TFWP) and the International Mobility Program* (IMP).

2. Immigration of Refugee Protection Regulation (SOR /2002-227), section 187.
3. Immigration, Refugees and Citizenship Canada, Immigration Guidelines.

TFWP

Regular Program

The TFWP allows Canadian employers to hire foreign workers to fill temporary labour and skill shortages when qualified Canadian citizens or permanent residents are unavailable. This program is managed jointly by Employment and Social Development Canada (ESDC) and IRCC. Under this program, employers must demonstrate that they have been unable to recruit Canadian citizens or permanent residents for the job, due to a labour or skill shortage.

Under the TFWP, employers must first obtain a positive Labour Market Impact Assessment (LMIA) in order for the foreign national to then be able to apply for a work permit. An LMIA is a document issued by ESDC following a thorough assessment of Canada’s labour market in order to determine whether or not Canadian citizens or permanent residents are available to undertake the type of work in question.

If all the conditions are met, a positive LMIA would be issued and the foreign national will then be able to apply for a work permit either at the port of entry upon arrival, if he/she is a citizen of a visa-exempt country (or permanent resident of the United States), or at the Canadian visa office in their country of citizenship or legal residence.

Global Talent Stream

The *Global Talent Stream* (GTS) aims to help Canadian employers attract new talent with a faster and more efficient process for highly skilled workers. To benefit from the GTS, the employer must work with ESDC to develop a Labour Market Benefits Plan that demonstrates its commitment to activities that will have lasting, positive impacts on the Canadian labour market (e.g. job creation, skills and training investments, growth of revenue, etc.). The GTS has no minimal recruitment requirement, but the employer will be asked to describe any efforts to recruit Canadians and permanent residents. The GTS is divided in two categories:

- **Category A:** Meant for employers who will be referred by a designated referral partner and who seek to hire unique and specialized talent in an area of specialization of interest for the employer;
- **Category B:** Meant for employers who seek to hire highly skilled workers with specific work experience in positions above a varying

median wage in one of the 13 listed occupations, most of which are in the IT industry.

Simplified Process for Certain Occupations in Québec

Certain occupations in the Province of Québec are subject to a facilitated LMIA process that exempts employers from demonstrating recruitment efforts for specific occupations. The lists of occupations are established by region and are updated yearly. This simplified process allows employers to receive LMIAs on a somewhat more accelerated basis, provided that the potential employees meet a range of requirements associated with the occupations in question.

IMP

The IMP allows employers to hire a foreign worker without an LMIA. It is divided in various categories. Some of them are based on the Legislation, on International agreements (e.g. NAFTA, CETA, GATS, etc.), on Canadian interests, humanitarian and compassionate considerations, etc.

Some of the categories of work permit under the IMP include intra-company transferees, professionals, spouses of skilled work permit holders, emergency repairs or repair personnel for out-of-warranty equipment, francophone mobility, bridging an open work permit, Québec selection certificate holders residing in Québec, post-doctoral Ph.D. fellows and award recipients, post-graduation work permit, reciprocal employment and International Experience Canada.

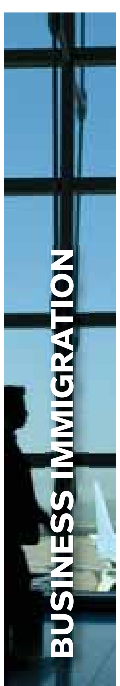
Applying For A Work Permit

The work permit can be applied for once an LMIA is issued (if applicable), or when the foreign worker is exempted from the obligation of obtaining an LMIA. The foreign worker can apply for their work permit upon entry into Canada or at a visa office abroad, depending on their country of citizenship or if they are permanent residents of the United States.

Foreign Nationals Who Do Not Require Visas

A foreign national can apply for their work permit at the port of entry (Canadian land border or airport) if they are a citizen of a visa-exempt country (or are permanent residents of the United States).

All visa-exempt applicants (except certain people, including U.S. citizens) will still require an Electronic Travel Authorization (eTA) in order to travel to Canada by air.



Foreign Nationals Who Require Visas

Foreign nationals who require a visa to enter Canada must apply for their work permit at a visa office abroad. This can be done electronically or on paper. While there is a general list of documents to be provided in support of an application for a work permit, each local visa office has its own specific requirements and it is important to review them before submitting the application. A personal interview may also be required. The application must be submitted at the visa office responsible for the foreign national's country of citizenship or that person's country of current legal residence.

In addition, certain foreign nationals will require a medical examination prior to their admission into Canada if they are seeking to enter for six months or more and have resided in a designated country for more than six months during the past year.

International Mobility Workers Unit

Employers seeking to hire visa-exempt foreign nationals under one of the IMP categories, might have their application pre-approved by the International Mobility Workers Unit, an in-country service available to visa-exempt nationals not currently in Canada. A positive opinion can facilitate the issuance of the work permit.

Employer Obligations Toward Foreign Nationals

Canadian employers of foreign nationals are expected to meet rigorous compliance requirements regarding the foreign workers in their employ. It is essential that Canadian employers:

- **Ensure ongoing compliance with the foreign national's original terms of employment:** When hiring a foreign worker, Canadian employers set out the terms of employment both to the foreign worker and to the government of Canada. These must be respected in the same way as they would for a Canadian employee. However, in cases of foreign workers, any changes to the terms of employment — including minor changes such as an increase in salary or a change in the number of hours worked — may need to be reported to Canadian authorities prior to this change taking place (depending upon the work permit category). Audits of employers that currently have or have had (audits can be retroactive six years) foreign workers in their employ are routine occurrences.

- **Hire a foreign worker with the requisite authorization:** The law prohibits any employer from hiring a foreign national who does not possess the requisite work authorization. It also places the onus on the employer to verify the status of every foreign national that it employs. In other words, should the employer fail to exercise "due diligence" in determining whether employment is authorized, the employer will be deemed to have known that it is not authorized.
- **Avoid any form of misrepresentation:** Canadian law prohibits any person, including an employer, from communicating either directly or indirectly, information that is false or misleading, or making any erroneous representation that could lead to Canadian immigration law or regulations being administered incorrectly. Therefore, it is important that any statement, form, or document produced by an employer be accurate and true, including but not limited to the offer of employment, any forms, or communications exchanged with officers.

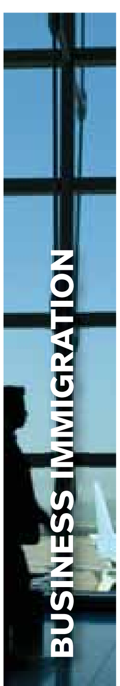
The consequences of non-compliance in any form on the part of the Canadian employer could be significant. Employers found non-compliant are subject to:

- warnings;
- administrative monetary penalties ranging from C$500 to C$100,000 per violation, up to a maximum of C$1 million over one year, per employer;
- a ban of one, two, five or 10 years, or permanent bans for the most serious violations from all forms of foreign worker programs;
- the publication of the employer's name and address on a public website with details of the violation(s) and/or consequence(s); and/or
- the revocation of previously issued LMIAs.

Furthermore, depending on the nature of the breach, companies, directors, and officers can also be sentenced to a fine of up to C$50,000 or C$100,000 and imprisonment for a term of two or five years.

Permanent Residents

Many programs currently exist in order for foreign workers to settle permanently in Canada. Some of these are point-based systems that factor in personal, professional, and other qualities in addition to any time spent in Canada as a foreign worker. Other programs are based on family reunification. Additional options also exist on the provincial level tailored to the needs of each province.



Permanent residents can, like any Canadian citizen, work and live in Canada, subject to certain obligations imposed upon them, including a residency obligation. Under the current legislation, the residency obligation requires any permanent resident to be physically present in Canada for at least 730 days in any five-year period, failing which they may lose their permanent resident status. Certain exceptions to this obligation exist.

Inadmissibility

Foreign nationals can be considered criminally inadmissible to Canada for having committed or having been convicted of an offence inside or outside of Canada that constitutes an offence under Canadian law. Individuals who are inadmissible to Canada may be denied entry to the country regardless of their purpose for entering Canada. In certain cases, this inadmissibility can be overcome via an application for a temporary resident permit, granted on a temporary basis in the case of an established and urgent need to travel to Canada.

In some circumstances, individuals who are inadmissible to Canada may be eligible for rehabilitation, which overcomes criminal inadmissibility permanently for the specific offense that triggered inadmissibility.

Finally, other inadmissibility grounds include medical conditions and misrepresentations.

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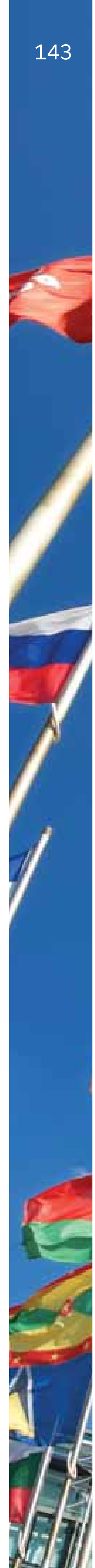
INTERNATIONAL TRADE AND INVESTMENT

By John Boscariol 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), the *Comprehensive Economic and Trade Agreement* (CETA) with the EU, the *Comprehensive and Progressive Trans-Pacific Partnership* (CPTPP) and numerous other regional trade and investment protection agreements. Recently, Canada has concluded negotiations and signed the *Canada United States Mexico Agreement* (CUSMA), the modernization of NAFTA. The implementing legislation for CUSMA had passed through two readings in the House of Commons, but died on the order paper prior to the rising of the House in June 2019. It is expected that Canada will implement CUSMA in the winter of 2019. However, while Mexico has already fully ratified the CUSMA, it is unknown whether there will be sufficient support in the United States Congress for it to be implemented in the United States. Pending ratification by all three Parties to CUSMA, NAFTA will remain in force.

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/Canada United States Mexico 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 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 CUSMA largely replicates many of the obligations the parties had agreed to in the *Trans-Pacific Partnership* before the United States left the agreement. However, there are a number of major changes to NAFTA, including a major increase in the percentage value of any automobile made in North America to qualify as a CUSMA originating automobile. The CUSMA will also eliminate the Investor-State Dispute Settlement mechanisms between Canada and the other two parties (though Mexico will still have access to a similar mechanism under the CPTPP). This severely curtails the rights of U.S. investors in Canada, and Canadian investors in the United States.

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

On September 21, 2017, Canada and the European Union provisionally implemented the EU-Canada CETA. The agreement is now fully enforce except for a few specific provisions — most notably enforcement provisions of the investor-state dispute settlement protections, obligations to impose criminal sanctions on copyright violations, and certain market access protections for portfolio financial services.

As one of Canada's broadest and most significant trade agreements 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 entered into force, 98% of all EU tariff lines became duty-free for Canada. Canadian exporters 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 includes 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.

While not yet in force, CETA includes a novel mechanism for ISDS arbitration. 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 is not yet in force. However, the recent opinion of the European Court of Justice, that the CETA ISDS arbitration mechanism is not incompatible with EU law, is a major step towards full and final implementation.

The *Comprehensive and Progressive Trans-Pacific Partnership Agreement*

The CPTPP is a trade agreement among 11 Pacific Rim countries, representing a major portion of the global economy; especially when one considers that Canadian suppliers now have preferential access to the Pacific Rim, the EU, and the United States. The agreement provides 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, and Vietnam. It came into force in December 2018 and has been implemented by Mexico, Japan, Singapore, New Zealand, Canada, Australia, and Vietnam.

The CPTPP is a broad and comprehensive agreement in the mould of CETA. The CPTPP reduces trade barriers across a range of goods and services, which will, in turn, create new opportunities for businesses and consumers. The CPTPP 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, Morocco, the Caribbean Community (CARICOM), the Dominican Republic, the Andean Community (MERCOSUR), among others.

Bilateral Investment Treaties

Bilateral investment treaties (BITs) between Canada and 38 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.

Canadian Free Trade Agreement

The federal government of Canada has negotiated the *Canadian Free Trade Agreement* (CFTA) with each of the governments of Canada's provinces and territories, an agreement which replaces the former inter-provincial trade agreement, the *Agreement on Internal Trade*. The CFTA 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 CFTA also provides for government-to-government and person-to-government dispute resolution.

The CFTA came into force in 2017, replacing the AIT, which had come into force in 1995 and had been updated since that time through 14 protocols of amendment.

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, Iran, Iraq, Lebanon, Libya, Mali, Nicaragua, North Korea, Russia, Somalia, South Sudan, Sudan, Syria, Ukraine, Venezuela, Yemen, and Zimbabwe. Canada

also maintains very significant prohibitions on dealings with listed "designated persons," terrorist organizations and individuals associated with such groups. Furthermore, Canada recently implemented the *Justice for Victims of Foreign Corrupt Officials Act (Sergei Magnitsky Law)*, which designates foreign officials implicated in human rights abuses and prohibits all dealings in the property of such persons.

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

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.

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.

Canada has also implemented certain controls on "brokering" of arms and arms related technologies. These restrictions control the ability of Canadians and persons in Canada to arrange or negotiate the transfer of defence items and technology between foreign countries.

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. The only country on the ACL is North Korea at the present time.

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.

Defence Production Act — 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 numerous 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. Canada has also seen three recent successful prosecutions of individuals for CFPOA violations. Most notably, in *R. v. Karigar*, the defendant was sentenced to 36 months in prison for his involvement in an agreement to bribe a foreign official, even though no bribe was actually paid.

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

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 providing 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.

In 2018, Canada adopted a similar process, which it calls “Remediation Agreements.” As of June 2019, there have been no Remediation Agreements entered into.

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 trademark or pirated copyright goods may be detained upon importation into Canada. In accordance with the *Copyright Act* and the *Trademarks Act*, the owner of a valid Canadian copyright or a

Canadian trademark 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 trademark 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, CETA (Chapter 19), CPTPP (Chapter 15)*, and the CFTA (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 CFTA OBLIGATIONS, CANADA'S BID CHALLENGE AUTHORITY FOR FEDERAL PROCUREMENT IS THE CANADIAN INTERNATIONAL TRADE TRIBUNAL.

Pursuant to its 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 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

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;
- accessibility standards;
- federal and provincial privacy rules; and
- employment benefits, including pension, employment insurance and workers' compensation.

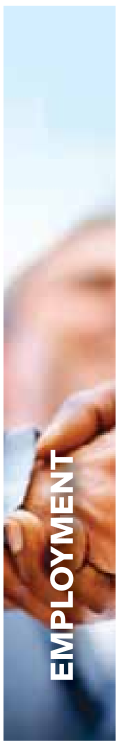
The employment relationship in Canada is governed by a broad array of legislation and common law principles. Employers need to be aware of the various legal considerations to avoid attracting liability in the workplace.

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

UNLIKE EMPLOYERS IN THE UNITED STATES, CANADIAN EMPLOYERS MAY NOT TERMINATE EMPLOYEES "AT WILL."

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.

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.

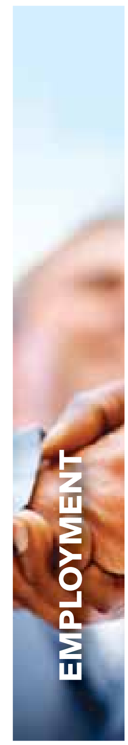
Certain classes of employees, including construction workers, employees on a temporary lay-off and employees terminated during or as a result of a strike or lockout may, on certain conditions, be exempted from the termination notice provisions of the legislation depending on the jurisdiction.

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.

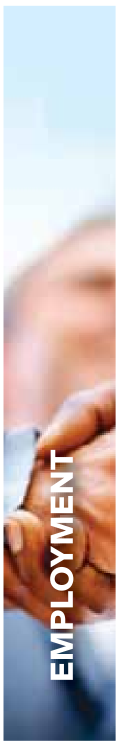
In addition to minimum statutory termination and severance pay entitlements, a terminated non-union employee may be entitled by common law (or civil law in Québec) to additional notice of termination or pay in lieu of notice. This right may be enforced before the courts. The amount of notice will depend 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

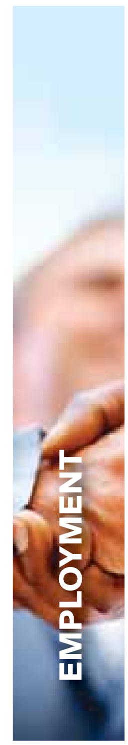
The *Canadian Charter of Rights and Freedoms* (Charter) is a constitutional charter that governs the content of legislation and other government actions. It contains anti-discrimination provisions that may be enforced by the courts. In addition, all Canadian jurisdictions have enacted human rights codes 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.

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

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.

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.

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.



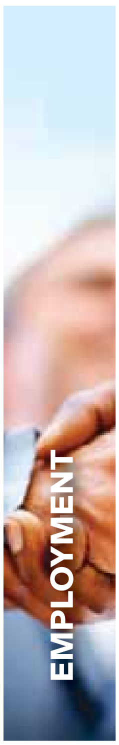
Occupational Health & Safety

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

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.

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.

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.



Workplace Violence and Harassment

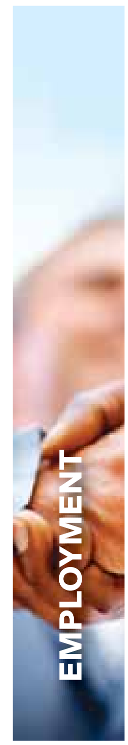
As part of maintaining a safe workplace, most Canadian jurisdictions have legislation providing for employer obligations in respect of the prevention of workplace violence and harassment, including violence or harassment by customers or the public. In several jurisdictions, these obligations extend to the duty to prevent and to address incidents of sexual harassment. In the province of Québec, psychological harassment in the workplace is addressed in employment standards legislation. The requirements of workplace violence and harassment legislation vary by jurisdiction, but employers need to ensure that they are aware of their obligations and remain in full compliance. Some key features of the legislation require employers to:

- assess risk in the workplace, based on a number of prescribed factors;
- develop policies and procedures relating to workplace violence and harassment;
- provide employee training; and
- develop procedures for investigating incidents of workplace violence or harassment.

Accessibility Standards

In Ontario, the *Accessibility for Ontarians with Disabilities Act, 2005* (AODA) places specific disability accommodation requirements on various categories of organizations in Ontario. The goal of the AODA is to provide accessibility for all those with disabilities. The obligations on employers and businesses have been rolled out slowly since 2012. In 2016 and 2017, the last significant block of employment obligations becomes effective on all employers. The AODA imposes a number of employment related obligations on employers. Among the obligations imposed by the AODA are that employers must:

- Develop, adopt and maintain an accessible employment policy statement;
- Provide disability awareness training (for employers with more than five employees) to be completed between three and five years from the time the standard comes into force;
- Develop, adopt and maintain procedures for accommodating employees in the recruitment, assessment, selection and hiring stages;
- Provide internal and external notification of disability accommodation and consult with job applicants requesting accommodation about possible accommodation;
- Develop and maintain individualized accommodation and return to work plans for employees;
- Maintain materials regarding policies and procedures that support employees with disabilities and information on how to request accommodation; and
- Provide AODA mandated policies and/or materials to inspectors as requested.

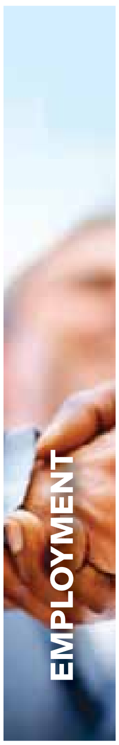


In addition to the obligations relating to employment, the AODA also imposes accessibility obligations on companies with respect to customer service, physical premises and information and communications.

The AODA was the first of its kind in Canada. Manitoba and Nova Scotia have since passed similar legislation. On June 21, 2019, the Canadian federal government passed similar legislation, the *Accessible Canada Act*, which applies to federally regulated entities, including private sector employers.

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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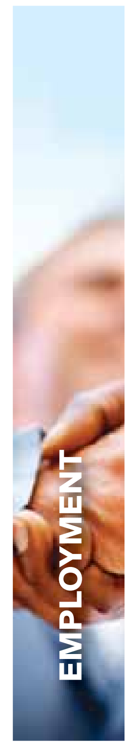


PRIVACY LAWS

By Charles Morgan and Emily Hutchison

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 IN CANADA ARE SUBJECT TO LEGISLATION THAT REGULATES THE COLLECTION, USE AND DISCLOSURE OF PERSONAL INFORMATION IN THE COURSE OF COMMERCIAL 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.

Furthermore, as of January 1, 2019, the Office of the Privacy Commissioner's (OPC) Guidelines for Obtaining Meaningful Consent (Guidelines) apply. A failure to obtain meaningful consent may lead a business to lose the ability to handle personal information needed to operate the business. In order to obtain meaningful consent, businesses are encouraged to ensure that their privacy policy is written in plain language, to use just-in-time privacy notices on their website as a supplement to the longer form privacy policy, to prepare an executive summary of their privacy policy's key highlights to place at the top of the privacy policy and to use interactive tools in the presentation of their privacy information.

For many years, Alberta's *Personal Information Protection Act* (PIPA) was the only general private sector privacy law in Canada that imposed 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.

As of November 1, 2018, due to amendments made to PIPEDA by virtue of the *Digital Privacy Act* (Act), organizations across Canada must comply with new mandatory breach notification rules. Organizations subject to PIPEDA have reporting, notice, and record retention obligations for any breach of security safeguards. A breach of security safeguards is broadly defined as: "the loss of, unauthorized access to, or unauthorized disclosure of personal information resulting from a breach of an organization's security safeguards." Reporting and notification obligations are triggered

when there is a real risk of significant harm to an individual (RROSH). RROSH is also broadly defined and includes "bodily harm, humiliation, damage to reputation or relationships, loss of employment, business or professional opportunities, financial loss, identity theft, negative effects on the credit record, and damage to or loss of property." The factors that are relevant to determine whether a breach creates a RROSH include the sensitivity of the personal information involved in the breach of security safeguards, as well as the probability that the personal information has been, is, and/or will be misused.

The report of the breach to the OPC must be made "as soon as feasible after the organization determines that the breach has occurred." The same criteria apply for notifying individuals of breaches involving their personal information, unless the law provides otherwise. The notification needs to be conspicuous and contain sufficient information to help affected individuals mitigate the risk of harm. Information as to what information should be included in written reports to the OPC and individual notifications can be found in the *Breach of Security Safeguards Regulations*. Furthermore, whether or not there is a RROSH, an organization must keep a security-breach log for 24 months following a breach of security safeguards. During this period, organizations must comply with requests from the OPC to have access to the record at any time. Further, an organization encountering a breach will have additional reporting obligations to other organizations and government institutions if the breached organization believes the other organizations may be able to reduce their risk of harm as a result.

Organizations subject to PIPEDA face liability for knowingly violating the notification requirements. An organization may be liable for fines up to $100,000 per violation. In addition, the Act provides the federal privacy commissioner with the right to make public any information that comes to his or her attention in the performance or exercise of any of his or her duties, as well as information in security-breach notification reports to the OPC, if he or she judges there to be a public interest for doing so. Overall, these provisions introduce more stringent privacy, consent, and breach notification obligations.

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 be:

- 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

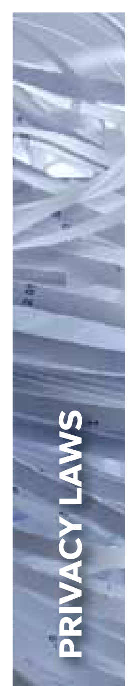
IMMEDIATE PRIORITIES FOR MOST ORGANIZATIONS THAT ESTABLISH A BUSINESS IN CANADA SHOULD INCLUDE THE APPOINTMENT OF AN INDIVIDUAL WHO WILL BE RESPONSIBLE FOR THE ADMINISTRATION AND OVERSIGHT OF THE ORGANIZATION'S PERSONAL INFORMATION MANAGEMENT PRACTICES.

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;
- 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);
- 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; and
- the adoption of a cybersecurity incident response plan that clearly specifies internal contacts and external advisors so that there is no mistake about who is to be contacted for immediate support in the case of an incident. An organization must be able to quickly identify a cybersecurity incident, immediately carry out its plan of action, isolate the affected systems, determine the damage and remediate.

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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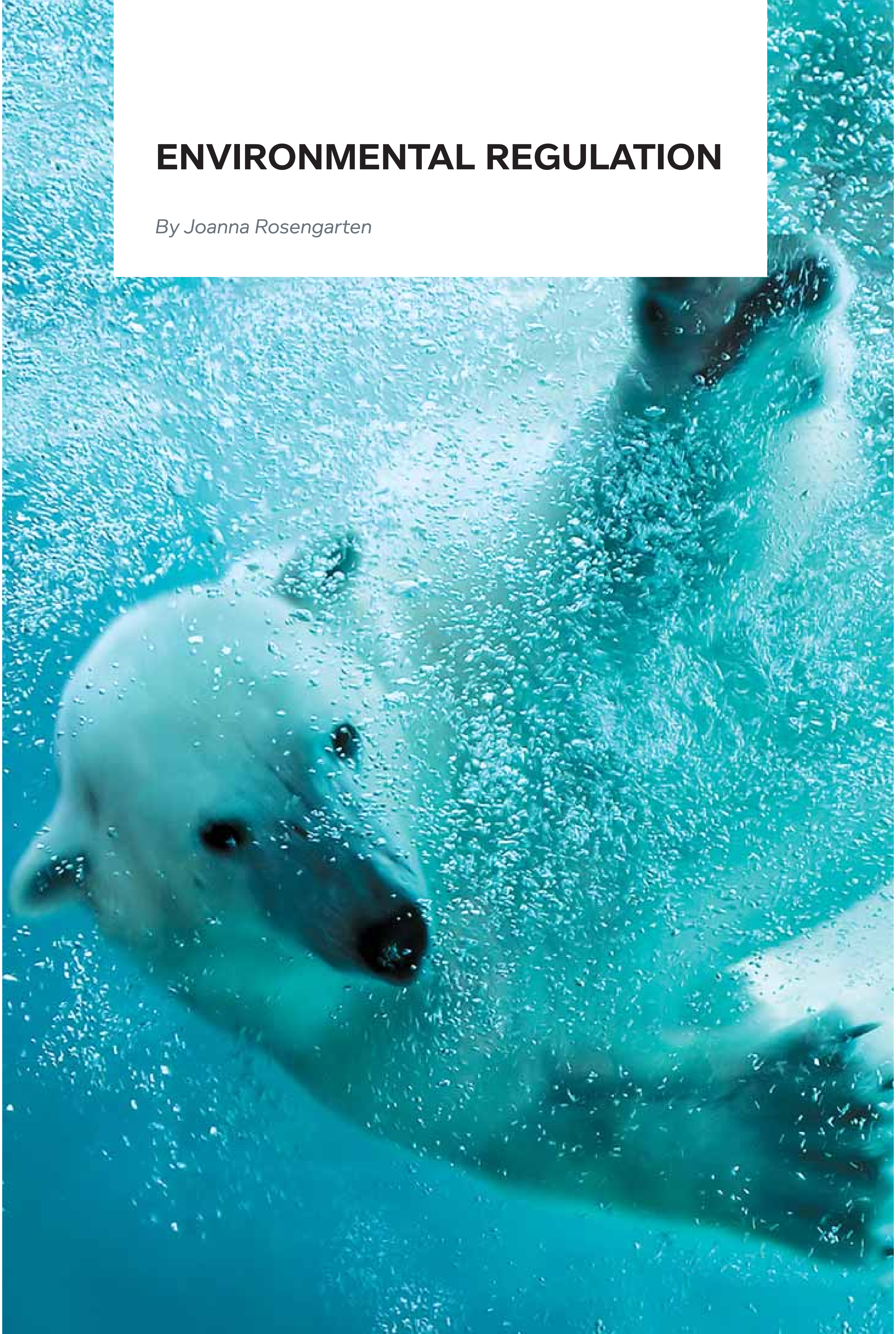
ENVIRONMENTAL REGULATION

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.

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.

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 have developed and started to implement legislation aimed at reducing greenhouse gas emissions. For example, British Columbia has a carbon tax in effect, while Québec has a cap-and-trade system with a declining absolute cap on greenhouse gas emissions. The federal government has begun implementing a federal carbon pricing system in provinces and territories that do not have their own qualified systems in place. The federal system consists of an output-based pricing system that applies to various industries, and a fuel tax that applies to fossil fuels consumed with the province or territory. 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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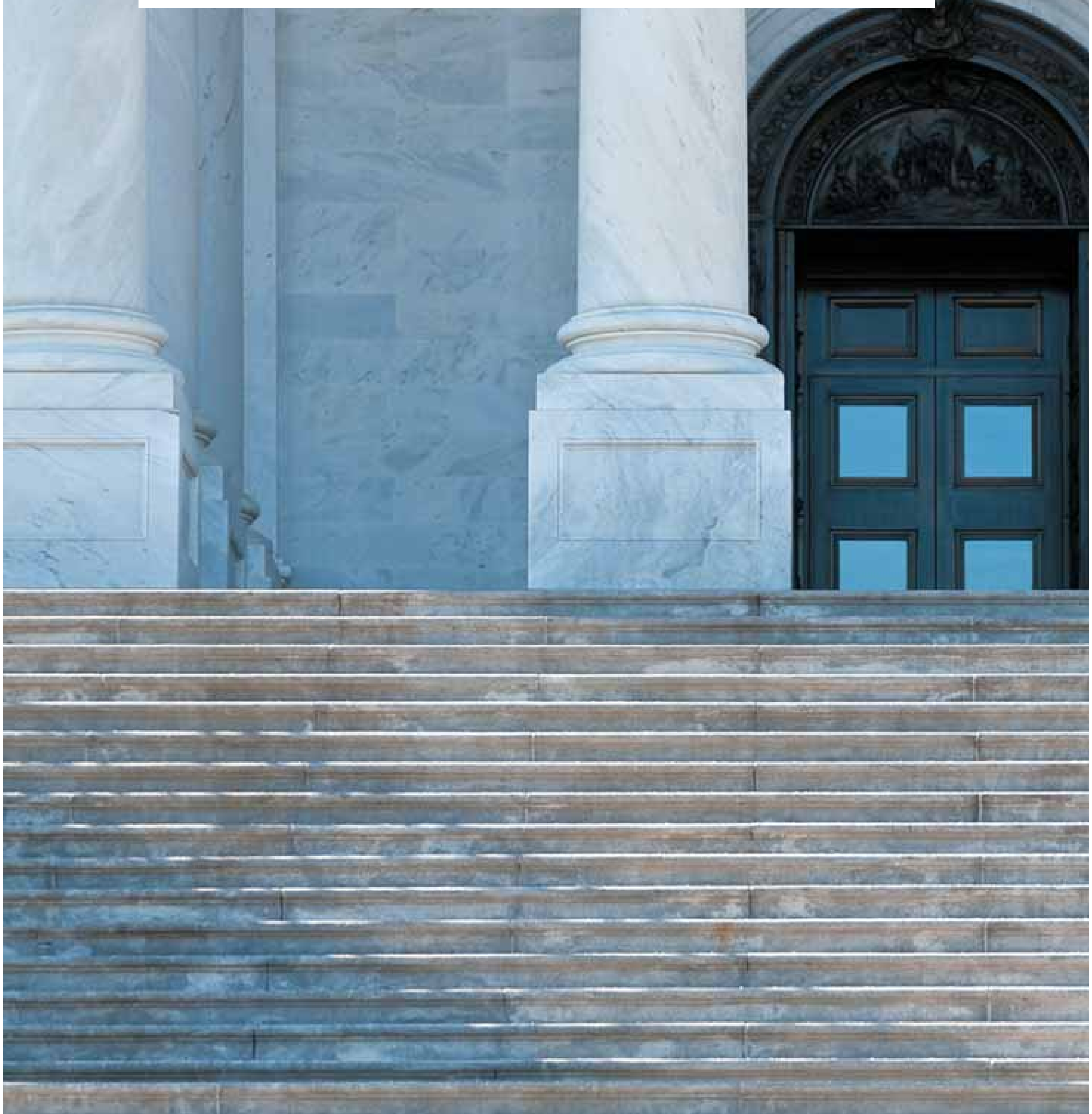
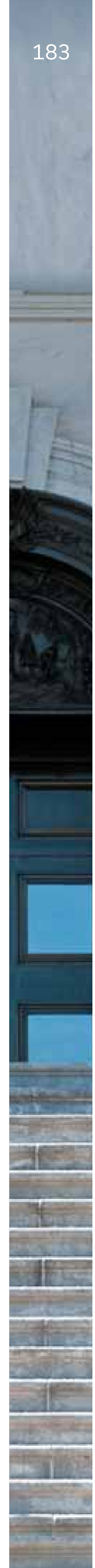
DISPUTE RESOLUTION

By Kosta Kalogiros





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 ceilings for the small claims division vary from province to province (e.g., British Columbia is set at C$35,000, Alberta is set at C$50,000, and Ontario is set at 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 or less).

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. anti-trust) 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.

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

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 consider their obligations to take reasonable and 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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BANKRUPTCY AND RESTRUCTURING

By James Gage

BANKRUPTCY AND RESTRUCTURING

Introduction

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) sell as a going concern or liquidate the corporation's assets for the benefit of its creditors, or (ii) restructure the affairs of the corporation.

WHEN A CORPORATION BECOMES INSOLVENT, TWO OPTIONS ARE GENERALLY AVAILABLE: (I) SELL AS A GOING CONCERN OR 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 licensed insolvency trustee. 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 and trust or loan 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.

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. 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.

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 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 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).

The 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 is responsible for the administration of claims made against the bankrupt estate in accordance with the relevant provisions of the BIA. If appropriate, the 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. With the approval of the inspectors, the trustee 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 to do so on other grounds.

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 insolvency trustee, 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 insolvency 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

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.

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 to conduct the sale of particular assets of the company or the sale of its entire business. 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.

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 and Adam Goldenberg

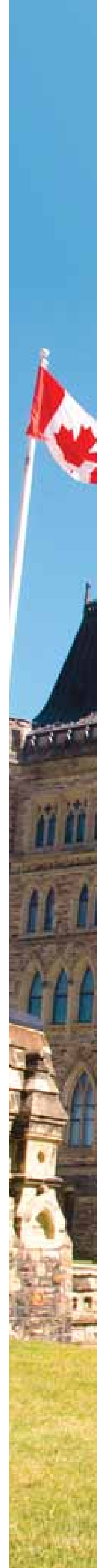
GOVERNMENT RELATIONS

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, in which the political party with the most members elected to Parliament or to the provincial legislative assembly typically forms the government. See Canada.

Usually, 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 tends to reduce 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, in which 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 at the federal level in Canada. A number of provinces have, however, been governed by coalition-like arrangements between parties, none of which holds a majority or even a plurality of the seats in the legislature.

Given the significant role that the federal and provincial governments play 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 legislative 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 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 Indigenous Peoples and the Canadian system of environmental assessments (EA), which is required for major projects approvals.

In the case of the group of Indigenous 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 in relation 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 may apply. The federal government is in the process of moving towards a more comprehensive impact assessment regime, which may come into effect later in 2019 or in 2020. If the project is strictly within a single province and federal jurisdiction is not involved, generally only the provincial EA process will apply. In some cases, both federal and provincial EA processes apply. 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 co-ordination 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. Businesses and organizations are required to register in respect of their in-house lobbying activities when their paid employees collectively devote a significant amount of time to regulated communications with public officials. The precise threshold for registration varies by jurisdiction, and may change over time as legislation is amended.

The registration of lobbyists has come under increasing scrutiny in almost

every jurisdiction in Canada. The Parliament of Canada and every provincial legislature has enacted lobbyist legislation. 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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GOVERNMENT PROCUREMENT

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

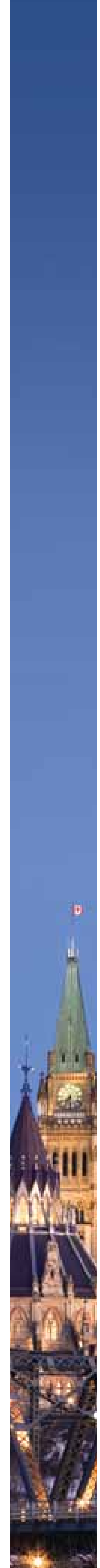
Procurement by the federal government is subject to the requirements of the *WTO Agreement on Government Procurement (WTO-AGP)*, Chapter 5 of the *Canadian Free Trade Agreement* (CFTA), Chapter 19 of the *Comprehensive Economic and Trade Agreement* (CETA) between Canada and the EU, Chapter 15 of the *Comprehensive and Progressive Trans-Pacific Partnership* (CPTPP), and Chapter 10 of the *North American Free Trade Agreement (NAFTA, and collectively the Trade Agreements)*. 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 Services and Procurement Canada (PSPC).

These commitments bind nearly all federal government departments and crown corporations. While not every Trade Agreement is applicable to every procurement, where there is overlap, the most stringent commitment is applicable. Canadian suppliers are protected under every Trade Agreement that is applicable to a particular procurement.

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*. The provinces and territories are also bound, to varying degrees by a number of the Trade Agreements, most notably the CFA, the WTO-AGP, CETA, and the CPTPP.

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. One of these requirements is compliance with Ontario's commitments under the Trade Agreements.

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.

In addition, the commitments made under various Trade Agreements, most notably CETA and the CFTA, bind many 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.

Comprehensive Economic and Trade Agreement* and the *Trans-Pacific Partnership

Canada has recently implemented the 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.

Canada has also recently implemented the CPTPP, which imposes further standards on the procurement process. A central aim of the CPTPP is to prevent procuring entities from discriminating between suppliers in the 11 Pacific Rim member countries. The CPTPP requires Canadian federal, provincial, and territorial 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.

Finally, while federal government procurements are currently protected under NAFTA, the modernization of NAFTA in the form of the *Canada United States Mexico Agreement* (CUSMA) does not contain procurement obligations that bind Canada or any sub-federal government.

Defence Procurement and the Controlled Goods Program

With regard to Canadian defence procurement, the *Defence Production Act* (DPA) gives the Minister of PSPC 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 Tètrault

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

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 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 PSPC'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:

- 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, PSPC 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.

In late 2018, the Canadian government started consultations on wide-ranging changes to the Integrity Regime. The planned changes would increase flexibility in the system contingent on wrongdoers coming forward voluntarily, admitting fault, and taking measures to remediate. The changes would also greatly expand the scope of debarring offenses to include, among other things, violations of sanctions legislation, being convicted of an offence resulting in a supplier being listed on the Environmental Offenders Registry, or engaging in behaviour that would "bring the Federal procurement into disrepute or otherwise be contrary to Canadian public policy." These changes have not yet been implemented into Canadian law as of the date of publication.

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 PSPC, 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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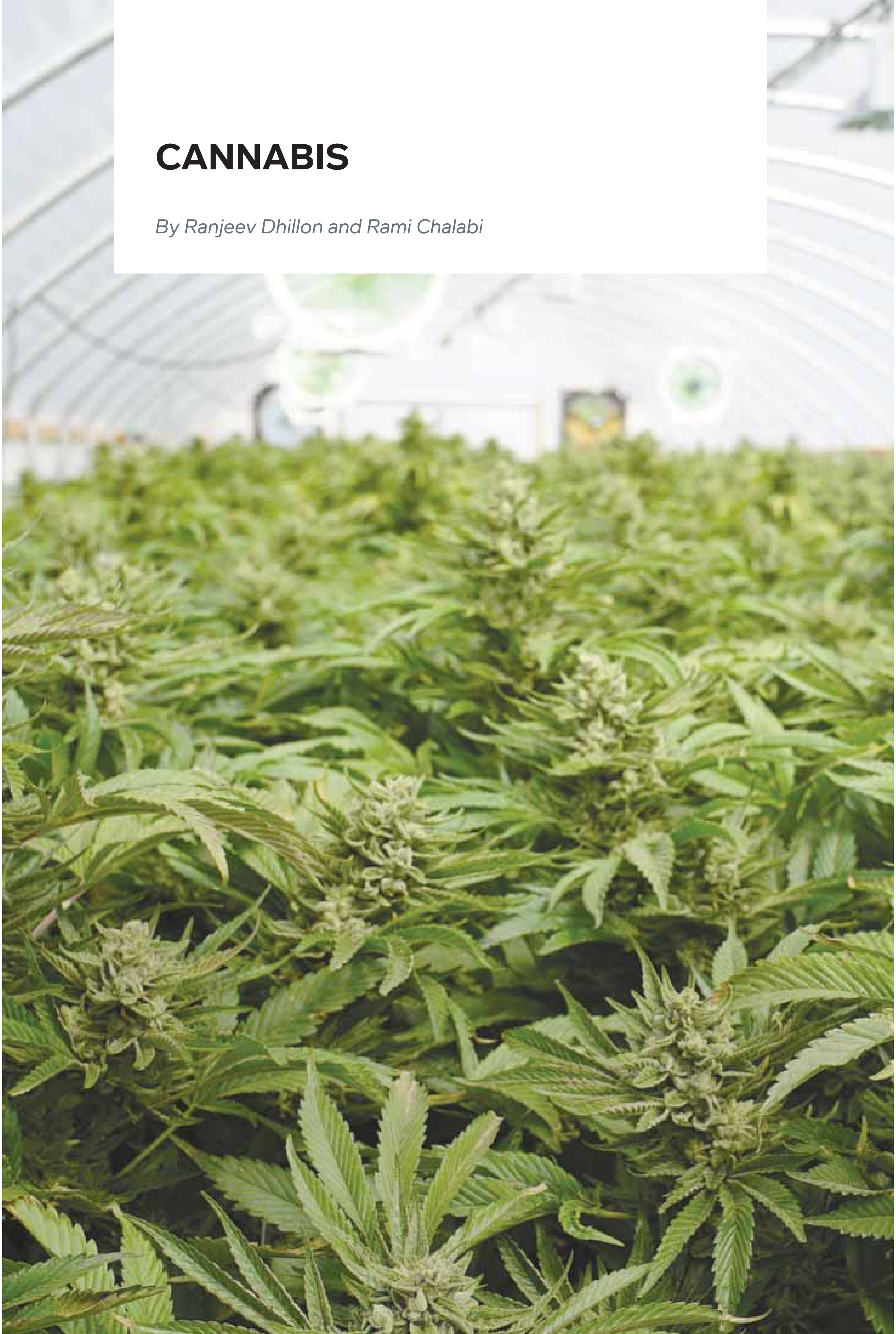
CANNABIS

By Ranjeev Dhillon and Rami Chalabi



CANNABIS

With the enactment of the *Cannabis Act* (Canada), Canada became the first G7 nation to federally legalize adult use of recreational cannabis permitting its production, distribution and sale. Since that time, the regulatory regime has evolved and the cannabis industry has continued to grow at a rapid rate, both domestically and internationally.

Licensing

Responsibility for the oversight of the cultivation, production and distribution of cannabis is shared between federal, provincial and territorial governments and municipalities. Health Canada provides licensing and a legal framework for the cultivation and production of cannabis through various licenses. An individual or business is required to obtain a licence issued by Health Canada in order to conduct various cannabis-related activities, including the cultivation of cannabis, the sale of cannabis for medical purposes, analytical testing and research, with various sub-licenses being available based on the nature and size of the activity. License holders must comply with the *Cannabis Act* and its regulations, as well as compliance with other applicable federal, provincial and territorial legislation and municipal laws.

Licenses related to distribution are issued at a provincial and territorial level. The distribution of cannabis varies by province and territory through private sales, government sales or a hybrid of the two.

Infused Products

Currently, product offerings are primarily limited to dried cannabis flower and cannabis oils, due to a strict regulatory environment. However, this is set to change in the coming months, as the federal government will be introducing new regulations that are expected to permit a much wider range of cannabis-infused products, including edibles, extracts suitable for vaping products, and topicals. The regulations are expected to introduce strict production parameters and guidelines with respect to these products, including limits on THC and certain ingredients and additives, and restrictions on the use of vitamins, mineral nutrients, meat products, caffeine and alcohol.

Mergers & Acquisitions

The rapid growth of the cannabis industry has been coupled with significant deal activity, with a number of recent high-profile mergers and acquisitions. While this trend is expected to continue, the profile and strategic rationale for these transactions are expected to evolve. First, while many acquisitions have focused on large vertically-integrated licensed producers, it is likely that the next wave of targets will be those that have a narrower focus who can fill a specific need (extraction, research and development, logistics). Second, as the cost of capital in the industry is expected to increase, there could be acquisitions of targets that are facing financial difficulties, including under bankruptcy proceedings.

Strategic Alliances

We have seen new entrants into the cannabis sector through strategic alliances or significant equity investments into large cannabis companies. The emergence of strategic partners with established, consumer-facing brands has provided cannabis companies with both capital and know-how to help execute on their long-term strategy, while providing established companies with access to a new, high-growth industry. This trend is expected to continue, as companies from other sectors (pharmaceuticals, consumer-packaged goods) continue to monitor the space.

Securities Regulation

The legalization of cannabis at the federal level in Canada stands in contrast to the regulatory framework in the United States. Although a number of U.S. states have legalized cannabis in some form, it remains a controlled substance under federal law. The Canadian Securities Administrators (CSA), have published guidance for companies with U.S.-based cannabis activities, and the Toronto Stock Exchange (TSX) undertook a listing review of cannabis companies with U.S. operations and maintains that its issuers are not permitted to participate in marijuana-related activities in the U.S. The Canadian Securities Exchange, in contrast to the TSX, has taken a more permissive approach, requiring only fulsome disclosure of these activities (consistent with the position of the CSA). The Canadian capital markets have thus far been receptive to U.S. companies and companies with U.S. assets.

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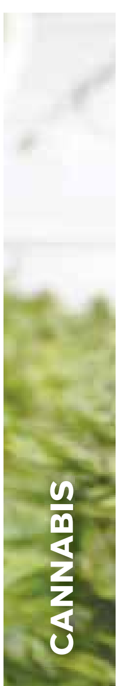

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