DOING BUSINESS IN CANADA

2016

GOWLING WLG

WELCOME TO CANADA

Canada is one of the world's premier locations for business investment. Boasting an exceptional wealth of natural resources, a sound financial system and world-class infrastructure, Canada is known for innovation in a wide range of sectors.

Gowling WLG understands the challenges of establishing and conducting business in this country. With offices in major cities across Canada and around the world, we provide effective counsel and insightful business solutions that help our clients access the full potential of the Canadian marketplace.

As one of Canada's leading business law, advocacy and intellectual property law firms, Gowling WLG understands the challenges of establishing and conducting business in this country. With offices in major cities across Canada and around the world, we provide effective counsel and insightful business solutions that help our clients access the full potential of the Canadian marketplace.

Doing Business in Canada was developed to provide business executives, foreign counsel and investors with an overview of the legal aspects of Canadian business operations. The information in this guide is current as of September 2016 and is for general information purposes only. It does not constitute a legal opinion or other professional advice.

If you are doing business in Canada or planning to do so, it is highly recommended that you seek detailed and specific advice from experienced professionals. To learn more about doing business in Canada and the services that Gowling WLG provides, visit us at gowlingwlg.com

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PARLIAMENT BUILDINGS, OTTAWA

The Centre Block and Peace Tower were rebuilt after a fire destroyed all but the Library of Parlaiment in 1916.

A: INTRODUCTION TO THE LEGAL STRUCTURE OF CANADA

HERITAGE

At the entrance to Canada's Parliament, carvings of a lion and a unicorn stand guard either side of the archway. The lion carries a Union flag and supports the Royal Arms while the unicorn holds the royal flag of France and represents the Arms of Canada.

HISTORICAL BACKGROUND

Unlike the United States, Canada was not created by a unilateral declaration of independence from the colonial occupation of England.

There was no "Canadian revolution" or other similar act that dramatically gave birth to an autonomous and independent Canada. Rather, Canada gained independence from England through a gradual legislative and political process. Canada's principal constitutional document is the *Constitution Act*, which includes the *Canadian Charter of Rights and Freedoms*.

1. FEDERAL AND PROVINCIAL JURISDICTION

Canada is a federal state with a federal government based in the capital city of Ottawa, Ontario. There are 10 provinces and three territories, and, accordingly, 10 provincial governments and three territorial governments — each based in the various provincial and territorial capitals.

The powers of both levels of government are outlined in the *Constitution Act, 1867*. In summary, the federal government is empowered to deal with issues concerning the "peace, order and good government of Canada," which, for the most part, means issues of national importance that transcend provincial borders. These matters include national defence, foreign affairs, criminal law, immigration, banking, the national currency, international trade and intellectual property.

The provinces are empowered to deal with issues that are more regional in nature, such as direct taxation within the province, natural resources, education, social programs (including welfare and health care), and rights related to private property and commerce. There are also many areas of joint federal-provincial responsibility. While the territorial governments are subject to federal jurisdiction, they have authority over a range of local government programs and initiatives.

In keeping with the separation of federal and provincial jurisdiction, the *Criminal Code*, the *Bankruptcy and Insolvency Act*, the *Competition Act*, the *Bank Act*, the *Patent Act* and the *Trademarks Act* are federal statutes, having force and effect throughout the country. However, many of the laws that affect Canadians on a day-to-day basis are within provincial and territorial jurisdiction. For instance, matters relating to property are within provincial jurisdiction, so each of the provinces has its own regime for land registration and personal property security. All of the provinces except Québec now have a personal property security regime that is similar, though not identical, to the corresponding provisions of the U.S. *Uniform Commercial Code*.

2. BRANCHES OF GOVERNMENT

The government's power in Canada is separated into three branches: legislative, executive and judicial.

a. Legislative power

Federally, the legislative branch is the Parliament of Canada. Parliament consists of two houses: the House of Commons and the Senate. The Senate, like the British House of Lords, has effectively lost all legislative power. The result is that the House of Commons is effectively the sole source of federal legislative authority in Canada. Members of the House of Commons (known as members of Parliament or "MPs") are elected for a term of five years, but are eligible for re-election.

The political party with a majority of seats in the House of Commons forms the Government of Canada, and the leader of this party is the prime minister of Canada. Each province and territory also has a legislature to which members are elected. The leader of a province is known as a provincial premier. The heads of territorial legislatures are known as leaders.

b. Executive power

The prime minister (or the provincial premier or territorial leader, as the case may be) appoints a cabinet, which consists of selected members of the respective legislature. Each member of cabinet is known as a minister and is given a portfolio of governmental responsibility, which primarily involves directing the relevant bureaucracy. The cabinet and associated bureaucracies form the Canadian executive branch of government. It is in this sense that legislative and executive authority are combined in the offices of the prime minister and the cabinet.

c. Judicial power

The Supreme Court of Canada is the final court of appeal for all lower courts in Canada. Appeal is available only by leave. There are two separate court systems that exist beneath the Supreme Court of Canada. The first, the Federal Court system, hears cases on issues that come solely under federal jurisdiction. The second is formed by the provincial court systems, which deal with civil and criminal matters within the province. The provincial court systems usually include trial and appellate divisions.

The *Canadian Charter of Rights and Freedoms* (the Charter) is the Canadian equivalent of the U.S. *Bill of Rights*. Although the Charter was not introduced into the Canadian Constitution until 1981, it has had a significant impact on the balance of power within Canada. Parliament is no longer the supreme power, as its actions have become subject to judicial scrutiny in a manner that did not exist prior to 1981.

Any court in Canada can review any act of Parliament or a provincial legislature if there are grounds to believe the act violates the Charter. If there is a violation, the court is empowered to declare the act — or any of its constituent parts — contrary to the provisions of the Charter or beyond the power of the government that enacted it and therefore of no legal force. No provision of any act, even prior to the enactment of the Charter, may derogate from the guarantees it affords.

However, in certain circumstances, some rights guaranteed by the Charter can be overridden by Parliament. All that is necessary is an express declaration that the law will operate notwithstanding the Charter. This is contained in section 33 of the Charter and is known as the "notwithstanding clause." The *Québec Charter of Rights and Freedoms* applies in Québec, not only to the Québec provincial legislature, but also to persons, corporations, partnerships and trusts.

3. COMMON LAW AND CIVIL LAW TRADITIONS

The Canadian legal system is based on the common law tradition of the United Kingdom. In this respect, common law principles in Canada, such as those found in the law of tort, contract or property are quite similar to those of the U.S. and the U.K. Québec stands as an exception, as its legal system evolved from the French civil law system. In Québec, as a general rule, the civil law system applies to private law matters while the common law system applies to public law situations. Thus, to the extent Québec is empowered by the Canadian Constitution to make laws, Québec uses a civil code (the *Civil Code of Québec*) to do so.

B: BUSINESS STRUCTURES

As is the case in most common law jurisdictions, a person or entity wishing to operate a business in Canada can choose from several different business structures.

The appropriate structure is determined on a case-by-case basis depending on the nature and location of the business, liability and general issues of exposure, the entity's financing requirements, and tax considerations.

There are three basic structures available: sole proprietorship, partnership and corporation. Foreign businesses may also conduct business within Canada through branch operations or a joint venture.

VANCOUVER

Vancouver is in the province of British Columbia, which is south of Alaska. It is Canada's major Pacific port city, and an international hub of trade and immigration.

1. SOLE PROPRIETORSHIP

A sole proprietorship is employed when the business is owned and operated by the individual responsible for the business and its liabilities.

This structure is extremely simple, with few legal complications. However, some requirements, such as licensing, may exist. This structure is best suited for small enterprises, as all benefits and liabilities of the business flow through to the individual.

One shortcoming is that the liability of the enterprise is the same as the liability of the individual operating the business. Unlike a corporation, assets of the sole proprietor are at risk in honouring the liabilities of the enterprise. Another shortcoming is that opportunities for tax planning are limited, as the profits of the business flow through to the individual and are taxed in his or her hands.

2. PARTNERSHIP

A partnership exists when two or more individuals or corporations carry on business together with a view to profit. In Canada, the provinces have exclusive jurisdiction with respect to partnerships and, accordingly, each province has enacted its own specific partnership legislation.

The common law provinces (all provinces excluding Québec) recognize the general partnership and the limited partnership, while Québec also recognizes the undeclared partnership. In Québec, a partnership is a contract by which two or more individuals or corporations agree to carry on an activity, which may be the operation of an enterprise by providing property, knowledge and/or activities, and by sharing profits.

TYPES OF PARTNERSHIPS

General partnership

Each partner is liable for the debts and obligations of the partnership on an unlimited basis. In Québec, creditors must first seek reimbursement from the property of the partnership; the personal property of a partner is not applied to the payment of creditors of the partnership until that partner's own creditors have first been paid.

Limited partnership

A limited partnership is composed of at least one general partner and any number of limited partners. General partners manage the affairs of the partnership and are liable to an unlimited extent to creditors of the partnership. Liability of the limited partners is limited to the amount of capital contributed. Limited partners must not participate in the management of the partnership, or they risk losing their limited liability.

Undeclared partnership

Québec also recognizes undeclared partnerships, which are de facto partnerships that are deemed to exist even though they are not registered in the manner prescribed by legislation concerning the legal publicity of enterprises.

Each partner retains ownership of the property constituting the partner's contribution to the undeclared partnership. Partners are also liable for the debts and obligations of the other partners on an unlimited basis, provided the debts have been contracted for the use or operation of the common enterprise.

For tax purposes, a partnership is not recognized as a distinct entity. Rather, the profits and losses of the partnership flow through, on a proportionate basis, to the partners, who must pay tax on these amounts in their personal tax returns.

3. CORPORATION

A corporation is a legal entity distinct from its shareholders. In Canada, a corporation is endowed with all the legal abilities of a natural person in that it can own property, carry on business, borrow, lend, sue or be sued.

Shareholders of the corporation do not own the business or assets of the corporation and, except in certain exceptional circumstances, are not personally responsible for its liabilities. Corporations offer limited liability, ease of transfer of assets and perpetual existence. Since a corporation is a distinct legal entity, it must pay tax on its income. The corporation is by far the most common business structure in Canada.

a. Incorporation under federal or provincial law

A corporation may be created under either federal or provincial law. Generally, if the business of the corporation will be conducted in only one province, the company is incorporated provincially. Companies that wish to carry on a business subject to federal regulation must be incorporated under federal law, and sometimes — such as in the case of banks — under industry-specific legislation. In addition, particular local nuances in the provincial statutes may result in a foreign investor favouring federal incorporation.

b. Public disclosure

The scope of public disclosure required of a corporation varies widely depending on the jurisdiction of incorporation, the type of business being conducted and whether the corporation is a public offering or non-offering entity.

c. Officers, directors and shareholders

In Canada, as in other common law jurisdictions, a corporation is composed of three groups: officers, directors and shareholders. In small private corporations, the same individual or individuals may, at different times, act in all three capacities. In public corporations, this is typically not the case.

The officers of a corporation are responsible for the daily management of its affairs. The directors of the corporation appoint the officers, and the shareholders of the corporation elect the directors. While the board of directors is not responsible for the day-to-day affairs of the business, it is charged with managing the business of the corporation. There are liabilities attached to the office of director, but insurance may be purchased to shield members of the board from certain liabilities.

d. Residency requirements

Foreign investors must consider residency requirements. The federal statute requires that at least 25 per cent of a corporation's directors be resident in Canada. Where there are fewer than four directors, the *Canada Business Corporations Act* requires that one director be resident in Canada. Each province has different residency requirements that investors wishing to incorporate in Canada should consider. It is of particular interest to note that there is no residency requirement for directors of corporations established under the business corporations acts of certain jurisdictions, including British Columbia and Québec.

e. Unlimited liability companies

An unlimited liability company (ULC) can be incorporated under the provincial laws of Alberta, British Columbia and Nova Scotia. Unlike shareholders of other corporations, shareholders of a ULC are personally liable for the liabilities of the company. These entities are generally used by foreign investors to gain advantageous tax treatments. Though ULCs are taxed as corporations in Canada, they are eligible for "check-the-box" election in the United States and may be taxed as either a corporation or a flow-through entity.

Corporate legislation in each of the three aforementioned provinces differs. A number of factors must be considered when determining where to incorporate, including costs, the extent of shareholder liability, requirements concerning director residency or head office location, and any restrictions imposed on the ability to finance third parties or to pay dividends.

4. BRANCH OPERATIONS

A foreign corporation may conduct business within Canada through a branch operation after obtaining a licence or otherwise registering in the province(s) where it carries on business. Although the definition of "carrying on business" varies from province to province, a corporation may be found to be carrying on business if:

- It has a resident agent, representative, warehouse, office or place where it carries on its business in a province.
- It holds an interest in real property located in a province other than by way of security.
- The type of business to be carried on is one that the province has chosen to regulate.

Generally, a corporation is not deemed to be carrying on business in Canada merely because it takes orders for, buys or sells goods, wares and merchandise, or offers or sells services of any type by use of travellers or through advertising, correspondence or the Internet. Branch offices are popular because they enjoy certain tax advantages. However, because a branch office is not a legally distinct entity from the parent company, the parent will be exposed to the debts, liabilities and obligations of the Canadian operation.

There are penalties for failure to obtain a licence where required. Furthermore, without a licence, a foreign corporation might not be capable of maintaining a proceeding in a court or tribunal in respect of a contract made by it. The procedure for obtaining a licence is generally uncomplicated, provided the name of the corporation is not similar to that of any other corporation or business entity in the same jurisdiction.

5. JOINT VENTURE

The term "joint venture" describes any arrangement where two or more persons agree to contribute goods, services or capital to a common commercial enterprise.

With no statute currently governing joint ventures in Canada, they are governed by the contracts arrived at between private parties. The terms of collaboration, the nature of co-venturers' respective contributions and the arrangements regarding management and sharing of profits are typically set out in the contract.

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C: SECURITIES LAW & CORPORATE GOVERNANCE

Canada currently does not have a federal securities regulator, as other major capital markets do. Rather, each province and territory has its own securities regulatory authority and its own set of laws, regulations, rules and policies.

The 13 provincial and territorial securities regulators work together to harmonize regulation across the country through rules known as "national instruments." As well, issuers can often rely on a "passport" system that allows them to deal directly with only one or two regulators.

"A MARI USQUE AD MARE"

Canada's motto, "from sea to sea," is a reminder of the breadth of its landmass, but also the country's historic ties to fishing and the ocean.

Efforts by the federal government to establish a national securities regulatory system were complicated and delayed by a Supreme Court of Canada decision in late 2011, which determined that a then-proposed federal statute governing securities was unconstitutional. Together with the federal government, British Columbia, Ontario, New Brunswick, Saskatchewan, Prince Edward Island and the Yukon are currently pursuing a co-operative capital markets regulatory system, and have published draft legislation and regulations in this regard.

1. DISTRIBUTION OF SECURITIES

In Canada, unless otherwise exempt, a distribution of securities cannot be completed without the filing of a prospectus. This requirement is intended to protect investors.

A prospectus is a comprehensive disclosure document providing detailed information on the issuer's business and the securities being offered. Furthermore, if the distribution of securities is made by an entity that is engaged in the business — or holding itself out as engaging in the business — of trading in securities, the entity must be registered as a dealer. This helps to ensure that securities are sold by qualified people who have a duty to know their clients and assess the suitability of their clients' investments.

Reporting issuers (i.e., public companies) may avoid prospectus requirements by distributing securities to "accredited investors" (i.e., specified institutional investors and individual investors who meet a certain threshold of net worth or taxable income).

Private corporations in Canada may avoid prospectus requirements by relying on a "private issuer" prospectus exemption. This exemption applies in cases where the corporation has fewer than 50 shareholders, securities that are closely held by a prescribed group of non-public investors — i.e., family, close friends and business associates, and accredited investors — and a restriction on the transfer of the corporation's securities.

2. LISTING IN CANADA

The Toronto Stock Exchange (TSX) and the TSX Venture Exchange (TSX-V) are the two major Canadian public stock exchanges. Lately, there has also been an increasing number of junior issuers listing on the Canadian Securities Exchange (CSE). The TMX Group — which operates the TSX and TSX-V — has also recently launched TSX Private Markets, which facilitates the raising of capital on a private placement basis and secondary trading for Canadian private companies.

In Canada, opportunities exist for corporations to go public and access the capital markets at a much earlier stage than other markets, such as the United States. In some circumstances, the CSE and the TSX-V facilitate listing at a pre-revenue stage through a two-tiered system with different levels of listing requirements. Many non-Canadian corporations list in Canada as a first step toward listing in the U.S.

3. INITIAL PUBLIC OFFERINGS

The process for completing an initial public offering (IPO) in Canada generally takes three to four months. An issuer must first file a preliminary prospectus with securities regulators for their review and comment, followed by a final prospectus. A prospectus must contain "full, true and plain disclosure of all material facts" related to the issuer's business and the securities being offered. It must also include three years of audited financial statements prepared in accordance with International Financial Reporting Standards (IFRS) or U.S. Generally Accepted Accounting Principles (GAAP) with a reconciliation to IFRS.

Securities regulators are required to provide their comments within 10 business days of the date that the preliminary prospectus was filed. An issuer is not permitted to file a final prospectus until all comments from regulators are settled. Amendments to the prospectus rules in 2013 provided significantly greater clarification of the rules governing the pre-marketing and marketing of the public distribution of securities, including marketing materials and road shows.

An issuer planning a public offering in multiple Canadian jurisdictions will generally rely on the "passport" system.

Under this system, a preliminary prospectus filed and cleared with the issuer's principal regulator is automatically accepted by the other provincial regulators.

An issuer that becomes listed in Canada upon completion of an IPO, or that otherwise becomes a reporting issuer in Canada — e.g., through acquisition of a Canadian public company by way of share exchange — will be required to comply with Canadian requirements on timely and periodic disclosure, financial reporting, and corporate governance, as well as the policies of the exchange on which its securities are listed.

4. CONTINUOUS DISCLOSURE REQUIREMENTS

The continuous disclosure obligations of a reporting issuer fall into two categories: periodic disclosure and timely disclosure.

Periodic disclosure occurs at regular intervals and consists of quarterly and annual financial statements, quarterly and annual management's discussion and analysis, an annual information form (for TSX issuers) and shareholder meeting materials.

In Canada, reporting issuers are required to file their continuous disclosure and timely disclosure documents on sedar.com, a free electronic database for the general public, including investors.

Canadian securities legislation also requires insiders of reporting issuers to report their security holdings, as well as any direct and indirect transactions involving those holdings.

The principal requirement for timely disclosure is that a reporting issuer must issue and file a press release "forthwith" when a material change in its affairs occurs, or when material information relating to its affairs becomes known to management. A "material change" is a change in the business, operations or capital of the reporting issuer that would reasonably be expected to have a significant effect on the market price or value of any of its securities. This includes situations where a decision to implement one of the changes referred to above is made by the board of directors (or other persons acting in a similar capacity), or by the reporting issuer's senior management if it believes that confirmation of the decision by the board of directors (or people acting in a similar capacity) is probable.

5. CIVIL LIABILITY

Breach of timely and continuous disclosure requirements — including a misrepresentation in publicly disclosed communications — can result in civil and administrative proceedings against a reporting issuer. Possible consequences include being placed on a list of defaulting reporting issuers maintained by most securities regulatory authorities, the issuance of a temporary or permanent cease-trade order by the securities regulatory authorities, or delisting by the TSX or the TSX-V.

Reporting issuers in all Canadian jurisdictions have liability to investors under Canadian securities legislation for damages for misrepresentations in a publicly disclosed communication — such as an information circular or public oral statement — or failure to make timely disclosure. Plaintiffs are deemed to have relied on either the misrepresentation or on the reporting issuer having complied with its disclosure obligations. However, provincial securities laws do set limits on liability and provide for defences. Leave of the court is required for an action to proceed. Court approval is also required for settlements, and costs are awarded to the prevailing party as determined by the court.

In addition to the reporting issuer, its directors and officers — and other persons who knowingly influence the release of a misrepresentation — also have liability to investors under Canadian securities legislation. Generally, a defendant will not be liable for a misrepresentation in a publicly disclosed communication if the defendant proves that:

- Before the release of the information containing the misrepresentation, the defendant conducted or caused to be conducted a reasonable due-diligence investigation.
- At the time of the release, the defendant had no reasonable grounds to believe the document or statement contained the misrepresentation.

Similarly, a defendant will not be liable for breaches of timely disclosure obligations if it shows that, before the failure to make timely disclosure first occurred, it conducted or caused to be conducted a reasonable due-diligence investigation, and that it had no reasonable grounds to believe that the failure to make timely disclosure would occur.

6. FINANCIAL REPORTING REQUIREMENTS

An issuer listed on the TSX must file audited annual comparative financial statements, accompanied by an auditor's report, with securities regulators within 90 days of its financial year-end. For an issuer listed on the TSX-V or CSE, the time period is 120 days. The board of directors must approve these financial statements before they are filed.

Interim comparative financial statements are required on a quarterly basis and must be filed with securities regulators within 45 days of the end of the financial period for TSX-listed issuers, and within 60 days for issuers listed on the TSX-V or CSE. These statements are generally reviewed by auditors but are not required to be audited.

A reporting issuer is required to deliver annual or interim financial statements to security holders only upon request — provided the reporting issuer annually sends a request form to each security holder.

7. SHAREHOLDER MEETINGS

A meeting of shareholders of a corporate issuer must be held each year, generally not later than six months following its fiscal year-end.

Typically, a corporate issuer must mail a notice of meeting to all registered shareholders entitled to vote, to the corporation's directors and to the auditors at least 21 days prior to the meeting. Along with the notice, reporting issuers are also required to send to shareholders a management information circular describing the matters to be voted on at the meeting, and providing other corporate disclosure and proxy voting instructions. The notice and all documentation related to the meeting must be mailed concurrently to all holders of non-voting equity securities.

In lieu of mailing these materials to shareholders, a "notice and access" regime permits these materials to be made available and accessible to shareholders through the Internet — so long as certain conditions are satisfied and notice is provided to shareholders. The requirements of applicable corporate statutes must also be considered.

8. EXPEDITED PUBLIC FINANCINGS AND PRIVATE PLACEMENTS

A reporting issuer that has established a minimum 12-month continuous disclosure record in Canada, and has filed an annual information form (AIF), is generally eligible to complete a public offering on an expedited basis by filing a short-form prospectus. An AIF is a disclosure document filed within 90 days of an issuer's financial year-end that contains the corporate and non-offering disclosure found in a long-form prospectus. Only TSX-listed issuers are required to file an AIF.

A short-form prospectus describes the securities being offered, and incorporates by reference certain documents previously prepared and filed by the issuer — such as the most recent AIF, management information circular, annual and interim financial statements, and any material change reports. The short-form prospectus is usually cleared by securities regulators across Canada within one week.

9. PROSPECTUS-EXEMPT DISTRIBUTIONS

Certain exemptions permit issuers to distribute securities without filing a prospectus. Most notably, these exemptions include distributions to accredited investors and employees, and distributions of securities (other than to individuals) with an acquisition cost to the purchaser of not less than $150,000 in cash.

Examples of accredited investors include:

- Registered investment advisers and dealers, financial institutions, governments and government agencies, insurance companies, pension funds, and certain investment funds
- Individuals and corporations that meet certain income or financial asset thresholds.

Prospectus exemptions are also available for certain non-financing distributions, such as securities exchange take-over bids and distributions made in connection with a business combination or a reorganization transaction.

Prescribed notice of a prospectus-exempt distribution of securities must be filed with the applicable securities regulators in certain circumstances, together with the payment of a prescribed filing fee. If an offering memorandum is delivered to a Canadian investor in respect of such prospectus-exempt distribution, certain provincial securities regulators require it to be filed as well.

10. EARLY WARNING REPORTING

A person who acquires 10 per cent of the voting or equity securities of a reporting issuer — including convertible securities and rights to acquire voting or equity securities — is required to comply with the "early warning" provisions of Canadian securities law. These provisions include the obligation to issue a press release and to file an early warning report.

The purpose of the early warning report is to disclose to the market that a particular investor holds a significant ownership stake in the reporting issuer, and to provide information on the investor's intentions with respect to the investment.

A further report and press release are required for each additional two per cent of the voting or equity securities acquired. Relaxed early warning reporting requirements are available to certain eligible institutional investors who declare no intention to acquire over 20 per cent of an issuer's securities.

Amendments to the early warning provisions in May 2016 require additional reporting for both increases and decreases in ownership of at least two per cent, and enhance the content of the early warning disclosure that must be publicly filed.

Subject to certain exemptions, a person is prohibited from acquiring greater than 20 per cent of the voting securities of a reporting issuer unless that person first complies with the take-over bid rules of Canadian securities law, which require that an offer to acquire securities be made to all shareholders.

11. TAKE-OVER BIDS

A take-over bid is an offer made by a person (or group of persons acting in concert) to acquire from securities holders — i.e., not from treasury — voting or equity securities of any class of an issuer that, together with outstanding securities of the class already owned, exceeds 20 per cent of the outstanding voting or equity securities of such class.

Generally, a take-over bid is made by mailing a take-over bid circular to all shareholders and filing it with the applicable securities regulators. The take-over bid circular describes the terms and conditions pursuant to which the offeror will purchase the issuer's securities from shareholders and, where the consideration includes securities, also contains disclosure relating to the offeror and the securities being offered. As a result of recent amendments (discussed in more detail below), a take-over bid must be open for a minimum deposit period of 105 days subject to certain exceptions.

A minimum threshold for shareholder acceptance is a typical condition of a take-over bid (and as a result of the recent amendments, a minimum tender condition of 50 per cent is required), with 66⅔ per cent and 90 per cent being the most common thresholds. An acceptance level of 66⅔ per cent generally permits the offeror to eliminate the remaining shareholders who have not tendered their shares under the take-over bid pursuant to a second-stage transaction, such as an amalgamation. If an offeror acquires 90 per cent of the shares of a class not owned by it, the acquirer is permitted by most Canadian corporate statutes to compulsorily acquire the remaining shares.

There are very few exemptions from the take-over bid rules. The most useful exemption requires that securities be purchased by private agreement from no more than five sellers in respect of an offer to acquire that is not made generally to shareholders at a price not exceeding 115 per cent of the market price of the securities. Generally, the market price is equal to the average closing price of the securities on the stock exchange during the 20 trading days preceding the date of the agreement. Another exemption permits the purchase of no more than five per cent of a class of securities during any 12-month period at prices not exceeding the market price of the securities.

In response to concerns that Canada's take-over bid regime had become too "bidder-friendly," amendments were made to the regime in May 2016. Referred to as the "50-10-105 amendments," they stipulate that all non-exempt take-over bids must:

- Meet a minimum tender requirement of more than 50 per cent of the outstanding securities of the class that are subject to the bid
- Be extended for at least an additional 10 days after the minimum tender requirement is met
- Remain open for a minimum deposit period of 105 days, unless the target board states in a news release that a shorter deposit period (not less than 35 days) is acceptable — in which case, all concurrent bids must remain open for at least the stated shorter deposit period — or the target issues a news release that it intends to enter into a specified alternative transaction — in which case all concurrent bids must remain open for a deposit period of at least 35 days

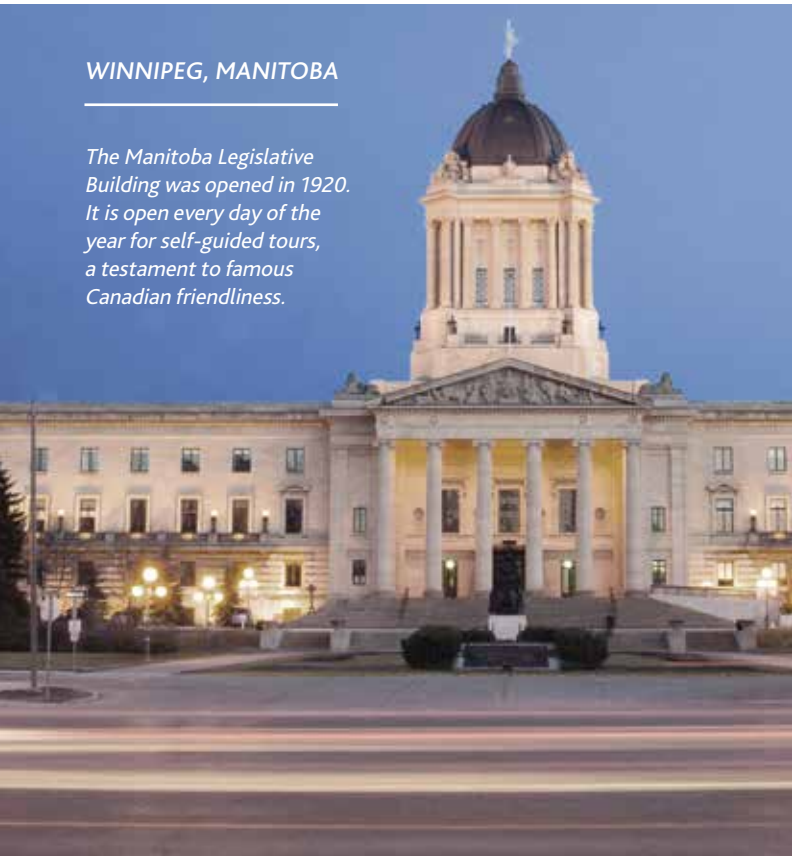
12. INSIDER REPORTING

Directors, chief executive officers, chief financial officers and chief operating officers of a reporting issuer, of a significant shareholder (those holding more than 10 per cent of the voting shares) of a reporting issuer, or of a major subsidiary of a reporting issuer — as well as the significant shareholders themselves — are generally considered to be "reporting insiders" and are required to file insider reports under Canadian securities laws. Other employees of a reporting issuer, by virtue of their responsibilities or their access to information and their ability to exercise power or influence, may also be considered "reporting insiders."

Insider reports are intended to provide the marketplace and regulators with disclosure relating to a reporting insider's direct or indirect beneficial ownership, control or direction over the reporting issuer's securities. A reporting person must file publicly available reports within 10 days of becoming a reporting insider, and within five days of subsequent changes in security ownership.

13. INSIDER TRADING AND TIPPING

Insider trading involves buying or selling a reporting issuer's securities with knowledge of material information about the reporting issuer that has not been publicly disclosed. Tipping involves providing material undisclosed information to a person other than in the necessary course of business.



WINNIPEG, MANITOBA

The Manitoba Legislative Building was opened in 1920. It is open every day of the year for self-guided tours, a testament to famous Canadian friendliness.

Insider trading and tipping are serious offences. Conviction in Ontario, for instance, can result in a fine of up to $5 million, imprisonment for up to five years less a day and/or banishment from trading in securities. Defendants have a defence to an insider-trading or tipping allegation if they prove that they reasonably believed that such material information had been generally disclosed.

14. CORPORATE GOVERNANCE

In response to the U.S. *Sarbanes-Oxley Act* of 2002, Canada's securities regulatory authorities have promulgated a series of corporate governance-related instruments.

For example, TSX-listed issuers are required to have an audit committee composed of at least three directors, all of whom must be both "independent" and "financially literate." Issuers listed on the TSX-V are required to have an audit committee composed of at least three directors, the majority of whom cannot be officers, employees or control persons of the issuer, or any of its associates or affiliates. The CSE provides greater flexibility on audit committee composition.

In addition, these instruments set out a list of non-binding corporate governance guidelines that reporting issuers are encouraged to consider in developing their own practices. While compliance with the guidelines is voluntary, mandatory disclosure is imposed on reporting issuers with respect to whether or not their corporate governance practices comply. Other corporate governance recommendations include:

- A board consisting of a majority of independent directors with an independent chair or lead director, and with the independent directors holding regularly scheduled meetings at which non-independent directors and members of management are not in attendance
- Written board and board-committee mandates that outline the functions and responsibilities of the board and its committees
- Clear position descriptions for the chair of the board, the chair of each board committee and the chief executive officer
- A written code of business conduct and ethics
- Nominating and compensation committees composed entirely of independent directors
- Orientation for new directors and continuing education opportunities for all directors
- Regular board, board committee and individual director assessments regarding effectiveness and contributions.

Annual corporate governance disclosure requirements for TSX-listed issuers relating to the representation of women on boards and in senior management, and director term limits came into effect on December 31, 2014. These requirements use a "comply or explain" model and were developed with a view to increasing transparency regarding the representation of women on boards and in senior management, and to promote board renewal and opportunities for women board candidates.

15. QUÉBEC

Documents of a contractual nature, such as prospectuses and take-over bid circulars (tender offer materials), must be translated and sent to Québec residents in French.

16. DEALER, ADVISER AND INVESTMENT FUND MANAGER REGISTRATION REQUIREMENTS AND EXEMPTIONS

Any person or company that engages in (or holds itself out as engaging in) the business of trading in securities in Canada — including acting in furtherance of a trade, such as the marketing of securities — must be registered as a dealer in each province or territory where such business activities are undertaken.

A person or company registered as a broker or dealer in a jurisdiction outside of Canada may rely on an "international dealer" exemption, which, subject to certain pre-notification filings (and the payment of an annual fee if trading in Ontario or Saskatchewan), generally permits a dealer to trade in non-Canadian securities to Canadian institutional investors and ultra-high-net-worth individuals.

Portfolio managers with Canadian clients must be registered as advisers in the Canadian jurisdictions where the clients reside. Portfolio managers that are registered, or those that are exempt from registrations in their home jurisdictions, may rely on an "international adviser" exemption, which, subject to certain pre-notification filings (and the payment of an annual fee if advising Ontario or Saskatchewan clients), generally permits them to act for institutional investors and ultra-high-net-worth individuals — as long as less than 10 per cent of their revenue is derived from Canadian clients.

The administrative fund managers of Canadian and certain non-Canadian investment funds (including private hedge funds) responsible for directing the business, operations or affairs of an investment fund — which may or may not be the same entity as the fund's investment adviser/portfolio manager — must be registered as investment fund managers, and must meet certain minimum risk-free capital, insurance and other compliance requirements. Again, subject to certain pre-notification requirements, non-Canadian investment fund managers that manage investment funds that admit Canadian investors may rely on an available non-resident investment fund manager registration exemption.

"Insider trading and tipping are serious offences, and conviction in Ontario can result in a fine of up to $5 million, imprisonment for up to five years less a day and/or banishment from trading in securities."

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D: SECURED FINANCING

FINANCIAL DISTRICT

All of the operational head offices of Canada's "Big Five" banks are located in Toronto's financial district. Their towers have been a defining element of the city's skyline since the mid-20th century.

The secured financing market in Canada is well-established, and qualified borrowers have several borrowing options readily available from banks and other financial institutions, as well as from private lenders.

Financing may be obtained from a single lender or from a syndicate of lenders where larger loan amounts are required. Loan syndications in Canada are structured in a very similar way to those in the United Kingdom and the United States.

1. BANKS

The banking system in Canada is sophisticated and well regulated. Bank loans are available from domestic banks, as well as from foreign bank subsidiaries operating in Canada or Canadian branches of foreign banks. The six largest Canadian banks command most of the market and provide debt financing, cash management and investment services across the country. Some of these banks also have subsidiaries operating in the U.S. and outside of North America.

Banks are regulated under the ***Bank Act*** (Canada), which authorizes and governs domestic banks (Schedule I), foreign subsidiary banks controlled by eligible foreign institutions (Schedule II) and foreign bank branches of foreign institutions (Schedule III). With increasing competition in the banking sector, a business borrower has a wide range of financing sources and options.

2. OTHER FINANCIAL INSTITUTIONS AND PRIVATE LENDERS

In Canada, there are also a number of non-bank lenders that provide debt financing, often in the form of asset-based loans, term loans or mezzanine debt. Among these institutions are trust and loan companies, credit unions, caisses populaires (primarily in Québec) and, in some instances, insurance companies. Financing is also increasingly available from investment funds, equipment lessors and a wide range of large private companies.

3. SECURITY

Loans can be unsecured or, more commonly, secured against the property of the borrower and any guarantors. In Canada, there are no statutory financial assistance rules that prohibit a corporation from giving guarantees to a lender in respect of loans made to a corporation's subsidiary or parent. However, it is still necessary to comply with general global corporate law principles requiring directors to act in the best interests of a corporation. Security can be taken against personal property — including accounts receivable, securities and intellectual property — and against real property.

a. Personal property

Each of the common law provinces and territories has enacted a personal property security act (PPSA) that governs the creation, perfection and enforcement of personal property security interests. PPSA legislation is similar to Article 9 of the ***Uniform Commercial Code*** (UCC) in the U.S., although there are some differences (including differences among common law provinces and territories) in how the applicable PPSA addresses the perfection of a security interest in certain types of assets — such as deposit accounts, cash collateral and intellectual property — from the equivalent treatment under the UCC.

Each province has its own electronic public registry system to record PPSA security interests granted by borrowers and guarantors over their personal property. Each system consists of a notice-based registry, which provides notice of the existence of security interests that have been granted by debtors to their secured creditors. The underlying security documents creating those security interests are not registered.

Although the PPSA legislation in each of the common law provinces and territories is similar in concept, the provisions and requirements vary slightly. Consequently, security given by corporate borrowers with assets in multiple provinces and territories will need to comply with the statutes of each of those jurisdictions, and PPSA registrations in multiple provinces and territories may be necessary.

The choice of the province or territory of registration depends on several factors, including where the chief executive office — or "head office" in Québec — of the relevant borrower or guarantor is located, where the assets are located and what types of assets are subject to the security.

The ***Civil Code of Québec*** governs equivalent matters in the province, where security over personal property — known as "movable property" in Québec —

is generally taken by way of a movable hypothec, with or without delivery. Movable hypothecs must be registered in the province's Register of Personal and Movable Real Rights (RPMRR). Similar to the PPSA systems, the RPMRR is a notice-based registry providing notice of the existence of security and other rights that have been granted by debtors to their secured creditors. The underlying security documents creating those security and other rights are not registered. In Québec, the *Civil Code* permits a secured creditor to obtain control of monies on deposit in a bank account either by entering into an agreement with the third-party bank and the grantor, called a control agreement, by which the third party agrees to comply directly with the secured party's instructions or the secured party becomes the account holder of the financial account.

Québec also has particular requirements for the execution of instruments. For example, certain instruments must be executed in front of a notary, and certain formal requirements for security documents and the timing of their registration — or "publication" in Québec — differ from those of the common law provinces and territories. For instance, an instrument must be executed prior to its registration at the appropriate registry office. Recent amendments to the *Civil Code* have served to streamline the structuring of syndicated loan transactions and the perfection — or "opposability" in Québec — of security in cash collateral and deposit accounts.

Canada is also a signatory of the Cape Town Convention, such that the perfection of security in aircraft and other similar mobile assets is also regulated by international protocol in conjunction with various laws in the majority of the provinces and territories.

b. Real property

A lender may take security over real property by way of a charge or mortgage of land, a debenture or — if real, or "immovable," property is located in Québec — an immovable hypothec. Most provinces and territories have an electronic land registry system to record mortgage — or "hypothec" in Québec — and other secured interests in real property. Although these registry systems are similar in concept, each jurisdiction has certain unique provisions and requirements for real property security. In many cases, a title insurance policy will be obtained by the secured creditor in support of its charge or mortgage document.

c. *Bank Act* (Canada) security

Pursuant to the *Bank Act* (Canada), Schedule I, Schedule II and Schedule III banks also have the ability to take security from certain types of borrowers over certain types of property specified in the Act — such as raw materials, work in progress or finished goods in the inventory of businesses. Certain formal requirements must be met in order to take *Bank Act* (Canada) security. Special security documents must be executed by the borrower to obtain this security, and a separate registration system is involved. *Bank Act* (Canada) security is available only to secure the repayment of direct loans and advances made to a borrower, and is not available to secure a guarantor's liabilities.

d. Inter-creditor arrangements

Borrowers frequently satisfy their financing requirements from multiple sources, with different secured creditors having security over different assets, or having different security rankings over the same asset pool. In these situations, inter-creditor agreements are usually required in Canada to modify those relative priority rankings that would otherwise apply to the assets under the applicable legislation in the absence of an inter-creditor agreement.

In Québec, if an inter-creditor agreement includes an assignment of rank — in Québec, cession of rank — such assignment of rank will be registered — in Québec, published — at the appropriate registry office. Additionally, in Ontario, estoppel letters often must be obtained from secured creditors with prior registrations in order to limit the scope of the security interests claimed by them.

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E: TAXATION

In Canada, an income tax is levied by both the federal and provincial/territorial governments, and a variety of other taxes, including federal and provincial value-added and sales taxes, are also imposed.

This chapter focuses on income tax and discusses some of the principal income tax considerations that apply to non-residents of Canada who wish to invest or carry on business in the country. Although a wide variety of business structures are available to non-residents, the following discussion mainly addresses the income tax considerations that apply to Canadian subsidiaries and branch operations.

CONFEDERATION

Province House, located in Charlottetown, Prince Edward Island, hosted a series of meetings in 1864 that eventually led to Canada's Confederation in 1867. The politics of taxation was one of the key issues up for discussion.

Since Canadian income tax rules are complex and subject to change, the information here is not intended to be comprehensive.

1. GENERAL TAX RULES

a. Residence in Canada

The application of Canadian income tax is based on a taxpayer's residence. Although residence is generally a question of fact, there are a few specific rules. For example, a corporation is deemed to be resident in Canada for purposes of the *Income Tax Act* (ITA) if it was incorporated in Canada any time after April 26, 1965.

A corporation incorporated outside of Canada can also be resident in Canada if its "central management and control" is located in Canada. In the absence of evidence to the contrary, the location of a corporation's central management and control — that is, the location of its highest level of corporate control — is generally understood to be the place where the corporation's board of directors meet. However, the courts and tax administrations examine the facts in detail to determine the location where the true management and control are exercised.

b. Sources of income

Canadian resident corporations are taxable on their worldwide income from every source, including business income, property income and gains arising on the disposition of capital property (i.e., capital gains).

Income is usually classified as business income if a certain degree of commercial activity is present. Property income is derived from more passive activities such as the collection of interest, dividends, rents and royalties.

Presently, only 50 per cent of a capital gain is taxable, so the classification of property as capital or otherwise for tax purposes is important. Property is generally considered to be capital property if it is held as an investment and not as a trading asset. For example, the building in which a business has its offices would normally be considered capital property, as would equipment or machinery that is used by the business in the course of earning income. However, property that is acquired for the purpose of generating a profit on resale will generally be considered inventory rather than capital property.

c. Canadian-controlled private corporations

A Canadian-controlled private corporation (CCPC) receives preferential tax treatment, including reduced tax rates on a specified amount of its active business income. Special planning is required if a non-resident wishes to carry on business in Canada through a CCPC. To qualify as a CCPC, a private corporation must not be controlled directly or indirectly by non-residents, public corporations or any combination of the two.

A "private corporation" is essentially a corporation that:

- Is resident in Canada
- Is not a public corporation
- Is not controlled by one or more public corporations (subject to certain limited exceptions)

Control of a CCPC includes not only holding a sufficient number of shares to elect a majority of the directors, but also the ability to control the corporation in fact. In determining whether there is control by a non-resident or a public corporation, all shares held by non-residents and public corporations are aggregated. Therefore, even if 51 per cent of the voting shares of a corporation were widely spread among a very large number of non-resident persons or public corporations, the corporation would not be considered a CCPC.

Where 50 per cent of the voting shares of a private corporation are held by a Canadian resident and 50 per cent of the voting shares are held by a non-resident, it may be possible for the corporation to qualify as a CCPC — provided that no other facts give the non-resident control.

d. Withholding tax on passive income of non-residents

The ITA imposes withholding tax at a rate of 25 per cent on the gross amount of certain payments made by a resident of Canada to a non-resident, including management fees, dividends, rents and royalties. This rate may be reduced pursuant to an applicable tax treaty.

Withholding tax is not imposed on arm's-length interest payments unless the interest is "participating debt interest" — being, in general, interest determined by reference to revenue, profit, cash flow, commodity price or other similar criteria. Furthermore, under the *Canada-U.S. Income Tax Convention* (1980), commonly referred to as the Canada-U.S. Tax Treaty, interest paid to a resident of the United States may be exempt from

Canadian withholding tax even if the recipient does not deal at arm's length with the payer.

The 25 per cent withholding tax on dividends may also be reduced under an applicable tax treaty. For example, Article X(2) of the Canada-U.S. Tax Treaty provides for a withholding tax rate of five per cent on dividends paid or credited by a Canadian corporation to a corporation resident in the U.S. if the U.S. resident holds 10 per cent or more of the Canadian corporation's voting shares. Otherwise, under the Canada-U.S. Tax Treaty, the withholding tax rate applicable to dividends is generally reduced to 15 per cent. It is important to note that a person claiming benefits under the Canada-U.S. Tax Treaty must satisfy the "limitation on benefits" provisions of the treaty.

In addition, Canada has eliminated the withholding tax on computer software and certain other intellectual property royalty payments under the Canada-U.S. Tax Treaty.

e. Tax treaties

In addition to reducing or eliminating withholding tax, most tax treaties with Canada generally provide that the business profits earned by non-residents from carrying on business in Canada are not subject to tax under the ITA except to the extent that such profits are attributable to a permanent establishment of the non-resident in Canada. Permanent establishments are discussed further in this section under "Canadian taxation of a branch operation."

f. Transfer pricing in non-arm's-length transactions

The ITA normally imposes tax on transactions between related parties based on the price and terms that would have applied between unrelated parties.

The ITA adopts the "arm's-length" principle in its transfer pricing rules to counteract the potential for abuse. The transfer pricing rules relate to all types of non-arm's-length inter-company transactions involving property, services, intangibles and any cost-contribution arrangements, such as research and development cost-sharing or management-fee cost allocations.

Canadian taxpayers are taxed on their transactions with non-arm's-length non-residents on the basis of terms similar to those that would have applied had the parties been dealing at arm's length. Canadian taxpayers that transact with non-arm's-length non-residents are also required to prepare and retain certain documentation under the ITA. Failure to do so may result in significant penalties if the terms of their transactions are ultimately held not to be arm's-length terms. These rules apply to related persons and to parties who, as a matter of fact, do not deal with each other at arm's length.

g. General filing and reporting requirements

In general, every corporation that is taxable in Canada must file a Canadian income tax return within six months of the corporation's taxation year-end — regardless of whether the corporation has realized a profit or whether its income is exempt from Canadian tax pursuant to the terms of a tax treaty. The ITA sets out penalties for failing to file or for providing incorrect or incomplete information on a return.

Currently, the filing of consolidated Canadian income tax returns by related corporations is not permitted. Each corporation must file its own return and may not utilize any losses of related corporations to offset the income, although certain deductions may be transferred among members of qualifying corporate groups in limited circumstances.

Corporations making specified payments, including wages and other remuneration, must submit periodic information returns detailing such payments and must remit withholding tax on such payments. Canadian resident corporations and foreign corporations carrying on business in Canada are also subject to reporting requirements in respect of transactions with non-arm's-length non-residents.

h. General anti-avoidance rule

The ITA includes a general anti-avoidance rule (GAAR), which is a broadly worded provision that can result in the re-characterization of transactions for Canadian tax purposes in order to deny a "tax benefit" resulting from an avoidance transaction.

The ITA broadly defines a "tax benefit" as a reduction, avoidance or deferral of tax or other amount payable, or an increase in a refund of tax or other amounts. An avoidance transaction is a transaction or series of transactions that gives rise to a tax benefit that may reasonably constitute a misuse or abuse of any provision of the ITA, the Income Tax Regulations, the Income Tax Application Rules, a tax treaty or any other enactment relevant to computing tax.

When a misuse or abuse occurs that results in a tax benefit, the Canada Revenue Agency (CRA) is allowed to determine the tax consequences to the taxpayer, in a manner that is reasonable in the circumstances, in order to deny the tax benefit.

i. Payroll tax

Employers, including non-resident employers, are required to register with the CRA. They are also generally required to withhold and remit to the receiver general for Canada withholding tax from salaries, wages and other remuneration paid to employees (whether resident or non-resident) for employment services performed in Canada. Employers must also generally pay and remit other amounts, such as Canada Pension Plan contributions and *Employment Insurance Act* contributions.

These obligations can arise in respect of a non-resident employer that has staff temporarily in Canada, including where the non-resident employer has no permanent establishment in Canada. Where a payee is both a non-resident individual and is exempt from Canadian tax pursuant to a treaty between Canada and the payee's country of residence, the payee may be able to obtain a waiver from income tax withholding from the CRA. Relief from the obligation to make Canada Pension Plan contributions may be available if social security coverage continues in the individual's country of residence.

New relieving rules, which came into effect in 2016, can relieve a qualifying non-resident employer that has qualifying non-resident employees temporarily working in Canada from payroll withholding requirements. In general, both the employer and the employee must be resident in a country with which Canada has a tax treaty, and the employee must work in Canada for less than 45 days in the calendar year or be present in Canada for less than 90 days in any 12-month period.

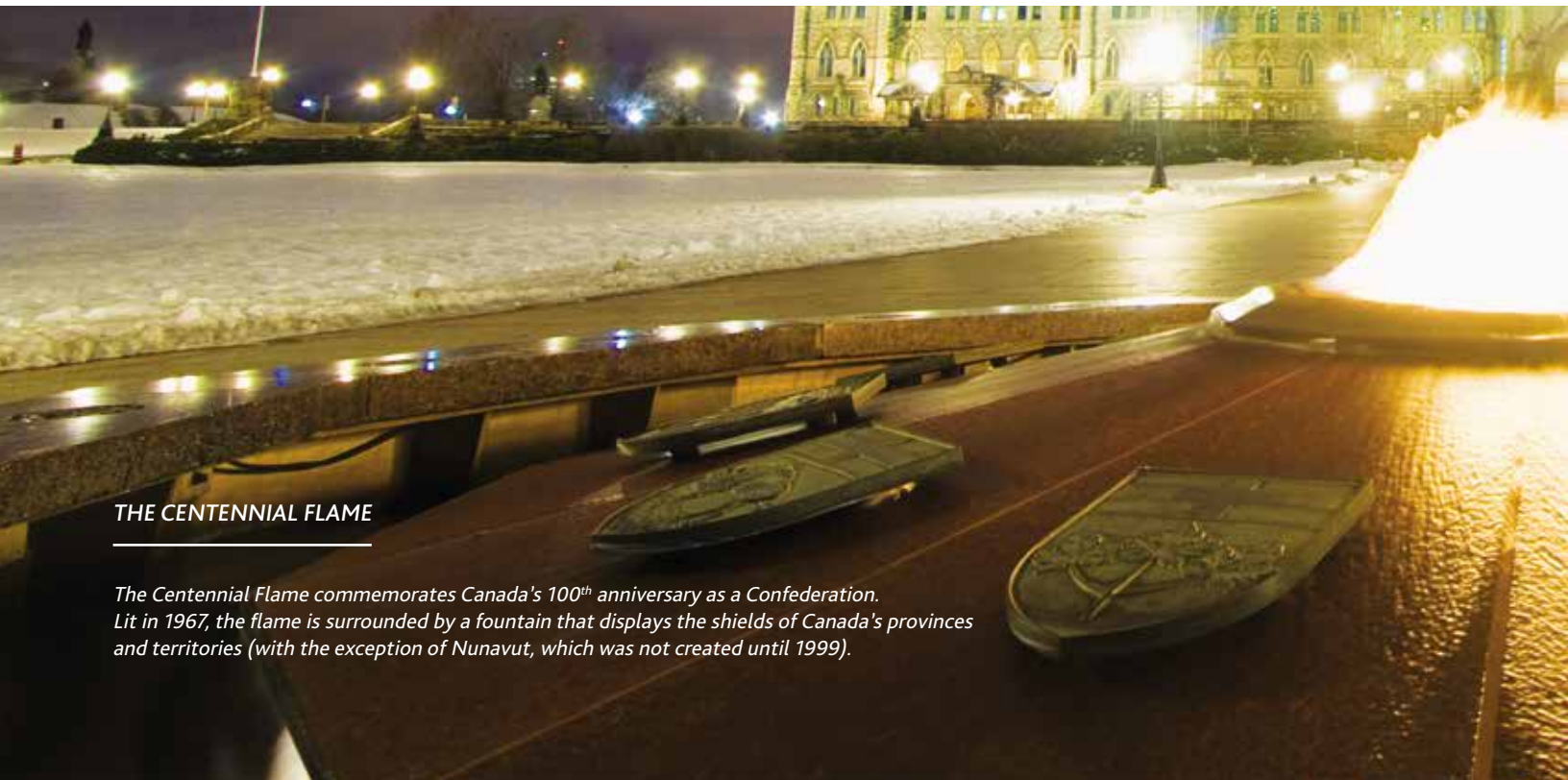
Additional withholding in respect of tax may be required for services or work performed in Québec.

j. Regulation 105 withholding

The ITA requires all persons to withhold and remit to the CRA 15 per cent of any fees, commissions or other amounts paid to non-residents for services rendered in Canada (other than salary or wages paid to an officer or employee, or a former officer or employee, which are subject to a payroll tax as described above).

This requirement applies even when the non-resident does not have a permanent establishment in Canada or is entitled to an exemption under a treaty for Canadian tax on income from performing services in Canada. The amount withheld and remitted is not determinative of the tax liability of the non-resident, but is applied on account of the tax liability (if any).

If the person performing the services is eligible for an exemption from Canadian income tax on its Canadian business income under a treaty, the person may recover the tax withheld — commonly referred to as the "Regulation 105 amount" — by filing a Canadian tax return. There is also a process whereby the non-resident can obtain a waiver of the requirement of the payer to withhold the Regulation 105 amount in certain circumstances, but the waiver must be applied for in respect of each contract and prior to any payment.



THE CENTENNIAL FLAME

The Centennial Flame commemorates Canada's 100th anniversary as a Confederation. Lit in 1967, the flame is surrounded by a fountain that displays the shields of Canada's provinces and territories (with the exception of Nunavut, which was not created until 1999).

k. Scientific research and experimental development

The ITA provides generous incentives for expenditures incurred for scientific research and experimental development (SR&ED) related to business carried on in Canada by the taxpayer. Through a system of tax deductions and credits to taxpayers, in conjunction with similar tax incentives provided under various provincial laws, Canada has an attractive tax environment in which to engage in SR&ED. These incentives are significantly enhanced for taxpayers that are CCPCs.

2. GENERAL APPLICATION OF CANADIAN TAX TO NON-RESIDENTS

Canada imposes income tax under the ITA on a taxpayer's income for each taxation year. While residents of Canada are taxed on their worldwide income, with a few exceptions, non-residents are only subject to Canadian income tax on their Canadian source income.

Non-residents who were employed or carried on business in Canada during the year or disposed of "taxable Canadian property" are liable to pay income tax on their taxable income earned in Canada, which will consist of their income from those three sources.

Non-residents are also subject to withholding tax on passive income such as dividends, rent and royalties from Canadian sources (withholding tax is discussed earlier under "Withholding tax on passive income of non-residents").

A non-resident of Canada who resides in a country that has a tax treaty with Canada may benefit from exemptions or reduced rates of tax in Canada under that treaty.

a. Carrying on business in Canada

i. Income tax

In many cases, it will be obvious whether a business is being carried on in Canada. However, there are situations where the location of the business is not as clear for tax purposes. Determining whether a non-resident is carrying on business in Canada for income tax purposes requires an analysis of all of the facts, including establishing the place where contracts are concluded and profit-generating operations are based.

In addition, a non-resident will be deemed to be carrying on business in Canada for purposes of the ITA if the non-resident does any of the following:

- Produces, grows, mines, creates, manufactures, improves, packs, preserves or constructs, in whole or in part, anything in Canada, regardless of whether the non-resident sells it or exports it from Canada without selling it
- Solicits orders or offers anything for sale in Canada
- Disposes of timber resource property, Canadian real property (other than capital property) or, in certain circumstances, Canadian resource property

If a non-resident individual carries on business in Canada in a taxation year, they may be required to file an annual Canadian income tax return. Generally, a non-resident individual is only required to file a return if tax is payable under the ITA, or if they dispose of certain taxable Canadian property.

By way of contrast, a non-resident corporation that carries on business in Canada in a taxation year must file a return for the year, regardless of whether it has realized a profit in Canada or if its income is exempt from Canadian tax under an applicable income tax treaty. If such an exemption is available, it is claimed when filing the Canadian tax return.

Where a non-resident carries on business in Canada, both Canadian federal and provincial (or territorial) income tax may be imposed.

In addition to income tax, a variety of indirect taxes could be applied to business operations in Canada, as discussed below.

ii. Value-added taxes (VATs)

The Goods and Services Tax (GST) and Harmonized Sales Tax (HST) apply to most supplies of property and services made in Canada, and the GST applies to most importations of goods into Canada. The GST applies at a rate of five per cent and the HST at a rate of 13 to 15 per cent, depending on the province in which the supplies are made or deemed to be made.

The GST/HST is intended to be a VAT and, therefore, is not generally borne by businesses. GST/HST paid by a business is generally recoverable if the business is registered for GST/HST purposes and makes GST/HST-taxable supplies. Certain supplies are exempt from GST/HST, including certain supplies of financial services, residential real property, health care and educational services. Businesses that make exempt supplies may not be permitted to fully recover GST/HST paid or payable on property and services acquired for related purposes and, therefore, will bear the burden of the tax as a cost of their business activities.

A non-resident that carries on business in Canada may be required to register for GST/HST purposes and be liable to collect and remit the GST/HST. A non-resident that is required to register, but that does not have a permanent establishment in Canada, is required to post a recoverable security with the CRA on registering for GST/HST purposes.

In addition to the GST, the province of Québec imposes a VAT in the form of the Québec sales tax (QST) at a rate of 9.975 per cent. The QST is administered by a separate tax authority under legislation distinct from the GST/HST, such that a separate registration is required. The tax base, exemptions and recoverability are similar to that of the GST/HST.

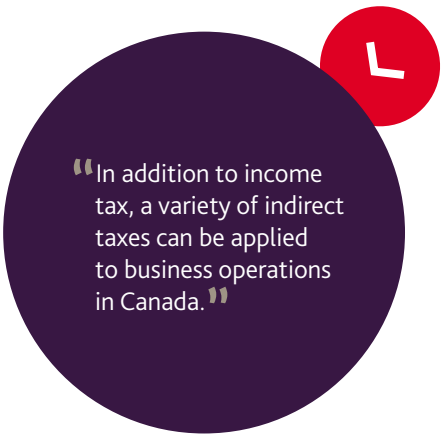
iii. Provincial sales taxes

Most supplies of goods, including most computer software, are subject to provincial sales tax (PST), while real property and most other intangible personal property are not. PST also applies to a limited range of taxable services that vary from province to province. Each province also provides for different tax exemptions, though all provinces have a general exemption for goods purchased for resale purposes.

British Columbia, Saskatchewan and Manitoba each impose their own form of PST similar to state sales and use taxes in the U.S. British Columbia imposes its PST at a rate of seven per cent, Manitoba at a rate of eight per cent, and Saskatchewan at a rate of five per cent — though the rates can vary for certain supplies. There must be a degree of connection to a province in order for a seller to be obliged to register to charge and collect the PST for that province. The required degree of connection depends on the provincial rules.

iv. Books and records

Persons carrying on business in Canada must maintain books and records regarding their Canadian operations at a Canadian place of business — or otherwise make them available for audit by the CRA. Recent court decisions have confirmed the CRA's ability to make wide requests for documents and information in the context of an audit. Failure to comply with such a request may result in the documents and information being inadmissible in the defence of an assessment for tax.



b. Taxable Canadian property

A non-resident is generally taxed in Canada on any capital gain from the disposition of "taxable Canadian property." For this purpose, "taxable Canadian property" includes:

TAXABLE CANADIAN PROPERTY

i. Real property or resource property located in Canada.

ii. Eligible capital property or inventory that was used in carrying on a business in Canada (with some limited exceptions).

iii. A share of the capital stock of a corporation (other than a mutual fund corporation) that is not listed on a designated stock exchange, or an interest in a partnership or trust (other than a mutual fund trust or an income interest in a trust resident in Canada) at a particular time if, at any time during the previous 60-month period, more than 50 per cent of the fair market value of the share or interest was derived directly or indirectly from certain Canadian properties (e.g., real property situated in Canada, Canadian resource properties, timber resource properties, or options or interests in such properties).

iv. A share of the capital stock of a corporation listed on a designated stock exchange, a share of a mutual fund corporation or a unit of a mutual fund trust at a particular time if both of the following conditions applied at any time during the previous 60-month period:

- The taxpayer — including people not dealing at arm's length with the taxpayer — owned 25 per cent or more of the issued shares or units of any class of the capital stock of the corporation, or more than 25 per cent of the issued units of the trust.
- More than 50 per cent of the value of the shares or units was derived directly or indirectly from certain Canadian properties — e.g., real property situated in Canada, Canadian resource properties, timber resource properties, or options or interests in such properties.

v. Options or interests in the properties described in (i) to (iv).

A non-resident that disposes of taxable Canadian property is generally subject to notification and withholding tax requirements. Subject to certain exceptions, the ITA requires a non-resident who disposes of taxable Canadian property to notify the CRA of the disposition not later than 10 days after it occurred. A non-resident vendor will also be required to remit to the CRA an amount on account of its tax payable or provide appropriate security.

Once the non-resident has given the required notice and paid the required amount, the CRA will issue a certificate of compliance — commonly known as a "Section 116 certificate" — to the non-resident vendor. If a Section 116 certificate is not obtained, the purchaser must remit to the CRA 25 per cent of the gross purchase price within 30 days of the end of the month in which the disposition occurs. The purchaser also has the right to withhold this amount from the purchase price or otherwise recover the amount from the non-resident vendor.

It is usually advantageous for the non-resident to obtain a Section 116 certificate from the CRA, since a certificate will be issued based on a payment of an amount calculated with reference to the gain arising from the disposition. Without the Section 116 certificate, the tax withheld by the purchaser is based on the gross selling price of the property. These withholding obligations and notification requirements apply even if a loss arises on the disposition. However, they generally do not apply to certain dispositions of taxable Canadian property that would otherwise be exempt from Canadian tax under Canada's tax treaties.

3. CANADIAN TAXATION OF A CANADIAN RESIDENT SUBSIDIARY

a. Income tax liability

A subsidiary that has been incorporated anywhere in Canada is considered to be resident in Canada for income tax purposes. It is subject to federal and provincial/territorial taxation in Canada on its worldwide income in the manner indicated previously in the discussion on Canada's general tax rules.

Canada's corporate tax rates have been gradually reduced in recent years and are now relatively low. Combined federal and provincial/territorial rates on general business income of a corporation are currently between 25 and 31 per cent, and range between 26 and 27 per cent for the most populous provinces of Alberta, British Columbia, Ontario and Québec.

b. Business and property income

The ITA provides that a taxpayer's income from a business or property is the profit from that source for the taxation year. "Profit" is to be computed initially using applicable general commercial and accounting norms, but is subject to many specific adjustments under the ITA.

c. Capital gains and losses

Capital gains receive preferential treatment under the ITA since only 50 per cent of a capital gain — also referred to as a "taxable capital gain" — is included in income. A capital gain is the amount by which the proceeds of a disposition of a capital property exceed its adjusted cost base and reasonable costs of disposition.

Fifty per cent of a capital loss — also referred to as an "allowable capital loss" — is deductible but generally only against taxable capital gains. The amount by which taxable capital gains exceed allowable capital losses incurred in a taxation year is included in the corporation's income and is subject to tax at the regular rates. Where allowable capital losses exceed taxable capital gains, the excess, or net capital loss, may be carried back three years and carried forward indefinitely, but may only be used to offset taxable capital gains of those other years.

d. Deductibility of expenses

In general, in order to be deductible, expenses must be incurred in the year for the purpose of gaining or producing income from business or property. Generally, only current expenses are deductible in computing taxable income. Capital expenditures are not generally deductible, although an amount representing depreciation may be deducted pursuant to the capital cost allowance (CCA) regime, which is discussed in more detail later in this section.

The accounting and tax treatment of expenses are not always the same:

i. Meals and entertainment expenses

Generally, only 50 per cent of food and entertainment expenses may be deducted under the ITA, even if they were incurred solely for bona fide business purposes.

ii. Interest

Generally, interest is deductible only to the extent that it is paid or payable on a debt incurred for the purpose of earning income from business or property. A number of restrictions may apply. For example, the "thin capitalization" rules restrict the interest deduction that a corporation resident in Canada can deduct on a debt owing to a "specified non-resident."

For taxation years beginning after 2012, the permissible amount of debt to specified non-residents is one and a half times the equity. In general, interest on debt in excess of this limit is non-deductible and deemed to be a dividend from which the Canadian payer must withhold tax (see "Withholding tax on passive income of non-residents").

Specific rules apply for the purpose of calculating both the amount of debt and equity affected by these restrictions. Canada also has specific withholding tax rules on certain back-to-back loan arrangements involving non-residents.

iii. Loss carry-overs

Losses realized from business or property are fully deductible in the year that they are incurred. To the extent that all or any portion of these losses remain unused and were incurred in or after 2006, they may be carried back three years and forward 20 years. For losses arising before 2006, the carry-forward period is shorter, ranging from seven to 10 years depending on the circumstances. Capital losses may only be deducted against capital gains and may be carried back three years and forward indefinitely.

The ITA restricts the ability of a corporation to use loss carry-overs after control of the corporation has been acquired. In general terms, losses from property do not survive an acquisition of control, while business losses incurred before the acquisition of control may only be used to offset income after the acquisition of control from the same or a similar business.

e. Capital cost allowance (CCA)

The ITA explicitly disallows the deduction of capital expenditures with limited exceptions. For example, instead of claiming a deduction for depreciation, the ITA permits the deduction of CCA. For this purpose, the Income Tax Regulations (the Regulations) require the grouping of depreciable assets into various classes.

A deduction for CCA may be claimed annually based on the total undepreciated capital cost (UCC) of each asset class at the rate prescribed by the Regulations. CCA is generally computed on a declining-balance basis and, in most cases, only half of the amount that is normally deductible can be claimed in the first year that an asset is acquired.

In addition, CCA may only be claimed on an asset when the asset is "available for use" for the purpose of earning income, as that term is defined in the ITA. Detailed rules specify when a particular property becomes "available for use." CCA is a discretionary deduction, thus the taxpayer is not required to claim it in a particular year.

When a depreciable property is sold, the proceeds of disposition are deducted from the UCC of the class. If that deduction results in a negative balance for the class, the negative balance may be included in income as a recapture of CCA. A resulting positive balance may be deducted from income as a terminal loss if no assets remain in the class. The disposition of depreciable property may also give rise to a capital gain.

f. Repatriation of funds: Dividends

The ITA generally imposes a 25 per cent withholding tax on dividends paid by a Canadian subsidiary to its non-resident shareholder. This rate may be reduced by a treaty. For example, under the Canada-U.S. Tax Treaty, the rate of withholding tax on a dividend paid by a wholly owned subsidiary may be reduced to five per cent. The Canadian subsidiary is required to deduct or withhold this tax from the dividend.

g. Repatriation of funds: Paid-up capital

A Canadian subsidiary of a non-resident shareholder may distribute paid-up capital without Canadian withholding tax, even if the subsidiary has undistributed earnings and profits. A number of corporate law and tax requirements must be satisfied in connection with a return of capital.

h. Management, rental and royalty payments

The ITA generally imposes a 25 per cent withholding tax on the payment of management fees, rent and royalties, which is subject to reduction under Canada's tax treaties. Under many of Canada's tax treaties, management fees charged by a non-resident parent to a Canadian subsidiary are not subject to Canadian withholding tax if the non-resident does not have a permanent establishment in Canada.

i. Inter-corporate loans

i. Loans from non-resident parent to Canadian subsidiary

The "thin capitalization" rules in the ITA may disallow a deduction for interest payable by a Canadian subsidiary on debts owing to a "specified non-resident person" if such debts exceed certain limits.

Subject to an applicable tax treaty, a Canadian subsidiary must withhold tax on interest paid to non-arm's-length parties or on participating debt interest. A notable exception is available for U.S. residents under the Canada-U.S. Tax Treaty, which eliminates withholding tax on interest paid by a Canadian subsidiary to a U.S. parent, provided that the U.S. parent qualifies for the benefits of that treaty and the interest is not participating debt interest.

ii. Loans from Canadian subsidiary to non-resident parent

If a Canadian subsidiary lends money to its non-resident parent and the loan is not repaid within one year (from the end of the subsidiary's taxation year during which the loan was made), the entire principal amount of the loan will be deemed to be a dividend paid to the parent, and withholding tax will be payable on the amount of the deemed dividend.

Even if the full principal amount of the loan is repaid within the time required, if an appropriate interest rate was not charged, a deemed taxable benefit may arise — which would result in a deemed dividend and Canadian withholding tax.

4. CANADIAN TAXATION OF A BRANCH OPERATION

A non-resident corporation that carries on business in Canada must pay Canadian income tax on income earned in Canada. Generally, however, Canada's tax treaties provide that a corporation's business profits will only be subject to Canadian income tax to the extent that they are attributable to a Canadian permanent establishment.

a. Permanent establishment

Whether a Canadian permanent establishment exists depends on the facts. Generally, a permanent establishment is a fixed place of business through which the business of the non-resident is wholly or partly carried on. Tax treaties generally provide that a permanent establishment includes a place of management, a branch, an office, a factory or a workshop. Under many of Canada's tax treaties, a building site or construction or installation project also constitutes a permanent establishment, but generally only if it lasts more than 12 months. As such, depending on the nature of its activities, a branch operation in Canada will often have a permanent establishment in Canada.

A permanent establishment can arise in many other circumstances as well. For example, the CRA considers computer equipment — such as a server that connects to the Internet — to be tangible property having a physical location. Such equipment may therefore constitute a non-resident person's place of business if it is at the disposal of the person (in other words, if it is owned or leased and used by the person). On the other hand, the mere use of a computer or server owned by a third party will not generally constitute a fixed place of business of the non-resident if the computer or server is not at the non-resident's disposal.

Agents and employees in Canada may themselves constitute permanent establishments in some circumstances — namely in cases where such a person has, and habitually exercises, authority to conclude contracts in the name of the non-resident. Care is required here, but in the appropriate circumstances a non-resident corporation will not be considered to have a permanent establishment in Canada by reason of having sales representatives in Canada — provided the representatives do not have or habitually exercise authority to conclude contracts in the name of the non-resident.

Under the Canada-U.S. Tax Treaty, if a U.S. enterprise is providing services in Canada and is not otherwise found to have a permanent establishment in Canada, it will nevertheless be deemed to be providing the services in Canada through a permanent establishment if:

- The services are provided by an individual who is present in Canada for an aggregate of 183 days or more in any 12-month period and more than 50 per cent of the gross active business revenue of the enterprise is derived from such services.
- The services are provided in Canada for an aggregate of 183 days or more in any 12-month period with respect to the same or a connected project for customers who are either resident in Canada or who maintain a permanent establishment in Canada.

b. Branch tax

In addition to Canadian federal and provincial income tax, a non-resident corporation carrying on business in Canada through a Canadian branch operation is subject to a branch tax. Under Part XIV of the ITA, the branch tax is 25 per cent of after-tax income that is not reinvested in Canada. Where the rate of withholding tax on dividends is reduced by a tax treaty, as is usually the case, the rate of the branch tax is often reduced to the same rate.

The ITA generally provides that branch tax is levied on the after-tax Canadian earnings of the business carried on in Canada, less any amounts that are reinvested in the Canadian business. A tax treaty may modify the method of calculating the earnings for branch tax purposes. In addition, a tax treaty may exempt the first $500,000 of a non-resident corporation's income from branch tax.

The branch tax is intended to approximate the Canadian withholding tax that would have been payable on dividends paid by a Canadian-resident subsidiary to its non-resident parent. In the absence of this branch tax, a Canadian branch could be more tax-efficient than a Canadian subsidiary.

A branch is not a legal entity, and the financial and tax accounting for branches may be more complex than for a Canadian subsidiary. For example, the determination of the branch's proportionate share of the corporation's overall general and administrative expenses can raise difficult questions. Non-resident corporations wishing to carry on business in Canada through a branch face the potentially serious practical problem of preparing financial statements for the branch in a manner that will be acceptable to both the CRA and the tax authorities of its country of residence.

On June 26, 2012, the competent authorities of the U.S. and Canada entered into an agreement regarding the application of Article VII of the Canada-U.S. Tax Treaty. That agreement provides that the competent authorities will interpret Article VII in a manner entirely consistent with the fully authorized Organisation for Economic Co-operation and Development

approach. A description of the ramifications of this agreement and, more particularly, the taxation benefits to U.S. corporations carrying on business through a permanent establishment, is beyond the scope of this publication. However, this agreement should be taken into consideration when deciding whether to carry on business operations in Canada through a branch rather than a Canadian subsidiary.

c. Books and records

When a corporation carries on business through a Canadian branch, all of its books and accounting records with respect to its Canadian operations must be kept at its Canadian place of business, or other designated place. They must also be made available for audit by the CRA.

d. Taxation of non-resident employees of a branch

The taxation of employees of a branch depends on whether the employees are, or become, Canadian residents. Residency is generally determined based on the extent of the residential connections with Canada. However, an individual may also be deemed to be a resident of Canada, for example, by sojourning in Canada for 183 days or more in the year.

Where an individual is a resident of Canada and continues to be a resident in another country — in other words, if the individual is a dual resident — Canada's tax treaties contain tiebreaker rules for determining where the individual will be considered a resident for tax purposes. Where an individual is a dual resident, the tiebreaker rule in a particular tax treaty may result in that individual being regarded as non-resident in Canada.

Generally, a treaty tiebreaker rule provides that an individual is resident in the jurisdiction in which they have a permanent home available to them. If the individual has a home in both or neither places, then the next consideration is the individual's centre of vital interests — that is, the state in which their personal and economic ties are closer. If these considerations are not determinative, certain treaties will then consider the individual's habitual abode, followed by their citizenship. Failing this, the respective tax authorities must be called upon to settle the matter.

Employees who move to Canada and become Canadian residents are taxable on their worldwide income. On the other hand, employees who are non-residents of Canada are taxed only on their Canadian source income, which would include remuneration received for employment duties they physically exercise in Canada. However, in some situations, a tax treaty may deny Canada the right to tax such remuneration. For example, under the Canada-U.S. Tax Treaty, Canada will generally not tax a U.S. resident employee of a U.S. employer on their employment income for a particular calendar year if either of the following conditions are met:

- The remuneration does not exceed $10,000 in respect of employment in Canada during the particular calendar year.
- The employee is present in Canada for periods that do not exceed 183 days in that year, and the remuneration is not borne by a Canadian branch.

Canada's other tax treaties generally apply rules similar to those of the Canada-U.S. Tax Treaty, with the exception of the $10,000 safe-harbour rule. As a result, Canada's tax treaties will often deny Canada the right to tax non-resident employees temporarily working in Canada — provided they are in Canada for less than 184 days and their remuneration is not borne by a Canadian branch.

This exemption does not preclude the obligation of the employer, whether resident or non-resident, to withhold income tax from a U.S. resident's remuneration for the services performed in Canada — unless a waiver is obtained from the CRA, or relief is provided by the new payroll exemption for qualifying non-resident employers and employees that became effective in 2016. Other payroll source deductions may also apply subject to certain exceptions.

e. GST/HST

Non-resident corporations with a permanent establishment in Canada are deemed to be resident in Canada for GST/HST purposes, and therefore may be required to register for and collect GST/HST on all taxable supplies of property and services made through the permanent establishment. Special rules may require self-assessment for GST/HST on intangible property and services sourced from outside of Canada.

f. Unlimited liability companies

In some circumstances, it may be advantageous to incorporate a Canadian subsidiary as an unlimited liability company (ULC). These special corporate vehicles are available under the laws of the provinces of Alberta, British Columbia and Nova Scotia.

A ULC may be considered to be a flow-through or fiscally transparent entity for U.S. tax purposes. However, for Canadian purposes, a ULC is not fiscally transparent and is taxed as a Canadian corporation. As well, certain benefits under the Canada-U.S. Tax Treaty are not available to ULCs. For general information on ULCs, see the "Business structures" chapter.

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F: MERGERS & ACQUISITIONS

Canada is an ideal location in which to establish and grow a business, including by way of mergers and acquisitions. There are a number of advantages to choosing Canada:

- It has strong international trade arrangements and ties.
- Businesses operating in Canada have access to a large market across North America due to the North American Free Trade Agreement.
- Canadian banks and financial institutions are open to financing investment and expansion, and are frequently ranked as the soundest financial institutions in the world.
- The country's business operating costs have historically been the lowest in the G-7.
- Canada has one of the world's most attractive tax regimes.

A COUNTRY UNITED

Key to the unification of Canada's provinces was the construction of a trans-Canadian railway. It was completed in 1885 at Craigellachie, British Columbia.

1. PLANNING A PRIVATE M&A TRANSACTION

a. Structuring of M&A for a private Canadian company

There are two common forms used to structure mergers and acquisitions of private businesses in Canada: share purchase transactions and asset purchase transactions.

In a share purchase transaction, the buyer purchases all (or the majority of) the issued and outstanding shares of the target corporation from its shareholders. An asset sale involves the negotiated purchase of the assets (or certain assets) of a company without acquiring the entity that owns them. An asset purchase transaction is typical when only a single property or division is of interest, or the new owner wishes to cap legacy liability exposure. A third and less commonly used form is the combination of two corporations through an amalgamation under corporate statute.

The choice of form is a threshold issue that is determined through negotiation between a buyer and seller, which typically involves significant input from the parties' tax advisers.

For tax reasons, buyers generally prefer asset transactions — unless the buyer is specifically looking to acquire certain tax attributes of the target — while sellers generally prefer share transactions. The transaction parties need to consider that asset transactions are generally more complex than share transactions, since they require parties to obtain a larger number of consents and to transfer a larger number of diverse assets. However, asset transactions may be the only practical structure when the parties want to transfer some (but not all) of the assets of a business. As well, the additional due diligence required in the context of a share transaction may impose longer pre-acquisition time frames.

b. Due diligence

Due diligence is the process undertaken by the buyer to familiarize itself with the business and assets of the seller or target. The scope of the due diligence generally varies depending on the nature of the business being acquired, the industry in which the business operates, and other legal and business considerations. In addition, the nature of the due diligence is dictated by the structure of the acquisitions.

In the context of a share transaction, legal due diligence typically involves:

- A review of the corporate records of the target corporation (as described in more detail below).
- A review of any contract or agreement to which the target corporation is a party.
- Public searches in connection with corporate status, encumbrances and litigation.
- A review of the target corporation's intellectual property.
- A review of certain governmental records regarding the target corporation that can only be accessed with the target corporation's written consent (related, for example, to tax, employment or the environment).
- Other diligence as dictated by the nature of the target corporation's business. Corporate records should be reviewed to verify the number and type of issued shares of the target corporation. A review of these records (particularly the board of directors' minutes) may also provide valuable insight into the target corporation's business, and may help uncover potential liabilities that can be addressed prior to the closing of the acquisition.

Legal due diligence in the context of an asset transaction is generally the same, though the scope is concentrated on matters that are related to the assets or liabilities being acquired or assumed.

c. Amalgamation

An amalgamation is a statutory means to effect a merger and acquisition by consolidating existing corporations into a new corporation. As mentioned earlier, this method is a less commonly used alternative to share and asset transactions. In Canada, the term "amalgamation" does not have the same broad meaning as it does in the United States, where it is generally used to describe mergers and acquisitions effected by a number of legal means.

2. REGULATORY APPROVALS

a. Ontario *Bulk Sales Act*

Ontario's ***Bulk Sales Act*** (BSA) was designed to protect a business' trade creditors when the business disposes of its "stock in bulk." The BSA applies to every sale in bulk outside of the ordinary course of business. The sale of a business'

assets in the context of an M&A transaction will almost always be deemed to be a sale in bulk outside of the ordinary course of business. When a seller fails to comply with the BSA, a transaction is voidable and the buyer may be liable to the creditors of the seller.

To comply with the BSA, the buyer must:

- Obtain a statement of trade creditors from the seller
- Ensure that adequate provisions are made for payment of creditors
- Complete post-closing filings

A seller may also be exempted from compliance with the BSA by obtaining a court order that provides for such an exemption.

b. *Investment Canada Act* and the *Competition Act*

Acquisitions or investments that exceed certain thresholds are subject to review under the *Investment Canada Act* and pre-notification under the *Competition Act* — see the "Regulation of foreign investment" chapter for further details. Canadian M&A is generally based on "free market" principles, with minimal regulatory involvement.

3. TAX MATTERS

Acquisition vehicle and the use of a Canadian subsidiary

Typically, a non-Canadian buyer would establish a Canadian subsidiary to act as the acquisition vehicle. In addition to achieving business objectives, a Canadian subsidiary may provide a number of advantages to the buyer from a Canadian tax perspective. These advantages may include:

- Facilitating the deduction of interest on financing for the acquisition against the income of the Canadian target
- Creating high paid-up capital in the shares of the Canadian subsidiary to facilitate repatriation of funds back to the non-Canadian parent corporation free of Canadian withholding tax
- Positioning the buyer for a possible "bump" in the tax cost of the Canadian target's non-depreciable capital property

To take advantage of some of these benefits, it may be necessary to carry out a subsequent amalgamation of the acquisition vehicle and Canadian target.

Care is required when designing the share structure of the Canadian subsidiary and arranging for it to be properly capitalized and financed for the acquisition.

Where assets, rather than shares, are being acquired, it is even more important to consider using a Canadian subsidiary. If a non-Canadian buyer purchases Canadian business assets directly, it will be liable for debts and liabilities that arise from the operations. It will also be liable for taxation on the income of those assets and any business carried out in Canada, and will have to file Canadian income tax returns every year to report its income from Canadian operations.

By using a Canadian subsidiary to acquire the assets and to conduct the Canadian operations, the subsidiary becomes responsible for reporting the income and paying tax on the income, instead of the non-Canadian parent.

4. EMPLOYMENT AND LABOUR MATTERS

a. Buyers' obligations toward employees in a non-unionized workplace

A buyer of shares steps into the shoes of the employer. All employer obligations continue to be borne by the target corporation and all employment terms remain in existence at closing. Thus, all obligations (both to existing and ex-employees) remain with the business acquired — except to the extent assumed and satisfied by the seller pursuant to the purchase agreement. Typically, indemnity provisions will be negotiated between the seller and buyer, but the target still remains on the hook to satisfy all obligations to existing and ex-employees.

Subject to statutory successor employer rules, the buyer of assets does not inherit pre-closing obligations — except to the extent assumed by the buyer pursuant to the purchase agreement, or if in Québec. The buyer is on the hook for all obligations arising from the date of re-hiring. Again, negotiated indemnity provisions may reduce the buyer's exposure under statutory successor employer obligations, but the buyer still remains on the hook to satisfy those obligations to re-hired employees. In Québec, the buyer of assets inherits almost all pre-closing obligations. For further details about successor employer rules, see the "Re-employment" section.

b. Obligations of a buyer of shares versus a buyer of assets in a non-unionized workplace

A buyer of assets (except in Québec and subject to any contrary obligations in the purchase agreement):

A BUYER OF ASSETS

- Is free to "cherry pick" which employees, if any, will be offered employment with the buyer
- Is not required to match pre-closing terms of employment — subject always to compliance with statutory requirements
- Will not have any obligations toward employees who are not offered or do not accept employment with the buyer

A buyer of shares inherits a target with all employees, all existing terms of employment and all obligations on closing (except in Québec and subject to any contrary provisions in the purchase agreement). A share purchase does not, in itself, change — or give the buyer or target any right to change — employment status or employment terms.

c. Re-employment

For statutory purposes, generally a buyer cannot simply re-employ the employees and ignore the employees' service history. However, for other purposes, a buyer may be able to do so (except in Québec). Technically (again, except in Québec) a buyer is not obliged to recognize prior service for non-statutory purposes — for example, when considering eligibility for stock option awards or under internal severance policies.

At the federal and provincial levels, for both unionized and non-unionized workplaces, statutory "successor employer" provisions ensure that for statutory purposes the sale of a business — whether via share or asset purchase — does not interrupt employment for employees of the acquired business who are employed by the buyer after closing. Some exceptions apply, such as when there is a prolonged break in service between the last day of employment with the acquired business and the first day of employment with the buyer — Ontario, for example, requires at least a 13-week period of non-employment to "break the chain."

In the absence of a sufficient break in service, terminating employment at or before closing and then re-hiring after closing will not suffice to "break the chain" of service for statutory purposes.

In a non-unionized environment, if the buyer wants to "break the chain" for non-statutory purposes, the buyer must include enforceable written provisions in an employment agreement or hiring letter, clearly specifying that prior service will not be recognized except to the minimum extent required by applicable employment or labour standards legislation.

In Québec, the *Civil Code* and labour standards legislation generally prohibit a buyer of assets from re-employing the employees as new employees without recognizing their seniority with the acquired business for all purposes.

d. Employment agreements or outstanding claims

Typically, termination or severance and change of control obligations are embedded within employment agreements or hiring letters. A clear understanding of all termination or severance-related obligations is critical.

Because of the "reasonable notice" concept — for further information, see the "Employment law" chapter — these obligations are often much more significant than they might first appear.

A buyer should carefully review all termination or severance-related provisions (and potential enforceability risks) under all employment agreements, hiring letters, variable compensation or incentive plans (cash-based and equity-based), and policies. Note whether change of control provisions or agreements are "single trigger" (triggered by closing, regardless of re-employment) or "double-trigger" (triggered only if the employee is not re-hired, or is terminated at or within a specified period after closing).

A buyer should also pay attention to pending lawsuits, outstanding employee complaints, government investigations and recent terminations — unless a release agreement has been executed by the ex-employee.

e. Changing terms of employment

As noted previously, a buyer of assets has significant control over terms of employment at the point of re-hiring (except in Québec). Ideally, such changes will be implemented through pre-hiring employment agreements or hiring letters. However, a buyer of shares does not have any automatic right to alter terms of employment after closing.

In a non-unionized workplace, in order to change terms of employment post-closing, the buyer must follow proper notification processes.

If changes affect essential terms of employment and are disadvantageous to an employee — for example, a 15 per cent salary reduction — the buyer may face a claim from an objecting employee. Even if the employee does not object, if a dispute later arises, certain changes may be unenforceable unless "fresh consideration" is provided to the employee (for example, a modest signing bonus or stock option grant). Mere continuation of employment is not sufficient "fresh consideration." Failure to properly implement changes can result in a claim for breach of contract, or constructive dismissal (if the change or cumulative changes amount to a fundamental change). Thus, the introduction of significant changes needs to be managed carefully so as to minimize risks and maximize retention of desired employees.

f. Pensions and benefits

Existing pension and benefit entitlements will have to be addressed if shares of the target corporation are acquired or, in the context of an asset purchase, if there is a collective agreement or employment agreements that require such pensions and other benefits to be provided. The manner in which these pension and benefit entitlements are addressed depends on the specific facts and circumstances of the transaction, and of the parties involved. A buyer should consult with its advisers at an early stage to consider these matters.

5. DISTRESSED M&A

The buyer of a seriously financially distressed business in Canada faces many of the same challenges that would be presented in the U.S. or other jurisdictions. If the target is insolvent or near insolvency, time is critical in preserving, as best one can, enterprise value. Ideally, as a buyer of a distressed business, you want to gain the maximum leverage in controlling the speed and trajectory of the sale process. However, exercising such control in a Canadian court-supervised process is inherently problematic since the court will always prefer to expose the target to the largest market for the longest time possible in the circumstances.

The use of "toe hold" distressed lending or investing can give you an initial advantage insofar as you have the opportunity to become well-known to the target's management and stakeholders, in order to gain access to valuable due diligence on the target and to participate in the formulation of the sale process. Stepping up to be the "stalking horse bidder" may also permit you to participate in the formulation of the subsequent competitive sale process from a structural and timing perspective, and to set a price floor and a modest break fee.

The use of credit bidding in a Canadian court-supervised sale process — whether in reorganization or receivership proceedings — continues to grow. Canadian court-supervised sale processes in many instances have adopted the standard features of the U.S. sale process (e.g., with a competitive or auction model being utilized). It is important to note that Canadian courts have only recognized credit bidding in circumstances where assets being sold were fully charged by the security underlying the credit bid. Equally, the credit bid process should not be used as a foreclosure process and for that reason it will likely only be used within the context of a competitive sale process.

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G: EMPLOYMENT LAW

Employment and labour law can be complex for foreign and domestic employers alike. Before becoming an employer in Canada, there are certain logistical requirements that must be met.

Firstly, an employer must be registered with the Canada Revenue Agency, or Revenu Québec if the employee is based in Québec. Depending on the size of the payroll, an employer may also have to register with other provincial taxation authorities.

WORKFORCE

Canada boasts a well-educated and diverse workforce.

The applicable employment and labour laws are determined by the nature of the employer's business. The vast majority of employers are governed by provincial laws, and an employer operating in more than one province must comply with each province's legislation. Approximately 10 per cent of the Canadian workforce is governed by federal laws, such as the *Canada Labour Code* and the federal *Employment Equity Act*. Even if an employer is federally regulated, it must still conform to certain provincial laws related to matters such as workers' compensation.

While the laws are substantially similar across the country, there are important variations regarding minimum wage and hours, statutory leaves, vacation entitlements, entitlements upon termination, and health and safety. This adds significant complexity to managing a workforce in Canada.

The bulk of the discussion that follows assumes that the employer is non-unionized, as there are very different requirements imposed on the employer once a union and a collective agreement are in place. Some of these requirements are discussed later in this chapter under "Labour relations." In many cases, the collective agreement imposes its own regime, which replaces the statutory regimes discussed here.

1. THE CONTRACTUAL NATURE OF THE EMPLOYMENT RELATIONSHIP

Canadian employment law is based on the premise that the employment relationship is a contract. The applicable legislation will imply certain terms and, in the absence of written contractual terms, the courts and tribunals will imply a host of contractual obligations on both parties. The general law of contracts — such as offer and acceptance, duress, and frustration — also plays an important role in employment law.

While there are some narrow exceptions for certain industries and sectors, most employment contracts are assumed to be of indefinite duration and can only be terminated by specific events, such as:

- Resignation of the employee
- Termination for just cause
- Termination without cause
- Death
- Frustration of the employment relationship

Certain employees governed by federal, Québec and Nova Scotia laws enjoy significant protection against termination without cause, which is not afforded to employees in other jurisdictions. These protections are outlined later in this chapter.

Limited-term contracts are often the exception to the norm and need to be established on the evidence. The best evidence is, of course, a written agreement. However, the courts have on occasion deduced that a term contract exists based on the parties' conduct, job titles and/or the wording in a job posting. Term contracts come to an end at a predetermined point in time or, in some cases, when a specific event or milestone is reached. Subject to certain statutory requirements, limited notice or other formalities are required upon the end of a term contract. Nonetheless, great care should be taken in drafting offers for this type of employment. One significant risk employers face is the requirement to pay out the balance of the term in the event of an employee's early termination without cause. This can be avoided through a carefully drafted written agreement.

2. TERMINATION OF EMPLOYMENT

As previously stated, most employment relationships are considered to be of indefinite duration.

There is no "at will" employment in Canada — some courts have even found that "probationary" employees are entitled to a fair opportunity to demonstrate their competence. In most cases, in order to terminate employment without notice or compensation in lieu, the employer must prove just cause. There is a significant onus on the employer to provide compelling evidence. The vast majority of employer-initiated terminations will be without cause, and the employer will be required to provide working notice or monetary compensation in lieu of notice.

a. Termination without cause

In most cases, an employee who is terminated without cause is entitled to notice of termination or pay in lieu of notice. However, as mentioned above, certain employees governed by federal, Québec or Nova Scotia laws have special protections against terminations without cause, of which employers in those jurisdictions need to be aware.

i. General

In general, an employee's entitlement to notice of termination is derived both from statute and the common law (i.e., "reasonable notice"). The applicable provincial and

federal employment statutes prescribe only the minimum period of notice or payment in lieu of notice that must be given to a dismissed employee. The parties are not permitted to "contract out" of the statutory minimums. Statutory minimums usually range from one to eight weeks of notice. In Ontario, some employees are also entitled to an additional lump-sum payment known as "statutory severance pay," which ranges from five to 26 weeks of regular earnings.

There may be separate and additional obligations in situations involving the termination of a group of employees — including the obligation to provide additional notice, and the obligation to provide advance written notice to a specific government department.

It is a common and serious mistake to assume that the statutory minimums are the employer's only obligations in the event of a termination without cause. Employees also have rights under common law.

In the absence of a contractual stipulation to the contrary, an employer will routinely be obliged by judges to provide far greater notice periods under common law than those prescribed by the applicable statute. Factors that the courts consider in determining what constitutes reasonable notice include:

REASONABLE NOTICE

- Years of service
- Seniority within the organization
- Salary and other compensation
- Employee's chances of finding similar, suitable alternative employment
- Employee's health
- Employee's education, experience and expertise
- Promises of job security, even if not enforceable at law
- Whether the employee was enticed from secure employment

There have been cases where employees with long-term service have been awarded more than 24 months of notice, or compensation in lieu of notice. If the employee is successful in finding other employment within that time, the earnings from the new employment will be deducted from the compensation payable by the employer. However, these "mitigation earnings" do not reduce the employer's obligation to provide the minimum statutory requirements of pay in lieu of notice and, in Ontario, severance pay. An employee's failure to act reasonably in terms of their efforts to mitigate can reduce the damages payable by the employer.

Provincially regulated employees outside of Québec can contract out of the common law obligation to provide reasonable notice. However, the contract cannot and should not make any effort to exclude the statutory minimum notice or severance pay. Where a contract does not comply with the minimum standards of the applicable statute, the offending provision will be considered void. The courts will not simply impose the minimum statutory notice, but will award pay in lieu of the common law "reasonable notice," which is almost always significantly greater than the notice period or pay in lieu that the employer intended.

ii. Québec

The *Civil Code of Québec* specifically provides that employees may not contractually waive in advance their right to obtain damages for insufficient notice of termination, or in instances where the manner of "resiliation" (the *Civil Code* word for termination) is abusive. Therefore, it is important that a contractual termination clause reflects the prevailing norms in the jurisprudence regarding what is a fair and appropriate notice of termination.

It should be noted that in Québec, an employee who has at least two years of uninterrupted service (with the same employer) and who believes that he or she was dismissed without just cause can challenge the employer's decision. The employee may apply to the Commission des normes du travail (Québec's provincial labour standards board) in order to seek reinstatement or damages in lieu of reinstatement.

Therefore, when employees have more than two years of uninterrupted service, an employer needs good and sufficient cause to terminate their employment — or it must be able to demonstrate that the termination was a result of a genuine restructuring, such as an overall reduction in force.

iii. Nova Scotia

In Nova Scotia, an employee with 10 or more years of service may seek reinstatement or damages in lieu of notice through the Nova Scotia Labour Standards Tribunal. To defend such an order, the employer must prove that it had good reason or just cause for the termination. The Tribunal has the power to order reinstatement with back wages, or an appropriate alternate remedy if the employee does not wish to return to work. The employer can attempt to avoid reinstatement — but not compensation for reasonable notice — by proving that the termination was related to a genuine restructuring, such as downsizing or plant closure.

iv. Federally regulated employers

Federally regulated employers — such as banks, interprovincial trucking companies and airlines — are governed by the *Canada Labour Code*. Non-managerial employees with 12 months of service may challenge their termination and seek reinstatement from the Canada Labour Board, or seek damages in lieu. The onus is on the employer to establish just cause for the dismissal.

The Canada Labour Board has established significant case law, which it will consider in its review of the employee's job functions and role in the organization to determine whether an employee was managerial. Job titles are not determinative of the issue. Many mid-level managers would not be considered to be true managers for the purposes of the *Canada Labour Code*.

b. Termination with cause

If an employer wishes to terminate an employee for misconduct without providing notice or compensation in lieu, the employer must establish just cause. In the courts and tribunals in Canada, this is a difficult burden.

Effectively, the employer must establish that the employee's conduct amounted to a repudiation of the employment contract. Examples of just cause include:

- Serious acts of dishonesty
- Gross misconduct, such as violence or harassment
- Breach of the duty of confidentiality
- Persistent neglect of duties
- Gross insubordination

> "The vast majority of employers are governed by provincial laws, and an employer operating in more than one province must comply with each province's legislation."

Whether conduct amounts to just cause will be determined in the context of the employee's period of service and overall work record. It is extremely difficult to terminate a long-service employee for just cause, even where they engage in serious misconduct. While employers may rely upon "after acquired cause" they may not rely upon cause known at the time of the termination unless the employer purports to terminate for such cause.

There is no such thing as "near cause" or "diminished notice" and so just cause really is an all or nothing proposition.

c. Resignation

Employees may resign their employment. While the law implies a duty to provide reasonable notice, there are very few cases where an employer has been able to obtain redress from the courts or tribunals due to inadequate notice. These cases usually involve highly placed executives or professionals, and are often coupled with serious misconduct — such as theft of a corporate opportunity, flagrant solicitation of clients or misappropriation of employer trade secrets.

d. Resignation by employee due to constructive dismissal

In certain cases, employees may resign on the basis that the employer has made unilateral and fundamental changes to an important aspect of the employment relationship — referred to as "constructive dismissal." Examples of constructive dismissal include a significant reduction in pay, changes to the structure of compensation, a relocation outside of the normal commuting area or a demotion in the corporate hierarchy (even if pay and job title are maintained).

In some cases, employees have successfully argued that workplace harassment or discrimination constitute constructive dismissal on the basis that an implied term of the employment agreement is that the employee would not be required to work in a toxic work environment.

An employee who establishes constructive dismissal is able to sue for damages equivalent to the notice the employer would have had to pay upon termination without cause.

Employers contemplating significant changes to an employment relationship should implement strategies to avoid a claim of constructive dismissal, including providing advance notice of any changes. Written contracts of employment can be used to preserve an employer's right to implement certain types of changes that would otherwise be considered a constructive dismissal.

3. DUTY OF CONFIDENTIALITY

All employees have an implied legal obligation to keep secret the confidential information of their employers. However, it is prudent to have a written agreement determining what the employer considers to be confidential information, and to implement procedures to maintain the confidentiality of sensitive information. Courts are prepared to enforce the duty of confidentiality with an injunction.

4. RESTRICTIVE COVENANTS

Employers often wish to implement post-termination restrictions on employees' business activities. These clauses are usually divided into two categories: non-solicitation and non-competition clauses. The general rule is that any restrictive covenant:

- Must be limited to what is strictly necessary to protect the employer's legitimate interests
- Must be reasonable
- Cannot be contrary to public policy

According to Canadian law, there is a strong public-policy interest in permitting individuals to work freely in the market. Therefore, courts are very reluctant to enforce restrictive covenants that they deem unreasonable. Courts typically examine reasonableness in terms of duration, scope of behaviour and geographic limits. The clause must be clear and precise. Courts will generally not "blue-pencil" or redact unenforceable clauses in order to make them enforceable, nor will they "read them down."

Non-solicitation clauses limit the employee's ability to solicit customers or other employees. Although the courts generally enforce well-drafted non-solicitation clauses, care must be used to ensure that the duration and scope of the clause are not excessive.

Non-competition provisions are enforceable only in exceptional cases. The onus is on the employer to establish why the non-competition clause is necessary, and why a non-solicitation clause is inadequate to protect its interests. Different rules apply, however, if the non-competition clause is part of an acquisition of the employee's ownership interest, or where it can be established that the purchaser required the clause in order to preserve the value of the assets or shares purchased.

In certain cases, courts will enforce a restrictive covenant with an injunction. Legal advice should be obtained regarding the proper drafting of confidentiality, non-solicitation and non-competition clauses.

5. LEGISLATION GOVERNING THE EMPLOYMENT RELATIONSHIP

The Canadian workforce is heavily regulated. As previously discussed, depending on the industry and type of business, an employer may be regulated federally, provincially or a mix of both. The following are the main types of legislation that exist in virtually every jurisdiction.

a. Employment or labour standards

All jurisdictions provide minimum standards for the terms of employment. Employment standards can be quite complex and the legislation can often be varied by obscure regulations that apply to specific industries. As well, certain exemptions apply to some types of employees, such as managers or professionals, regardless of industry. The specific provisions vary by jurisdiction, but can be verified by checking governmental Internet resources or calling the appropriate department's information line.

Typically, to avoid coercion, employees are not permitted to contract out of the minimum standard through an agreement with the employer. However, if there is a compelling business reason, it is possible to obtain exemptions to some minimum requirements by applying to the appropriate ministry or department.

EMPLOYMENT OR LABOUR STANDARDS

i. Hours of work

The statutes will typically provide for maximum hours per day and per week, as well as mandatory intervals between shifts.

ii. Overtime pay

The legislation will typically set a threshold of hours per week beyond which employees will be entitled to premium pay (typically 1.5 times the regular rate). The threshold varies across the country, but typically ranges between 40 and 44 hours per week.

The legislation in some provinces establishes methods to "average" overtime over more than one week in order to permit different types of scheduling. Time off in lieu of overtime pay, at the employee's request, is generally permitted.

iii. Public or statutory holidays

Canadians generally enjoy at least eight statutory holidays: New Year's Day, Good Friday (Friday before Easter Sunday), Victoria Day (last Monday before May 25), Canada Day (July 1), Labour Day (first Monday in September), Thanksgiving Day (second Monday in October), Christmas Day (December 25) and Boxing Day (December 26).

Remembrance Day (November 11) and the third Monday in February are holidays that are observed in many provinces. The first Monday in August is often observed as an additional holiday, although it is not a formal statutory holiday. In Québec, employees are also entitled to a paid holiday on June 24 (St. Jean Baptiste Day or Fête nationale du Québec).

Businesses are typically required to be closed on statutory holidays, although many exceptions and exemptions exist. Employers usually have to pay a significant premium to employees who work on a statutory holiday.

iv. Vacation

Employment standards laws generally prescribe minimum paid vacation entitlements. The minimum vacation entitlement is typically two weeks per year, rising to three weeks in several provinces after five years of employment. The employer may determine when employees take vacation.

The calculation of vacation pay is technical and can lead to unexpected liability for employers. Vacation pay is often a percentage of all earnings, including commissions and bonuses.

v. Pregnancy/parental leave

Most pregnant employees are entitled to 17 or 18 weeks of unpaid leave, depending on the jurisdiction. An employer cannot force or require an employee to commence their pregnancy leave early.

New parents — including the birth mother — and adoptive parents are entitled to take unpaid parental leave of 32 to 37 weeks, depending on the jurisdiction.

At the end of the pregnancy and/or parental leave, the employee is entitled to be reinstated to active employment. The rules regarding the nature of reinstatement differ slightly across jurisdictions. In some provinces, the requirement is to reinstate to the same job if it still exists, or to a comparable job if it no longer exists. In others, it is to a comparable position.

vi. Emergency leave/family responsibility/bereavement

Most jurisdictions permit employees to take a certain number of unpaid days off for personal reasons. The permitted reasons and duration differ in each jurisdiction. In some cases, leave due to the death of a family member is dealt with under a specific bereavement-leave section, while in other jurisdictions the statute establishes a variety of reasons that allow an employee to take days off. These reasons include the death of a family member, but can also include the illness or injury of the employee or immediate family members, a household crisis, or unexpected interruptions in childcare plans.

vii. Family medical leave/compassionate care leave

Employees who need time off to take care of a seriously ill or dying relative are entitled to leave without pay ranging from eight to 12 weeks, depending on the jurisdiction. Employees may be entitled to benefits under the ***Employment Insurance Act*** during this period.

viii. Military/reservist leave

All jurisdictions provide job-protected leave for members of the reserve forces who are called into active duty or are required to participate in reservist training.

ix. Sick leave/family caregiver leave and critically ill child care leave

Depending on the jurisdiction, there may be specific job protected leave granted to employees who need to take time off due to a serious personal illness or the serious illness of a child.

x. Other leaves

Other unpaid leaves are granted for circumstances such as organ donation, crime-related child death and disappearance, and family weddings (Québec).

xi. Jury duty

All jurisdictions provide job protection in order to enable an employee to serve on a jury. In addition, many jurisdictions will fine an employer significant amounts for not permitting an employee to serve on a jury.

xii. Equal pay for equal work

Canadian employers are prohibited from differentiating between male and female employees who perform substantially the same kind of work in the same establishment, requiring essentially the same skill, effort and responsibility. In such circumstances, different rates of pay are prohibited, except where differences are attributable to a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a differential based on any factor other than sex. The courts and tribunals have established that titles are not determinative and that careful regard should be paid to the actual duties.

b. Pay equity

Québec, Ontario and federally regulated employers are subject to pay-equity obligations. The scope of obligations differs with the size of the workforce. The legislation is an effort to redress the historic gender gap in compensation. In essence, it seeks to ensure that there is equal pay for work of equal value. It requires employers to analyze jobs across their organization, review them for value (based on a number of statutory criteria) and examine whether there are compensation disparities between male-dominated and female-dominated jobs within the organization. Where female jobs are underpaid, the legislation prescribes a schedule for pay increments that have to be implemented to redress the balance. Although other jurisdictions have similar legislation, the scope is limited to the public sector.

c. Human rights

Human rights codes in every jurisdiction prohibit discriminatory practices in the context of employment. Generally, these codes provide that every person has a right to equal treatment in their employment without discrimination based upon race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences (e.g., a conviction for which a pardon has been granted), marital status, same-sex partnership status, family status or disability. Discrimination on the basis of sex includes pregnancy. Virtually all jurisdictions have recently amended their human rights codes to make discrimination on the basis of gender identity and gender expression illegal. This amendment is targeted at the transgendered population.

Employees also have a right to freedom from harassment in the workplace based upon any of the prohibited grounds of discrimination — whether at the instance of the employer, an agent of the employer or by another employee.

While mandatory retirement policies were once common across Canada, they are now increasingly treated as a form of age-related discrimination. Employers are required to establish a bona fide occupational reason why an employee must retire at a certain age, as opposed to undergoing individualized fitness or aptitude tests. There is no legislated mandatory retirement age. In large part, however, pensions are structured around a presumed retirement age of 65, and it may be financially disadvantageous for an employee not to start retirement at that age.

Normally employers are required to accommodate employees to the point of "undue hardship" where a job requirement brings into play a prohibited ground of discrimination. One example where the jurisprudence is evolving is the area of family care obligations and the duty to accommodate on the basis of "family status."

Employers are expected to be vigilant about any allegations of discrimination and harassment. Where there are reasonable grounds to believe a concern exists, employers are expected to investigate fairly, promptly and competently. Depending on the results of the investigation, employers are required to implement appropriate remedial and corrective measures.

d. Employment equity

The federal ***Employment Equity Act*** provides for employment equity for women, Indigenous peoples, people with disabilities and members of visible minorities. It is designed to remove inequality in the workplace by eliminating systemic barriers facing historically disadvantaged groups. The Act applies to all federally regulated employers who employ 100 or more people. Employers must identify and remove offending policies and practices, and, in place of these policies, employers must institute positive policies and practices to achieve a proportionate representation of people from historically disadvantaged groups in their workforce.

Such employers must also file annual reports concerning the number of persons they employ and the number of persons they employ from designated groups, with a breakdown by occupational groups and salary ranges.

The Federal Contractors Program applies to suppliers of goods and services to the federal government that have 100 or more employees and are bidding on contracts worth $200,000 or more. It imposes on such private sector employers obligations to implement employment equity in the workplace. Federal contractors can be audited for compliance and, where the results are unsatisfactory, given a specific time period for remedying any gaps. Québec has also instituted the Québec Contractors Program, which is designed to promote the employment of women, visible and ethnic minorities, and Indigenous peoples.

e. Occupational health and safety

The provinces regulate workplace health and safety in Canada to ensure that employers provide a safe work environment. There are stringent rules requiring the posting of safety legislation, the existence and updating of written policies, the establishment of workplace safety committees, safety training, the use of personal protective equipment, and the handling of hazardous materials. Employers,

directors, managers, supervisors and workers all share obligations to maintain a safe workplace. The failure to maintain a safe workplace can lead to both civil and criminal consequences.

Many jurisdictions in Canada have tried to deal with workplace violence in a proactive manner. Depending on the jurisdiction and industry, an employer may have obligations to create and conduct risk assessments, institute and update policies, train employees, and introduce physical and electronic safety measures that help protect the workforce from violence in the workplace. Where there are complaints of workplace violence, employers generally have a duty to conduct a prompt, fair and competent investigation. Furthermore, in Ontario, where there are reasonable grounds to believe that an employee is at risk due to domestic violence — such as stalking from a domestic partner — the employer has an obligation to take active steps to help prevent the employee from becoming a victim.

Employers in Québec and Saskatchewan have specific obligations with respect to the prevention of psychological harassment in the workplace. In general, the laws aim to prevent egregious bullying and do not protect against the normal psychological stresses in the workplace such as performance management, and scrutiny by managers and supervisors.

Ontario and British Columbia have enacted specific provisions regarding workplace bullying and harassment in their occupational health and safety legislation. Employers have a specific obligation to establish anti-harassment policies, train their employees about the law and investigate allegations of workplace harassment. Ontario has also recently made changes to its occupational health and safety statute with a view to preventing harassment and sexual harassment in the workplace.

Under the *Criminal Code*, directors and executives may face criminal prosecution for negligence that leads to serious injury or death of an employee or member of the public because of unsafe workplace practices. Under the various occupational health and safety laws across the country, there are significant fines and penalties if an employer fails to comply with applicable legislation. Fines can exceed $500,000 per charge where death or serious injury occurs, and multiple charges can be brought. Fines in the range of $100,000 to $150,000 are common for less serious violations.

f. Canada/Québec Pension Plan

The Canada Pension Plan — or, in Québec, the Québec Pension Plan — is administered by the government and requires contributions from both employers and employees at prescribed rates. Employers are required to deduct a percentage of an employee's pensionable earnings and remit that amount to the federal government together with an equal amount contributed by the employer.

In 2016, the contribution rate — except in Québec — is currently 4.95 per cent of annual income (capped at $54,900), to a maximum of $2,544.30 for both the employer and employee. The contribution rates in Québec are slightly higher at 5.325 percent to a maximum of $2,737.05 for each of the employer and employee.

g. Private pensions

There is no statutory obligation on an employer to implement a private pension plan for its employees. Federal and provincial laws regulate the terms, conditions and administration of private pensions.

6. LABOUR RELATIONS

Canadian law recognizes the right of employees to unionize, but does not impose a union or work council on employers. Each jurisdiction has comprehensive legislation with respect to the right and process through which workers can unionize. While the legislation recognizes an employer's right to fair comment during a unionization drive, the legislation precludes "unfair labour practices," such as coercion, intimidation, threats, promises or undue influences. The labour boards closely scrutinize any employer communication during a certification drive. The line between fair comment and unfair labour practice is often difficult to ascertain.

Once an application for certification is granted, legislation imposes a temporary "freeze" preserving the status quo while the collective agreement is negotiated. Once a union is certified, the employer is required to negotiate a collective agreement that governs the workplace terms. Many jurisdictions also have a process by which the parties can be ordered to binding arbitration of the first collective agreement post-certification.

The legislation also provides for grievance arbitration of workplace disputes, and provides protections designed to preserve the union's right to represent the workers in the

bargaining unit. For example, successor-rights provisions are designed to ensure that bargaining rights survive the sale or divestiture of a business.

The Canada Industrial Relations Board, the provincial labour relations boards and various arbitration panels have developed a sophisticated body of case law interpreting both federal and provincial labour laws. Canadian labour boards and arbitrators have broad remedial powers. Although the courts have the power to review the decisions of the labour boards, considerable deference is given to their specialized expertise.

7. PUBLIC HEALTH INSURANCE

Canada has a public health-care system that provides almost all critical medical services to almost all legal residents of Canada. The public health care system — often referred to as "medicare" — provides most health care services supplied by physicians, but does not cover supplementary health-related costs such as prescription drugs and routine dental visits. While there is no obligation to do so, because of the gaps in the public health-care system, many employers provide their employees with private supplemental health coverage, the particulars of which can vary greatly.

If the employer chooses to offer supplemental health-care coverage, employers cannot discriminate in the scope of the coverage. For example, spousal plans must also cover common-law and same-sex spouses.

While the public health-care system is largely paid for through general revenues, several provinces, including Ontario, British Columbia and Québec, have imposed a payroll tax on employers to help defray the cost of the medicare system.

New Canadian residents, including employees transferred to Canada, are not covered by public health insurance for the first three months of their stay in Canada. As such, special health insurance must be purchased.

8. WORKERS' COMPENSATION

a. Introduction

Workers' compensation is a system of income replacement benefits payable to a worker who is injured or develops an illness as a result of performing their job duties. The scheme is intended to relieve the injured worker of the delay, cost and difficulty of suing an employer in a civil action for negligence in the workplace. Compensation is to be provided expeditiously and without proof of fault. Assessments are levied upon employers, which are then gathered into a common fund from which benefits are paid to workers. In turn, employers are shielded from the risk of lawsuits and damages payable to injured or ill workers.

Administration and adjudication are carried out by a statutory corporation known in most provinces as the Workers' Compensation Board, but known as the Workplace Safety and Insurance Board in Ontario and the Commission de la santé et de la sécurité du travail in Québec.

b. Determination of employer contributions

The legislation governing workers' compensation is provincial in scope, so the particulars of each statute vary from province to province. However, the statutes generally apply automatically, and the coverage is compulsory for most employers. If coverage is mandatory, an employer must register immediately with the appropriate authority and commence paying a certain percentage of its payroll as the employer's premium. Premiums vary greatly, depending on the nature of the employer's industry.

Where an industry is excluded from the compulsory coverage, it may be possible for an employer to opt in. The employer may apply to the appropriate board for coverage of the business or undertaking.

Rates are usually established by examining the employer's industry group, and then adjustments are made based upon claims experience. Surcharges arising from the value of actual claims can be significant. Employers are prohibited from seeking any indemnity or contributions from workers for assessments or other liabilities arising under the applicable legislation.

c. Benefits

Injured workers are entitled to income replacement if the injury results in an inability to work. In addition, benefits will cover health-care needs arising from the injury, such as prescription drugs, assistive devices and therapy. Workers may also be entitled to a lump-sum amount if the injury results in a permanent impairment.

Where reintegration into the former workplace is not feasible due to the nature of the injury and any permanent impairment, an employee may also qualify for job retraining.

d. Duty to accommodate rehabilitated workers

The legislation generally requires an employer to re-employ an injured worker in the pre-injury position or to other suitable employment. This obligation is intended to reduce the accident costs arising from workers' compensation claims, as well as to encourage reintegration of injured but rehabilitated workers into the workplace.

9. EMPLOYMENT INSURANCE

The federal government, through Human Resources and Skills Development Canada, administers a program called Employment Insurance (EI), which provides payments for a period of time to workers who experience an interruption in their earnings for various reasons — including pregnancy or parental leave, lengthy illness and involuntary job loss for reasons other than their own misconduct.

An employee will not be entitled to benefits if he or she resigned without good reason or was fired for cause. The purpose of the program is to cushion the blow of a loss of earnings and, in the case of involuntary job loss, encourage the worker to search for new employment. The program is funded by premiums collected from both employees and employers through a payroll deduction made by the employer and submitted to the government.

Almost all full-time employees, as well as part-time and casual employees, are covered under the EI program, provided they meet specified minimum requirements. In some situations, self-employed workers may be eligible for EI special benefits.

Québec employees must apply to the Québec Parental Insurance Plan (QPIP), which provides more generous benefits to new parents than those given by EI. One interesting feature of the QPIP is that it provides certain benefits that can only be used by the new father and cannot be transferred or shared with the new mother. This benefit is designed to encourage new fathers to take an active role in parenting a new infant right from the beginning.

10. THE QUÉBEC *CHARTER OF THE FRENCH LANGUAGE*

This legislation is designed to make French the default language of work in Québec. It requires that written communications to staff in general — e.g., employee handbooks, benefit booklets, memos, etc. — be in French only, or at least bilingual (French and English). Employers must be careful to comply with the requirements of this legislation in terms of workplace intranet and computer-software resources. Verbal communication should also be in French. Accordingly, such policies and practices related to telephone support and voicemail systems must comply with the legislation.

Communications with a specific employee, such as offers of employment, disciplinary memos, and notices of promotions or salary increases, should also be in French — unless the employee specifically requests that they be in English. If so, there should be a written directive from the employee that communications are to be made in English.

It is illegal to make knowledge of any language other than French a job requirement, unless the employer can establish that such language skills are truly required.

11. THE "STATUS" OF WORKERS

There are risks associated with treating any worker (even a part-time worker) as an independent contractor as opposed to an employee. Historically, the determination of whether a worker is an employee or an independent contractor is not always easy. Courts have applied a number of tests, though the proposition remains that there is no conclusive way to determine whether a person is an employee or an independent contractor. Ultimately a court will engage in a search for the "total relationship of the parties," and the parties' own categorization of the relationship will not be determinative.

The court will consider a number of factors, including the level of control over the worker's activities, ownership of equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks. This is, of course, a non-exhaustive list and other cases involve an examination of, for example, the degree of management supervision and responsibility, hours of work, method of payment, and exclusivity of the relationship.

Recent case law has developed a category of worker referred to as a "dependent contractor." Providing most or all of their service to one business, these workers are not employees, but have been awarded the right to reasonable notice of termination in the absence of just cause.

H: IMMIGRATION & WORK PERMIT CONSIDERATIONS

Canada's immigration legislation and programs are designed to assist business people and foreign skilled workers with their entry into Canada. The Canadian system also facilitates the entry of foreign entities and business people seeking to start new businesses or subsidiaries in Canada.

Immigration issues should be considered well in advance whenever a foreign entity or worker wishes to enter Canada to do business. The most appropriate immigration strategy and entry option will need to be identified. It must also be determined whether the foreign national requires a work permit or if they may enter Canada as a business visitor.

EAST COAST

Along with Québec, the Maritimes were one of the first areas of Canada settled by Europeans. Teeming with cod, it was also the site of one of Canada's first industries.

1. CANADA'S *IMMIGRATION AND REFUGEE PROTECTION ACT* (IRPA)

The IRPA and its regulations affect business operations, human resource planning and potential liability. For example, the legislation influences:

- The ability to hire foreign workers for positions in Canada
- Foreign service providers or business people wishing to come into Canada for business purposes
- The ability of foreign nationals to acquire Canadian permanent resident status
- Companies and individuals by exposing them to potential liability for breaches of the IRPA

2. CANADA'S ENTRY AND WORK PERMIT RULES: A GENERAL OVERVIEW

As a general rule, no person other than a Canadian citizen or permanent resident may work in Canada without valid authorization. As such, the first question to ask is whether or not a foreign national entering Canada requires a work permit.

A work permit is a document that specifies the entity that the foreign national is legally entitled to work for, the occupation and the location of employment in Canada. The work permit also has a specific validity period and sets out conditions that the foreign national must not breach.

The distinction between a genuine business visitor and a foreign national requiring a work permit is not always clear. Under the IRPA, "work" has a broad definition: "an activity for which wages are paid or commission is earned, or that competes directly with the activities of Canadian citizens or permanent residents in the Canadian labour market." Business visitors are typically foreign nationals who enter Canada temporarily to engage in international business activities for a short time. These individuals must meet the following general criteria:

- Business visitors must have no intent to enter the Canadian labour market.
- The intended activity in Canada must be international in scope.
- The primary source of remuneration must be outside of Canada.
- Their employer's accrual of profits must be outside of Canada.

A foreign national will usually be allowed entry as a business visitor if the purpose of their entry falls under one of the following activities (note, this is a non-exhaustive list of potential business visitor activities):

- Attending business meetings
- Exploring business opportunities in Canada
- Negotiating the sale of non-Canadian-origin goods to Canadian customers
- Providing some types of after-sales service to Canadian customers
- Training Canadians employed within the same corporate group as the trainer
- Attending seminars or trade shows

If, after assessing the person and the purpose of their entry, it is determined that a work permit is required, the next step is to determine whether there is any work permit category under the IRPA, under an international agreement (such as NAFTA) or under any government program that fits the situation. If there is no suitable category available, the employer must first apply to Service Canada to obtain a Labour Market Impact Assessment — formerly called a Labour Market Opinion — which allows employment to be offered to a foreign national instead of to a Canadian citizen or permanent resident.

3. LABOUR MARKET IMPACT ASSESSMENTS (LMIAS) THROUGH SERVICE CANADA

Generally, the goal is to avoid the LMIA process if possible and to use a non-LMIA work permit category instead. This avoids the risk of Service Canada denying the LMIA request. As well, having to apply for an LMIA will delay the overall time frame for obtaining a work permit compared to non-LMIA work permits.

The Canadian government has made major changes to the LMIA rules since June 2014. Before that time, an LMIA was called a Labour Market Opinion or LMO. Many of the changes have increased the compliance obligations placed on employers using foreign workers.

The application package for an LMIA must be prepared with great care. The entity wishing to hire or engage the foreign national must demonstrate that it has met Service Canada's recruiting requirements, and that the wage being offered meets the prevailing wage rate for the occupation and the location where the foreign national will work.

Service Canada reviews a number of factors when assessing an LMIA application, including whether:

- The employer has made reasonable efforts to hire or train Canadian citizens or permanent residents.
- The work of the foreign national is likely to result in direct job creation or job retention for Canadians or permanent residents.
- The work is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadians or permanent residents.
- The work is likely to fill a labour shortage.
- The wages and working conditions are sufficient to attract Canadian citizens or permanent residents.
- The job offer is genuine.

If an LMIA is granted by Service Canada, it can then be used to obtain a work permit. However, if the foreign national will be working in Québec, special rules apply. Usually, in addition to the LMIA from Service Canada, a Québec Acceptance Certificate (CAQ) must be obtained from Québec authorities.

4. LMIA-EXEMPT WORK PERMIT CATEGORIES

There are a number of potentially useful LMIA-exempt work permit categories that businesses seeking to hire or bring foreign workers into Canada should consider. Some of the main categories are listed below.

a. Intra-company transferees

This work permit category is useful for transferring managerial or specialized personnel to Canada from a related foreign entity.

The general rules are:

INTRA-COMPANY TRANSFEREES

- The applicant must be an executive or manager, or have "specialized knowledge," and must be transferring into such a position.
- The applicant must have been employed full-time with the related foreign entity outside of Canada for at least 12 consecutive months in the three-year period prior to the application.
- There must be a proper relationship between the foreign entity and the Canadian entity receiving the transferee (e.g., parent-subsidiary or affiliates owned and controlled by a common parent company).

Initial work permits are usually granted for up to a three-year period. There are time caps that may limit the overall length of time that a foreign national may stay in Canada under this category. Executive or managerial transferees have a time cap of seven years, while "specialized knowledge" transferees may be in Canada under this type of work permit for up to five years.

This work permit category is often used when a foreign company wishes to start doing business in Canada. When setting up the corporate and ownership structure of a new business in Canada, it should be designed in such a way as to allow for the use of this type of work permit. There are special rules for startup situations where the Canadian branch or subsidiary has recently been set up — for example, the initial work permit will be granted for only one year so

that the viability of the Canadian operation may be examined prior to granting a renewal of the work permit.

b. North American Free Trade Agreement (NAFTA) Professional category

The NAFTA Professional category may be used by eligible American and Mexican citizens. NAFTA lists 63 professions that may be eligible for a work permit, including computer systems analysts, engineers, scientific technicians, management consultants, medical and some allied professions, and many scientific categories such as chemists, geologists and biologists.

The applicant must usually have a university degree related to a listed profession, and must be entering the country to work in that field. If the applicant is successful, they will receive a three-year work permit, which is renewable.

c. Other free trade agreements with entry provisions

Canada also has free trade agreements (FTAs) with relatively similar work permit provisions to NAFTA's Professional category with Peru, Chile, Colombia and South Korea. Eligible professionals from these countries may have special work permit options. Some FTAs also have special provisions to assist with obtaining intra-company transferee work permits.

Canada and the European Union have also entered into a FTA. The Canada-EU FTA will have mobility and work permit provisions, but these will only come into effect when the Canada-EU FTA is ratified and implemented, which may take some years.

d. NAFTA investor or trader categories

These work permit categories are potentially available to American and Mexican applicants who will be employed in Canada by enterprises with an American or Mexican nationality. In this instance, American or Mexican nationality means that at least 50 per cent of the entity established in Canada must be held by American or Mexican citizens or entities.

For the NAFTA Investor category, the foreign national applicant must (i) be seeking entry solely to develop and direct the enterprise — "develop and direct" means that the applicant should have controlling interest in the enterprise — or (ii) if an employee is in a position that is executive or supervisory, or that involves essential skills. However, a one-year work permit may be granted to an employee not possessing essential skills if the employee is needed for the startup of a new enterprise, such as a technical employee needed to train Canadians who will be hired by the new business.

As well, a substantial investment has to be made. There is no set rule on what constitutes a "substantial" investment, it will depend on the circumstances and the nature of the business. The objective of the NAFTA Investor category is to promote productive investment in Canada. Therefore, an applicant is not entitled to this status if the investment, even if substantial, will produce only enough income to provide a living for the applicant and the applicant's family.

For the NAFTA Trader category, the applicant must be entering Canada to carry on substantial trade in goods or services principally between Canada and the United States or Mexico. To be "substantial trade," over 50 per cent of the total volume of trade conducted by the entity in Canada must be between Canada and the U.S. or Mexico. The applicant must be employed in a capacity that is executive or supervisory, or that involves essential skills or services.

Initial applications under this category must be made to a Canadian visa office outside of Canada. The initial work permit is issued for a maximum of one year, with extensions granted for two years at a time. Generally, the intra-company transferee category is a preferable option. However, in situations where the corporate structure does not support that category or where the applicant has not worked for the related foreign company for at least 12 months, the NAFTA Investor or Trader category may provide a solution.

e. Entrepreneurs

There is a work permit category available for entrepreneurs who wish to enter Canada and set up a business that will then be operated by Canadians. This category allows foreign nationals to enter the country temporarily in order to set up their business, and then leave once it is up and running.

f. Spousal employment program

Spouses (including common-law and same-sex spouses) of most foreign nationals working in Canada may apply for a work permit under the Spousal Employment Program. The principal foreign national must be working in a position that is at a higher skill level. Typically this includes management, professional occupations, and technical or skilled trades workers. This program may assist companies in their recruiting efforts since accompanying spouses will usually be able to work in Canada.

5. PERMANENT RESIDENT STATUS

Many foreign workers who obtain work permits in Canada wish to apply for permanent resident status. Canada's permanent resident rules are designed to help such foreign nationals transition to permanent status. If permanent resident status is obtained, the foreign national no longer requires a work permit to work in Canada.

Canada historically had permanent resident programs aimed at business people — investors and entrepreneurs — but these federal immigration categories have now been shut down.

If a foreign national intends to settle in Québec, they will need to qualify for permanent resident status under Québec's immigration system. Québec offers a skilled worker category as well as programs for investors and entrepreneurs. There are also special programs offered by other provinces that may lead to permanent resident status.

6. PROVINCIAL NOMINEE PROGRAMS

Canadian provinces have provincial nominee programs (PNPs) in place. Each of these provincial programs is different, but generally the PNPs are designed to facilitate the recruitment of foreign skilled workers who are able to address skills shortages within the nominating province. Foreign nationals who qualify under a PNP are able to apply for permanent resident status using the nomination from

HARTLAND BRIDGE

Hartland, New Brunswick, is home to the world's longest covered bridge, at 1,282 feet (391m) long. It crosses the Saint John River from Hartland to Somerville, New Brunswick. The framework consists of seven small Howe Truss bridges joined together on six piers.

the province. If a foreign national is nominated under a PNP, he or she may obtain a work permit while the permanent resident application is being processed.

Some PNPs also have categories for business people or entrepreneurs. Each of these PNPs has its own unique eligibility requirements and criteria, but the goal is to attract experienced business people or entrepreneurs to purchase or set up businesses that will create employment for Canadians.

7. OTHER IMMIGRATION AND ENTRY ISSUES

There are a number of other immigration considerations that need to be reviewed when bringing a foreign worker to Canada or travelling to Canada for business purposes.

a. Is an entry visa required?

Depending on the citizenship of the foreign national, an entry visa — called a Temporary Resident Visa or TRV — may be required before the person can enter Canada. Where this is the case, the foreign national must apply for both the work permit and the entry visa at a Canadian visa office outside of Canada. Business visitors from countries that require an entry visa must also apply at a visa office before travelling to Canada. Applications can also be submitted online through Immigration Canada's website.

b. Is an Electronic Travel Authorization (eTA) required?

Canada has introduced a new entry requirement called an eTA. This is mandatory as of September 30, 2016, for most visa-exempt travellers flying into Canada. The eTA must be obtained through an online application process prior to boarding a plane to Canada. Once obtained, the eTA will be valid for five years. There are no eTA requirements for U.S. citizens or foreign nationals with TRVs.

c. Is an immigration medical required?

Foreign nationals who have lived in certain designated countries for more than six months in the 12 months prior to the application, and who are coming to Canada for more than six months, require an immigration medical as a condition of entry. This requirement may delay the application process, as a work permit applicant who needs an immigration medical must usually apply through a visa office outside of Canada.

d. Admissibility issues

A foreign national (and any accompanying dependants) seeking entry to Canada may be inadmissible due to criminal convictions, medical conditions or prior entry refusals. If any of these potential admissibility issues apply to a foreign national, the situation must be assessed well in advance to determine whether entry is possible. Where a candidate is inadmissible due to criminality, steps can sometimes be taken to remedy the situation depending upon the seriousness of the offence, the length of time since it occurred and the number of convictions.

e. Dependants

The accompanying spouse and children of a foreign worker will need to obtain immigration documentation. Spouses may qualify for a work permit under the spousal employment program. Children may need a visitor record or study permit.

f. Renewals of work permits

Once a work permit is obtained, the ongoing status of foreign nationals working in Canada must be carefully monitored to ensure that a renewal of the work permit is obtained well in advance of its expiry date. If an LMIA is the basis for the work permit, a new LMIA will need to be obtained before the work permit may be renewed.

g. Changes in position or circumstances

Any change to a foreign worker's job in Canada — such as a change in position, remuneration, duties or work location — must be assessed in advance to determine if a new LMIA and/or new work permit is needed. In addition, if corporate changes such as mergers or acquisitions lead to an employer changing its name, the foreign worker may require a new work permit.

8. OTHER CONSIDERATIONS

There are numerous practical considerations beyond identifying the proper immigration or work permit category to use.

a. The application package and supporting documentation

It is imperative to put together a strong application package when applying for an LMIA or a work permit. By ensuring that an application is well documented and complete, the likelihood of it being approved is significantly increased.

The extent and content of the material included in the application package will depend on the work permit category and the particular circumstances of each situation.

b. Employment issues

Offers of employment and employment contracts for foreign workers must be carefully crafted. Offers of employment to foreign workers should be made conditional on the worker obtaining a work permit and maintaining valid status to work in Canada. Transferred employees and foreign hires should be required to sign an employment contract during the hiring process to govern the employment relationship.

c. Tax issues

Different tax rates or dual tax-filing obligations may need to be addressed in intra-company transfer situations. As well, there may be tax issues or withholding issues for the company or for personnel whenever services are being rendered in Canada — even where the foreign national may not be directly remunerated in Canada.

d. Obtaining provincial health coverage

In Canada, health coverage is provided by provincial governments. Transferees or foreign national hires on work permits and their dependants will usually be eligible for public health coverage. The eligibility rules vary by province and private coverage should be arranged prior to entry to cover any waiting period. Extensions of work permits should be obtained early to avoid potential disruption in public health coverage.

e. Social insurance numbers

Foreign workers need a social insurance number to be paid employment income in Canada, which may be obtained from a local Service Canada office or by mail. A work permit must be obtained prior to applying for a social insurance number.

Learn more about our services in this area at
gowlingwlg.com/immigration-canada

I: COMPETITION & ANTITRUST LAW

Competition law in Canada is set out in a single federal statute, the *Competition Act*. Related regulations, guidelines, interpretation bulletins and case law all provide guidance on how the *Competition Act* is administered and enforced.

The Act is primarily administered and enforced by the Competition Bureau (the Bureau) and the Public Prosecutions Service of Canada. Certain provisions of the *Competition Act* also allow private parties to initiate enforcement proceedings. The purpose of the Act is to maintain and encourage competition in Canada, and it addresses three categories of conduct: mergers, criminal matters and reviewable practices.[1]

QUÉBEC CITY

The view of Old Québec is dominated by the iconic profile of the Château Frontenac hotel. During the Second World War, Winston Churchill, Franklin D. Roosevelt and William Lyon Mackenzie King met here to discuss military strategy at the highly secret first Québec Conference (codename "QUADRANT").

[1] The *Competition Act* also contains civil and criminal provisions relating to advertising and marketing matters. For more information, see the chapter on advertising and marketing.

1. MERGERS

The *Competition Act* defines a merger as the acquisition or establishment — whether by purchase or lease of shares or assets, or by amalgamation, combination or otherwise — of control over or a significant interest in all or part of a business.

The Bureau has adopted an expansive interpretation of this definition. It has indicated that it will generally not consider the acquisition of less than 10 per cent of the voting shares of a corporation to be a merger. It may consider the acquisition of between 10 and 50 per cent to be a merger, depending on whether the facts suggest that the purchaser will acquire the ability to materially influence the economic behaviour of the target. The Bureau has also taken the position that contractual arrangements, such as shareholders' agreements or management agreements, can also be considered mergers, provided they confer control over all or part of a business.

Unless the Bureau issues an advance ruling certificate (discussed later in this section), it has the right to challenge any merger prior to its completion and for one year following its completion. This right applies to all mergers, including those that do not exceed the mandatory pre-notification thresholds (also discussed later in this section). As a result, although this is uncommon, the Bureau has challenged some mergers that did not exceed the pre-notification thresholds.

a. Notifiable mergers

Mergers that exceed certain thresholds must be pre-notified to the Bureau and may not be completed until either (i) the statutory waiting period has expired and the Bureau has not obtained an order prohibiting closing, or (ii) the Bureau has completed its review and rendered a disposition that permits closing.

b. Thresholds

Notification is required if both of the following thresholds are exceeded:

- Party size: The parties, together with their affiliates, have assets in Canada or annual gross revenues from sales from or into Canada (exports and imports) that exceed $400 million.
- Acquired business size: The aggregate value of the assets in Canada to be acquired, or the annual gross revenues from sales in or from Canada generated by such assets, exceeds $87 million.[2]

Additional thresholds apply to proposed acquisitions of equity securities or equity interests, specifically:

- The proposed acquisition of voting shares of a publicly traded corporation will not be notifiable unless, following completion of the transaction, the purchaser owns more than 20 per cent of the voting shares (or more than 50 per cent if, prior to the transaction, the purchaser already owned more than 20 per cent).
- The proposed acquisition of voting shares of a private corporation will not be notifiable unless, following completion of the transaction, the purchaser owns more than 35 per cent of the voting shares (or more than 50 per cent if, prior to the transaction, the purchaser already owned more than 35 per cent).

The financial threshold analysis is based on the most recently available audited financial statements — provided that they are sufficiently recent. If audited financial statements are outdated, do not exist or do not contain sufficiently granular information, the analysis will be based on unaudited financial statements and internal books and records. The threshold analysis must be updated to reflect material developments — such as acquisitions, divestitures or write-downs — that occur subsequent to the currency date of the financial statements on which the initial analysis was based.

If a proposed transaction exceeds theapplicable thresholds:

- Notification is required even if the transaction obviously raises no substantive competition law concerns.
- Failure to comply with the notification provisions can result in a substantial administrative monetary penalty and/or criminal conviction.

c. Notification procedure

Notification can be effected in two ways: (i) the filing of a prescribed notification form by each of the parties, and/or (ii) requesting an advance ruling certificate. It is not

[2] The figure of $87 million applies in 2016, up from $86 million in 2015. It is adjusted annually based on the change in Canada's GDP.

uncommon to submit both types of notification.

i. Prescribed notification form

The prescribed notification form requires information about the business of the parties and their affiliates, including a narrative description of the business and its operations, financial statements, and customer and supplier lists. Strategic documents relating to the transaction — including business and marketing plans, board papers, and competition analysis — must also be submitted. This should be kept in mind when such documents are being prepared.

The submission of complete prescribed forms, as determined by the Bureau, triggers a statutory 30-day waiting period. During this time, the parties may not complete the transaction unless the Bureau completes its review and renders a disposition that permits the parties to close.

During the initial 30-day period, the Bureau has the right to issue a supplementary information request (SIR). SIRs are generally reserved for transactions that appear to raise significant competition law concerns, and are relatively rare, with only about half a dozen issued per year.

SIRs require the production of substantial additional information, and it is not uncommon for it to take several months for the parties to complete their responses. The issuance of a SIR has the effect of extending the waiting period until 30 days after compliance with the SIR, as determined by the Bureau.

ii. Advance ruling certificate

Another way of effecting notification is to request an advance ruling certificate (ARC). An ARC request is a letter — typically submitted by the purchaser's counsel — that describes the parties, the transaction and the relevant industry, and explains why the transaction should not be of concern to the Bureau. An ARC is the best possible outcome for the parties — especially for the purchaser — as it insulates the transaction from subsequent challenge, provided the transaction is completed within one year of issuance of the ARC. Accordingly, the Bureau typically only issues ARCs in respect of transactions that do not raise material substantive concerns.

In situations where the information provided in an ARC request is sufficient for the Bureau to complete its review, but the Bureau is neither comfortable enough to issue an ARC nor concerned enough to challenge the transaction, the Bureau will typically issue a no action letter (NAL) and waive the parties' obligation to submit prescribed forms.

Essentially, a NAL advises the parties that while the Bureau has no current plans to challenge the transaction, it reserves the right to do so within one year of closing. As a practical matter, parties can take a high degree of comfort from a NAL as it generally indicates that the transaction will not be subsequently challenged. Since 1986, when merger review was introduced in Canada, the Bureau has only challenged one transaction after issuing a NAL — a challenge it subsequently abandoned.

An ARC request does not trigger a statutory waiting period. However, the Bureau has issued guidelines indicating that it will endeavor to complete its review of transactions that it considers to be "non-complex" within 14 days of receiving a complete ARC request, and within 45 days of receiving a complete ARC request for transactions that it considers to be "complex."

Non-complex transactions are readily identifiable by the clear absence of competition issues, and include transactions where there is no or minimal competitive overlap between the parties. Complex transactions involve the merger of competitors or the merger of customers and suppliers where there are indications that the transaction may, or is likely to, create, maintain or enhance market power. The vast majority of transactions are classified as non-complex, with the Bureau completing its review within 14 days following classification.

From the parties' perspective, and particularly the purchaser's, closing after an affirmative clearance from the Bureau in the form of an ARC or a NAL is generally preferable to closing solely on the basis of the passive expiration of the statutory waiting period. Nevertheless, parties have the right to close on the basis of a passive expiration of the statutory waiting period without having received confirmation as to what the Bureau may do.

d. Filing fee

The filing fee is $50,000. This applies regardless of whether notification is effected by way of prescribed forms, ARC request or both. The issue of which party should pay the filing fee is a matter of business negotiation between the parties and should be addressed in the transaction's purchase agreement. Common arrangements include the purchaser paying 100 per cent of the filing fee or the parties agreeing to each pay half.

e. Test

The test that the Bureau applies in determining whether to challenge a proposed transaction is whether the transaction would prevent or lessen — or be likely to prevent or lessen — competition substantially. This test, as judicially defined, seeks to determine whether the transaction would give the merged firm the ability to profitably raise prices in the post-merger competitive environment or would create, maintain or enhance the merged entity's ability to exercise market power.

f. Possible outcomes

The possible outcomes of a merger review can generally be summarized as follows:

- The Bureau renders a disposition that permits the parties to close according to their desired schedule without any changes to the transaction. This occurs in the vast majority of cases.
- The Bureau takes longer than the parties would desire to complete its review. Closing is delayed but ultimately not challenged, and proceeds without any substantive change to the transaction. While not uncommon, this is certainly not typical.
- The Bureau agrees not to challenge the transaction on the basis of concessions made by the parties, such as the divestiture of certain assets. In the relatively rare situations where the proposed merger raises significant competitive concerns, this is a common outcome.
- The Bureau challenges the transaction before the Competition Tribunal (the Tribunal), a specialized quasi-judicial tribunal, by seeking an order to prohibit its completion. If the transaction is already complete, the Bureau seeks an order requiring that the transaction be undone or requiring the purchaser to sell part or all of the acquired business to a third party. This is extremely uncommon.

2. CRIMINAL MATTERS

As a result of significant amendments to the *Competition Act* that took effect in March 2009 and March 2010, several criminal offences were repealed and/or converted into reviewable practices. As a result, the *Competition Act* has effectively been left with only two criminal-offence provisions: conspiracy and bid-rigging.[3] Both offences are *per se* illegal, meaning that the effect of the conduct on competition is irrelevant. The standard of proof is beyond a reasonable doubt.

The penalties for violating these provisions are severe. Conviction may result in a combination of a substantial fine for the corporation and culpable individuals, prison time for culpable individuals, class action proceedings, civil damages awards and reputational damage. The trend in Canada appears to be toward more frequent prosecution, higher fines and more jail sentences.

An investigation or allegation that does not ultimately result in conviction can still be, and usually is, costly, disruptive and damaging to reputations. Accordingly, it is generally prudent to avoid conduct that could give rise to even the appearance of a violation of the *Competition Act*'s criminal provisions.

a. Conspiracy

It is unlawful for competitors to agree to:

- Fix, maintain, increase or control prices (including discounts, rebates, allowances, concessions or other advantages)
- Allocate sales, territories, customers or markets
- Fix or control the production or supply of a product

A "competitor" is broadly defined to include any person who it is reasonable to believe would be likely to compete with respect to a product. The definition includes existing competitors as well as potential competitors.

The alleged agreement does not need to be written (and often is not) and can be proved solely on the basis of circumstantial evidence. There must be proof of an agreement in order for there to be a conviction.

The *Competition Act* sets out an ancillary restraint defence and a regulated conduct defence. The ancillary restraint defence applies where the challenged agreement is ancillary to — and necessary to give effect to — a broader agreement that is not itself unlawful. An example of this would be a temporary non-compete covenant in an asset purchase agreement, pursuant to which the seller agrees not to compete with the buyer with respect to the purchased business. The regulated conduct defence applies where conduct that would otherwise violate the *Competition Act* is authorized and specifically required by other legislation. An example of this would be a provincial agricultural marketing-board legislation that requires producers to limit quantities and sell at specific prices.

The penalty for conspiracy is imprisonment for up to 14 years and/or a fine of up to $25 million.

[3] The price-discrimination, predatory-pricing and promotional-allowances provisions were repealed. The applicable conduct can still be challenged under the more general reviewable-practice provision relating to abuse of dominance. The price-discrimination provision was converted into a reviewable practice. The *Competition Act* also contains criminal provisions that address false and misleading advertising, which are discussed in the chapter on advertising and marketing.

b. Bid-rigging

BID-RIGGING OCCURS WHEN:

- Two or more persons agree that one or more of them will not submit a bid/tender, or will submit and then withdraw a bid/tender in response to a request for bids/tenders.
- Bids/tenders are submitted that are arrived at by agreement between two or more bidders.

An exception occurs if the agreement is made known to the persons who requested the bids before the bids are submitted. The penalty for bid-rigging is imprisonment for up to 14 years and/or a fine at the discretion of the court.

c. Immunity

The Bureau has established an immunity program under which the first conspirator to report a conspiracy may receive immunity from criminal prosecution — but not civil damages arising out of private causes of action — if that conspirator, among other things, did not coerce others into participating in the conspiracy and co-operates in the prosecution of other conspirators. Subsequent immunity applicants may receive some form of leniency in the form of reduced fines but will not qualify for full immunity.

d. Private actions

The *Competition Act* provides private parties with a right to sue to recover actual damages suffered as a result of a violation of the Act's criminal provisions. In theory, private parties have the right to initiate proceedings to prove both the violation of a criminal provision and their damages. As a practical matter, private parties tend to rely on convictions or guilty pleas that result from government — i.e., Public Prosecutions Service of Canada — enforcement to prove the violation, and their actions are limited to proving their damages. Private claims typically take the form of class actions.

3. REVIEWABLE PRACTICES

The *Competition Act*'s reviewable-practices provisions address conduct that is presumptively lawful. Such conduct can only be prohibited if the Tribunal finds that, depending on the reviewable practice in question, the conduct substantially prevents or lessens competition or has an adverse effect on competition. The standard of proof is a balance of probabilities.

For all but one of the reviewable practices, the only remedy available is a prohibition order. The underlying theory is that parties should not be punished for engaging in conduct that is presumptively lawful. Abuse of dominance is the exception, which can result in a divestiture order and potentially significant administrative monetary penalties.

The Bureau may initiate proceedings before the Tribunal with respect to all of the reviewable practices. Private parties have the right to initiate proceedings before the Tribunal for certain reviewable practices — but they must first obtain leave of the Tribunal.

a. Competitor agreements

This provision applies to all agreements between competitors, other than those specifically covered by the criminal conspiracy provision previously discussed. Examples of such agreements include joint ventures and strategic alliances. While these agreements often promote competition and enhance efficiency, they can be anti-competitive in some circumstances.

If, upon application by the Bureau, the Tribunal finds that a proposed or existing agreement between competitors has, or is likely to have, the effect of preventing or lessening competition substantially, the Tribunal may order that the agreement be terminated or amended.

The Tribunal may not make an order against an agreement that is likely to result in efficiency gains that will be greater than (and will offset) the effects of any prevention or lessening of competition. This is provided that the gains in efficiency would not likely be attained if an order were made.

b. Abuse of dominance

At the outset, it is worth noting that dominance alone is not problematic under the *Competition Act*; it is the abuse of dominance that the *Competition Act* seeks to address. In order for the Bureau to succeed in an abuse of dominance case, it must convince the Tribunal that:

i. One or more businesses have market power in one or more relevant markets in Canada or a part of Canada

Market power is the ability to profitably charge prices above competitive levels for a sustained period of time. A finding of market power generally requires the combination of a high market share and barriers to entry — e.g., high sunk costs or regulatory restrictions. There have been less than 15 cases pursued under the abuse of dominance provision since it was added to the *Competition Act* in 1986, and nearly all of them involved a party (or parties) with market shares substantially above 50 per cent.

ii. The dominant business or businesses have engaged, or are engaging, in a practice of anti-competitive acts

To be considered anti-competitive, the intended purpose and effect of the acts must be exclusionary, disciplinary or predatory, and directed at one or more competitors. While a customer or supplier can be central to the facts of an abuse of dominance case, the anti-competitive act itself must be directed at a competitor — e.g., entering into a long-term exclusivity arrangement with a supplier for the purpose of rendering that supplier unavailable to a competitor, or offering below-cost pricing to a critical customer of a competitor.

iii. The anti-competitive acts are having, or will likely have, the effect of preventing or lessening competition substantially

A finding of a substantial prevention or lessening of competition is based on a "but for" test — i.e., whether prices in the applicable market would be lower "but for" the conduct in question.

If the Tribunal finds abuse of dominance, it may order the transgressing business or businesses to cease the acts in question and/or take certain actions — such as the divestiture of assets or shares — that the Tribunal considers necessary to overcome the effects of the anti-competitive practice.

The Tribunal may also impose an administrative monetary penalty of up to $10 million for an initial transgression, and up to $15 million for each subsequent transgression.

c. Price maintenance

Price maintenance occurs when a supplier — by agreement, threat or promise — influences upward or discourages the reduction of the price at which a seller sells, offers to sell or advertises a product within Canada. Price maintenance also occurs when a supplier refuses to supply a product to, or otherwise discriminates against, a seller because of the low pricing policy of that seller.

If a supplier suggests a minimum resale price to a reseller, that suggestion constitutes price maintenance unless the supplier also makes it clear that the reseller is under no obligation to follow the suggestion, and that it will in no way suffer in its business relationship with the supplier if it fails to follow the suggestion.

If the Tribunal finds that price maintenance has had, or is likely to have, an adverse effect on competition in a market, the Tribunal may order the supplier to cease engaging in the challenged conduct and/or accept the seller as a customer on usual trade terms. The Bureau or an affected seller — with leave of the Tribunal — may seek such an order.

Prior to March 12, 2009, price maintenance was a *per se* criminal offence. In the more than seven years since its conversion to a civil reviewable practice, numerous suppliers have engaged in various forms of price maintenance — yet only one case has ever been considered by the Tribunal, and that case was not a typical price maintenance case. It involved the various fees Visa and MasterCard impose on merchants who accept their cards, rather than a situation where a supplier influences upward or discourages the reduction of the price at which a reseller sells or advertises the supplier's product.

d. Refusal to deal

If a supplier refuses to supply a would-be customer, the Tribunal may order them to supply the would-be customer on usual trade terms if it finds that:

i. The would-be customer is substantially affected in his or her business, or is precluded from carrying on business due to an inability to obtain adequate supplies on usual trade terms.

ii. The reason that the customer or potential customer is unable to obtain adequate supplies is because of insufficient competition among suppliers.

iii. The customer or potential customer is willing and able to meet the usual trade terms of the supplier or suppliers of the relevant product.

iv. The relevant product is in ample supply.

v. The refusal to deal is having or is likely to have an adverse effect on competition in a market.

The Bureau or a would-be customer — with leave of the Tribunal — may seek such an order from the Tribunal.

e. Tied selling

Tied selling is a form of refusal to deal in which a supplier agrees to supply a customer with a product only on the condition that the customer:

i. Acquire a second product from the supplier

ii. Refrain from using or distributing, in conjunction with the supplier's product, another product that is not manufactured or designated by the supplier

Tied selling also includes inducing a customer to agree to these conditions by offering to supply them with a product on more favourable terms. The Tribunal may find a major supplier is engaged in tied selling, or that it is widespread in a market, if it is likely to:

i. Impede entry or expansion of a firm

ii. Impede introduction of a product or expansion of sales

iii. Have any other exclusionary effect with the result that competition is, or is likely to be, lessened substantially

If this is the case, the Tribunal may prohibit the continuation of the practice or impose any other requirement necessary to overcome the anti-competitive effects of the practice.

The Bureau or an affected customer — with leave of the Tribunal — may initiate proceedings before the Tribunal.

f. Exclusive dealing

Exclusive dealing occurs when a supplier, as a condition of supply, requires a customer to deal only or primarily in products supplied or designated by the supplier, or refrain from dealing in a specified product except as supplied by the supplier. Exclusive dealing includes inducing a customer to agree to these conditions by offering to supply the customer on more favourable terms. The required proof and remedial action are the same as described under tied selling. As with tied selling, the Bureau or an affected customer — with leave of the Tribunal — may initiate proceedings before the Tribunal.

There have only been a few cases involving exclusive dealing and tied selling since these provisions were added to the *Competition Act* in 1976. What little case law exists suggests that in order for the Bureau or an affected private party to have a viable case, the alleged tied selling and/or exclusive dealing must make it nearly impossible for a competing supplier to enter or exist in a market.

g. Vertical market restriction

Vertical market restriction occurs when a supplier, as a condition of supply, requires a customer to supply a product only in a defined market, or exacts a penalty from the customer if the product is supplied outside a defined market.

If the Tribunal finds that this practice is engaged in by a major supplier or is widespread in a market, and is likely to substantially lessen competition, the Tribunal may prohibit the continuation of the practice or impose any other requirement necessary to overcome the anti-competitive effects of the practice.

The Bureau or an affected customer — with leave of the Tribunal — may initiate proceedings before the Tribunal.

There have been no cases involving the direct application of the vertical market restriction provision since it was added to the *Competition Act* in 1976.

J: REGULATION OF FOREIGN INVESTMENT

Foreign investment in Canada is regulated by the federal *Investment Canada Act* (ICA). Its purpose is to encourage foreign investment on terms that are beneficial to Canada.

While the ICA is primarily administered by Industry Canada, the Department of Canadian Heritage administers the Act in relation to defined "cultural businesses," which is discussed later in this chapter.

SO MUCH TO OFFER

Canada is known for its natural resources, steadier than average financial services, bioproducts, aerospace and automotive industries.

In general, the acquisition of control of an existing Canadian business or the establishment of a new Canadian business by a foreign investor is subject to notification or review.

Notification involves the completion of a prescribed form to provide certain information about the foreign investor, the Canadian business and the vendor. It is not an impediment to the closing of an acquisition — in fact, it can be submitted within 30 days of closing and is usually submitted after closing.

Where review is required, the foreign investor must submit more detailed information about itself and comprehensive plans for the Canadian business before closing. Where review is necessary, the foreign investor may only complete the proposed investment if the minister of industry or the minister of Canadian heritage, as applicable, determines it to be of "net benefit to Canada."

Whether the investment is reviewable, or merely notifiable, depends on a combination of the following factors:

- The enterprise value of the target Canadian business
- Whether the investor is controlled by residents of a World Trade Organization member state (a "WTO investor")
- Whether the investor is a state-owned enterprise (SOE)
- The value of the assets of the target Canadian business
- Whether the target Canadian business is already foreign controlled by a non-Canadian WTO investor
- Whether the Canadian target carries on a defined cultural business
- Whether the investment is to be effected directly, through the acquisition of a Canadian business, or indirectly, through the acquisition of a foreign business of which the Canadian business is a subsidiary

Certain transactions involving foreign investors are exempt from the provisions of the ICA, including internal corporate reorganizations that involve no change of ultimate control, realization of security held by a foreign entity on Canadian assets, bona fide estate transfers, and acquisitions of control of Canadian businesses subject to review under other Canadian legislation, such as the *Bank Act* (Canada).

1. CANADIAN BUSINESS

A business is deemed Canadian when it has:

- A place of business in Canada
- One or more individuals in Canada who are employed in connection with (but not necessarily by) the business
- Assets in Canada that are used to carry on the business

2. FOREIGN INVESTOR

A foreign investor is essentially a non-Canadian.

With respect to individuals, a Canadian is a Canadian citizen or, subject to certain qualifications, a permanent resident of Canada within the meaning of Canada's immigration legislation.

With respect to a business undertaking — including one owned by a government — the undertaking is considered Canadian if it is Canadian-controlled. Provisions relating to Canadian control are detailed and complex, but generally:

- If one Canadian, or two or more Canadian members of a voting group, owns a majority of the voting interests of an entity, the entity is Canadian-controlled.
- Conversely, if one non-Canadian, or two or more non-Canadian members of a voting group, owns a majority of the voting interests of an entity, the entity is not Canadian-controlled.
- With respect to a widely held public company that is not controlled in fact through the ownership of voting shares, the corporation is deemed to be Canadian-controlled if at least two-thirds of the board of directors is Canadian.

3. ACQUISITION OF CONTROL

The ICA contains detailed and complex provisions relating to the acquisition of control of a Canadian business by a foreign investor. To summarize:

- The acquisition of a majority of a corporation's voting shares is deemed to be an acquisition of control.
- The acquisition of less than a majority, but more than one-third, of a corporation's voting shares is considered an acquisition of control — unless it can be established that the acquiring party will not have control in fact of the corporation. For example, a 40 per cent acquisition would not result in control if another shareholder owned

the remaining 60 per cent, and a shareholders' agreement limiting the larger shareholder's rights did not exist.

- The acquisition of less than one-third of a corporation's voting shares is deemed to not be an acquisition of control.

4. REVIEW THRESHOLDS

Thresholds differ depending on the characteristics of the investor and the investment in question. If the review thresholds are not exceeded, the investment is subject to the notification procedure previously described.

a. Private sector WTO investors

i. Direct investment by a WTO investor that is not an SOE in a non-cultural Canadian business

The proposed direct acquisition of control of a Canadian business by a WTO investor that is not an SOE is reviewable if the enterprise value of the Canadian business exceeds $600 million.[1] In our experience, this is by far the most common permutation of foreign investment.

The formula for determining the enterprise value (EV) varies depending on whether the foreign investor is acquiring shares of a publicly traded company, 100 per cent of the shares of a private company, less than 100 per cent but more than a controlling number of shares of a private company, or assets.

IN SUMMARY:

EV of publicly traded company =
market capitalization + liabilities other than operating liabilities – cash and cash equivalents.

Market capitalization is based on the average closing price of the target's quoted equity securities in its principal market during the 20 trading days ending before the first day of the month immediately preceding the month in which the foreign investor submits its Application for Review or Notification Form.

EV of private company =
acquisition value + liabilities other than operating liabilities – cash and cash equivalents.

EV of assets =
acquisition value + liabilities assumed by the investor other than operating liabilities – cash and cash equivalents.

In the following situations, the board of directors or other authorized body of the foreign investor are required to determine the fair market value of the applicable item for inclusion into the balance of the applicable enterprise value formula:

- Where not all of a public company's equity securities are quoted
- Where the acquisition value cannot be precisely determined until a future date (e.g., there is an earn out or some other form of post-closing adjustment)
- Where the foreign investor is acquiring less than 100 per cent of the shares of a private company
- Where the parties are non-arms-length or the consideration is nominal or zero

ii. Direct investment by a WTO investor in a Canadian cultural business

The proposed direct acquisition of control of a Canadian cultural business is reviewable if the book value of the assets of the Canadian business exceeds $5 million. The same threshold applies if the investor is a non-WTO investor and/or an SOE.

Cultural businesses include:

- The publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine-readable form, but not including the sole activity of printing or typesetting books, magazines, periodicals or newspapers
- The production, distribution, sale or exhibition of film or video recordings
- The production, distribution, sale or exhibition of audio or video music recordings
- The publication, distribution or sale of music in print or machine-readable form
- Radio communications in which the transmissions are intended for direct reception by the general public; any radio, television and cable television broadcasting undertakings; and any satellite programming and broadcast network services

The ICA does not provide an exemption for ***de minimis*** involvement in a cultural business. Thus, even if a Canadian business is primarily involved in non-cultural business activities, a minimal involvement in cultural business activities will trigger the review obligation if the $5-million threshold is exceeded.

[1] This threshold will increase to $800 million on April 24, 2017, and will increase to $1 billion on April 24, 2019. Starting on January 1, 2021, it will be adjusted annually based on the growth in Canada's GDP

When review is required for a proposed acquisition of a Canadian business that involves both non-cultural and cultural business activities, applications for review must be submitted to Industry Canada (with respect to the non-cultural aspects of the business) and the Department of Canadian Heritage (with respect to the cultural aspects of the business).

iii. Indirect investment by a WTO investor in a non-cultural Canadian business

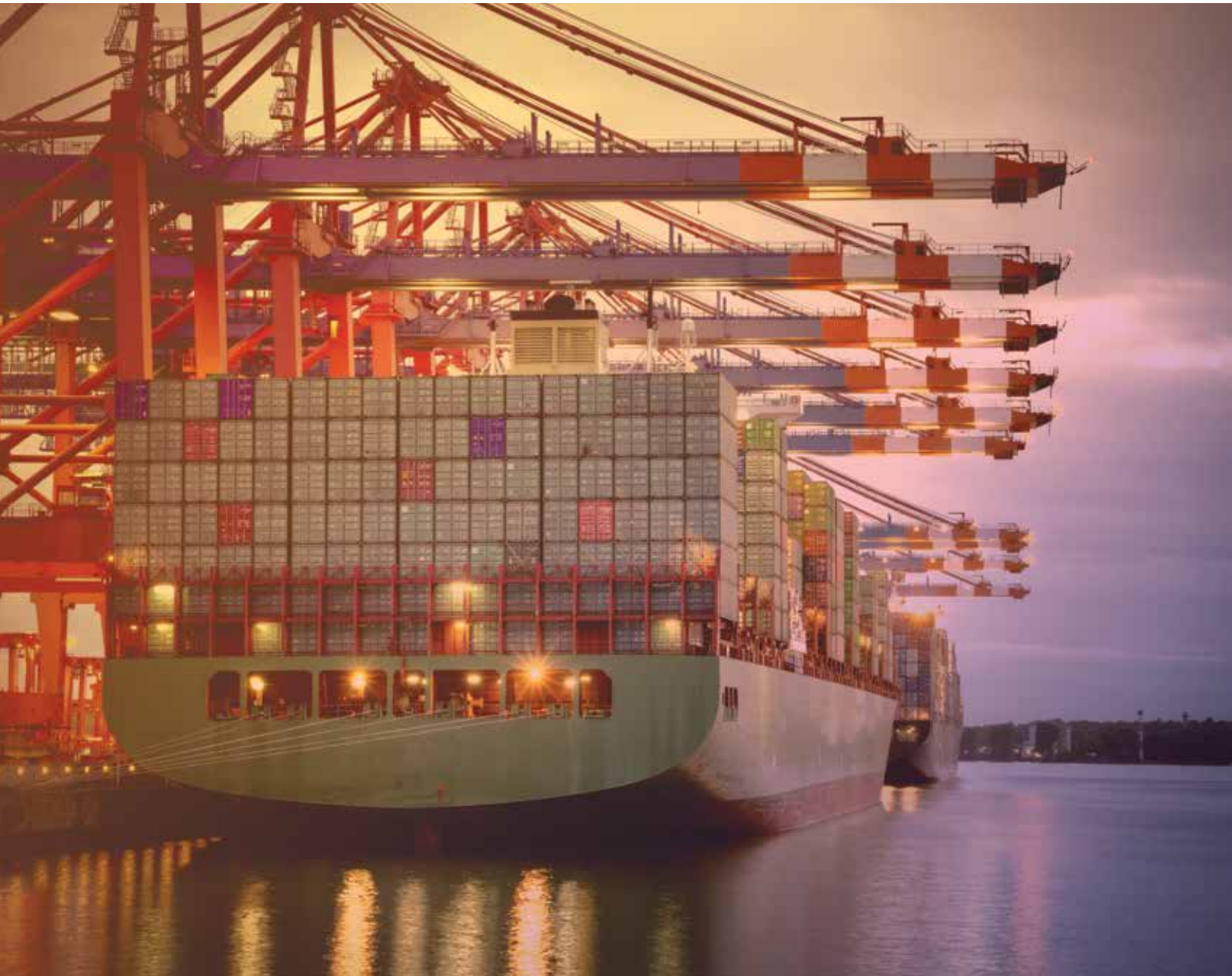
Indirect acquisitions of control by WTO resident investors are not reviewable unless they involve the acquisition of a Canadian cultural business, in which case the $5-million threshold applies. The same applies to WTO investors that are SOEs.

It should be noted that structuring a transaction for the purpose of avoiding review — e.g., incorporating a corporation outside of Canada, the sole assets of which are the shares of the Canadian corporation, and then purchasing the shares of the foreign corporation — is not permissible.

b. Private sector non-WTO investors

i. Direct investment by a non-WTO investor in a Canadian business

The proposed direct acquisition of control of a Canadian business by an investor that is not a WTO investor is reviewable if the book value of the assets of the Canadian business — as stated on its financial statements at the end of its most recently completed fiscal year — exceeds $5 million,



regardless of whether the Canadian business is engaged in non-cultural or cultural business activities, or whether the investor is also an SOE.

ii. Direct investment by a non-WTO investor that is not an SOE in a Canadian business, where the Canadian business is already foreign controlled by a WTO investor

In this scenario, the threshold set out in section a.(i) applies.

iii. Indirect investment by a non-WTO investor

The proposed indirect acquisition of control of a Canadian business by an investor that is not a WTO investor is reviewable if:

- The book value of the assets of the Canadian business exceeds $50 million
- The book value of the assets of the Canadian business exceeds $5 million, and the value of the assets of the Canadian business represents more than 50 per cent of the value of the assets of the target's entire international business

As with indirect acquisitions of control by WTO investor, the $5-million threshold also applies if the Canadian business is engaged in cultural business activities.

c. SOE investors

i. Direct investment by a WTO investor that is an SOE in a non-cultural Canadian business

The proposed direct acquisition of control of a Canadian business by a WTO investor that is also an SOE is reviewable if the book value of the assets of the Canadian business — as stated on its financial statements at the end of its most recently completed fiscal year — exceeds $375 million.[2] The lower $5-million threshold applies if the Canadian business is engaged in cultural business activities.

In some cases, it may be difficult to determine whether a foreign investor is an SOE and, by extension, which threshold applies. This is because the Act's definition of SOE includes an entity that is "controlled or influenced, directly or indirectly" by the government of a foreign state, whether federal, state or local, or an agency of such a government.

ii. Direct investment by a non-WTO investor that is also an SOE in a non-cultural Canadian business where the Canadian business is already foreign controlled by a WTO investor

In this scenario, the threshold set out in section c.(i) applies.

iii. Indirect investment by an SOE

If the SOE is a WTO investor, the acquisition of control of the Canadian business is not reviewable — see section a.(iii) for further details. If the SOE is not a WTO investor, the threshold set out in b.(iii) applies. In either case, if the Canadian business is engaged in a cultural business, the $5-million book value of assets threshold applies.

d. Discretionary powers

In addition to reviews that result from the application of the aforementioned rules, the government has other discretionary powers to order a review. For example:

- The government can review any investment that "could be injurious to national security."
- The government can deem that an entity is an SOE in fact, or deem that there has been an acquisition of control.
- With respect to most types of cultural businesses, the government can:
  - Elect to review the acquisition of control of an existing business or the establishment of a new Canadian business within 21 days of receiving the foreign investor's notification
  - Deem a business that carries on, or proposes to carry on, any such business to be non-Canadian on the basis that the business is controlled in fact by one or more non-Canadians

5. REVIEW

Where review is required, the foreign investor must submit an Application for Review and may not complete the proposed investment until the minister of industry and/or minister of Canadian heritage, as applicable, has determined it to be of "net benefit to Canada."

In the application, detailed information is required about the foreign investor, the Canadian business and the foreign investor's plans for the Canadian business.

To determine whether the proposed investment is likely to be of net benefit to Canada, the government considers factors such as:

- The effect of the investment on the level and nature of economic activity in Canada, including its effect on

[2] The figure of $375 million applies in 2016, up from $369 million in 2015. It is adjusted annually based on the change in Canada's GDP.

employment, resource processing, the utilization of parts, components and services produced in Canada, and exports from Canada

- The degree and significance of participation by Canadians in the business
- The effect on productivity, industrial efficiency, technological development, product innovation and product variety in Canada
- The effect on competition within any industry in Canada
- Compatibility with national industrial, economic and cultural policies
- Its contribution to Canada's ability to compete in world markets

In considering these factors, the minister of industry or the minister of Canadian heritage, or both as applicable, will consult with other relevant federal government departments as well as the governments of affected provinces, which are typically provinces in which the Canadian business has assets or employees.

A determination of net benefit to Canada is usually based on undertakings made by the foreign investor in relation to the factors outlined above. Undertakings are legally binding commitments made by a foreign investor that typically remain in effect for three to five years, and are subject to compliance reviews and audits over that time.

In our experience, the government is most concerned with securing undertakings that relate to specific levels of employment in Canada, the inclusion of Canadians in management positions, capital investment in the Canadian business and further development of Canadian-sourced technology in the country. However, the specific focus of the undertakings varies depending on the nature of the business.

a. Timing

The ICA provides the minister of industry and/or minister of Canadian heritage, as applicable, with 45 days to determine whether a proposed investment would be of net benefit to Canada, along with a unilateral right to extend the review period by 30 days. Additional extensions require the agreement of the foreign investor — without which the applicable minister would likely reject the investment.

In our experience, it is not uncommon for the review of large and complex transactions with significant political overtones to extend beyond 75 days.

b. Possible outcomes

The government may either approve the proposed investment or reject it. Almost all proposed investments are ultimately approved based on undertakings negotiated between the investor and the government. Only a handful of high-profile and/or politically controversial transactions have been rejected. For transactions that could raise significant political concerns, foreign investors should not underestimate the importance of an effective government relations strategy.

c. Fee

There is no filing fee for either an Application for Review or a Notification.

6. NATIONAL SECURITY

In 2009, the ICA was amended to provide the government with the right to review any investment that "could be injurious to national security." In 2013, and again in 2015, the government amended the national security provisions to provide itself with additional flexibility in relation to national security matters. This right to review applies to minority investments, internal reorganizations and the establishment of new Canadian businesses, not just the acquisition of control of existing Canadian businesses. It can also apply to investments in businesses with tenuous links to Canada, as a review can be ordered if "any part" of the business' operations are in Canada.

There is no minimum investment size below which a review on national security grounds may not be ordered. The government has deliberately provided no guidance as to what kind of investment could constitute a threat to national security, affording itself maximum flexibility to take a "we'll know it when we see it approach." The national security provision empowers the government to prohibit any proposed investment, impose conditions on its completion, or require divestiture of a completed investment. A national security review can take up to 200 days.

Full or even substantial information on the government's use of the national security powers is not public. However, the government recently, for the first time, released certain high-level information on its use of the power. Eight national security reviews have been conducted since the powers were introduced in 2009. In three of these cases, the government prohibited the foreign investor from completing the transaction (i.e., where the government conducted its review

before the closing of the transaction). In two cases, the government required the foreign investor to divest the Canadian business (i.e., where the government conducted its review after the closing of the transaction). In two cases, it allowed the transaction to close subject to conditions (which the government has not disclosed), and in another case, the parties abandoned the transaction. Notably, the government has not disclosed the industries in which the relevant Canadian businesses operated, the country of origin of the relevant foreign investors, or whether the relevant foreign investors were SEOs.

One of the biggest risks to foreign investors posed by the national security review powers relates to transactions that do not exceed the applicable mandatory review threshold. These transactions can be completed before being notified, as it is possible that the government could conduct a review and order divestiture after closing, which we now know has already happened in two cases. The government may not commence a national security-related review more than 50 days after receiving an investor's notification — 45 days plus a five-day notice period.

To address this risk in the context of transactions that could possibly raise national security review concerns due to the nature of the acquired Canadian business and/or the foreign investor, the investor can submit a notification more than 50 days before closing, and include a closing condition in the purchase agreement that either no national security review shall have been commenced, or any such review that is commenced shall have been concluded on terms satisfactory to the investor.

7. STATE-OWNED ENTERPRISES

In 2007, the government issued guidelines to clarify how the "net benefit to Canada" test will be applied in the context of proposed investments by foreign SEOs. The government subsequently provided additional guidance with respect to the application of the net benefit to Canada test, and amended various provisions of the ICA in relation to SOEs.

Essentially, the purpose of the guidelines is to ensure that the acquired Canadian business will continue to be operated on a commercial basis, with transparent corporate governance and reporting requirements, rather than to serve the non-commercial, political objectives of a foreign state. The purpose of the amendments is to subject SOE purchasers to a lower review threshold than non-SOE purchasers.

8. SECTOR-SPECIFIC LEGISLATION

In addition to the general ICA process, various federal and provincial statutes place additional restrictions on foreign ownership in specific industries.

Learn more about our services in this area at
gowlingwlg.com/international-trade-canada

K: INTERNATIONAL TRADE

In recent years, Canada has aggressively negotiated and concluded numerous new trade agreements that were built upon, and have gone beyond, the North American Free Trade Agreement (NAFTA) model.

With the gains of NAFTA firmly in place, Canada and the United States have endeavored to intensify North American economic co-operation through enhanced border co-operation and regulatory harmonization within the Beyond the Border initiative. In addition, Canada has been active in finalizing several investment treaties designed to protect Canadian investors abroad.

RAINBOW BRIDGE

One of many bridges across the Niagara River, the Rainbow Bridge is a symbol of the long-standing friendship Canada has with its largest trading partner, the United States.

While integration provides enhanced opportunities, it also emphasizes the need to comply with the legal framework governing trade and customs in each country (including export controls and sanctions regimes), and highlights the necessity of understanding the recourses available when investment and trade disputes arise.

1. IMPORTATION OF GOODS

a. Duties and tax

In Canada, customs duties are levied on imported goods that are classified under the Schedule to the Customs Tariff, in accordance with the harmonized system of customs classification. Duties represent the principal tax levied on goods imported into Canada. In addition to customs duties, imported goods and some services are subject to the federal Goods and Services Tax (GST). For more information on the GST, see the chapter on taxation.

While tariff classification is based on the harmonized system, goods may be classified differently in Canada than in other countries. In addition, not all countries have identical tariff codes, meaning an item listed under one tariff code in the U.S. may be listed under a completely different code in Canada. This often raises the question of whether the components within an imported product undergo the necessary tariff shift to claim preferential treatment under a trade agreement such as NAFTA.

There are many special tariff items under the Customs Tariff that allow for duty relief, such as goods destined for particular end uses. Canada also has duty-relief programs for temporary importations, as well as duty drawbacks and deferrals.

b. Valuation

Classification of a product under the Customs Tariff determines the rate of duty, which is then applied to the value for duty to calculate the duty payable. Canada's system of customs valuation is based on the World Trade Organization's (WTO) ***Customs Valuation Code***, which has been implemented into Canada's ***Customs Act***.

Transaction value is the primary valuation method for imported goods. It is the price actually paid or payable for the goods sold for export to a purchaser in Canada, subject to certain upward and downward adjustments.

Issues relating to transaction-value methodology often arise in related-party transactions due to the requirement that the value for duty reflect an arm's-length transaction. For instance, there is often tension between transfer-pricing objectives from tax and customs perspectives: a balance must be achieved to establish a transfer price that satisfies customs while maximizing tax-planning objectives.

c. Rules of origin

Preferential rates of duty are accorded to products that originate in a country with which Canada has a free trade agreement, such as NAFTA, or agreements between Canada and Panama, Peru, Israel, Chile and other states. (Canada currently has free trade agreements with 11 countries or regions and is in the process of ratifying three additional agreements.)

Whether a product "originates," so as to benefit from a trade agreement, is determined by rules of origin, which may involve complex calculations and analysis of both the tariff classification and value of the components that make up an imported product.

d. Appeals

Tariff classification, valuation and origin issues may all be appealed at the first level internally with the Canada Border Services Agency (CBSA), and then to the Canadian International Trade Tribunal (CITT), an independent tribunal.

e. Import restrictions

Canada maintains quantitative restrictions in the form of tariff rate quotas, which are primarily applied to sensitive agricultural products under the authority of the ***Export and Import Permits Act*** (EIPA), which authorizes an import control list. A permit must be obtained to import these products unless a permit exemption applies.

2. ANTI-DUMPING AND COUNTERVAILING DUTIES

The ***Special Import Measures Act*** (Canada) deals with dumping by foreign manufacturers and exporters, as well as subsidies received by foreign manufacturers. Dumping occurs when goods are sold for export at a price lower than that at which they are domestically sold in the country of origin under comparable conditions and terms of sale. The difference between the "normal" value and the export price is the margin of dumping.

A subsidy is a financial or other benefit that is granted by the country of origin's administration to a manufacturer of exported goods. Subsidies may be subject to countervailing duties.

While the CBSA determines the amount of dumping or subsidy, Canada does not impose duties on the dumped or subsidized goods unless the CITT finds that the dumping or subsidization has caused, or threatens to cause, material injury to a domestic producer. In recent years, dumping and subsidy actions before the CITT have often resulted in success for foreign manufacturers.

3. EXPORT CONTROLS AND SANCTIONS

a. Export controls

Canada has a comprehensive regime for export controls and sanctions administered primarily by Global Affairs Canada (GAC), with enforcement assistance from the CBSA.

Three lists established under the authority of EIPA govern exports of goods and technology from Canada to various destinations: the Export Control List, the Area Control List and the Automatic Firearms Country Control List.

Under the EIPA, it is an offence to export or transfer goods or technology included on the Export Control List, or export or transfer goods to a destination on the Area Control List, except under the authority of a permit. Canada does not have a "licensing" system similar to the U.S., which makes it necessary for each exporter of a controlled good or technology to apply for a permit where one is required.

The minister of foreign affairs has issued several general export permits (GEPs) that allow exports of controlled goods or technology to specific destinations without the requirement to apply for an exporter-specific permit (assuming certain conditions are met). In an effort to streamline the process for the export of certain controlled goods and technology, GAC has recently introduced a GEP authorizing the export of controlled dual-use goods and technology (with some exceptions) to certain eligible destinations, provided the exporter complies with specific conditions.

In the absence of an applicable GEP, exporters must apply for an individual export permit (IEP) to export controlled goods or technology, or to export to a controlled destination. "Broad base" categories of permits are available to authorize multiple shipments to multiple destinations over a certain time period, particularly for cryptography exports, which have created significant compliance problems for Canadian exporters.

Detailed schedules to the Export Control List, which itemize the specific controlled goods and technology, are included in the Government of Canada's *A Guide to Canada's Export Controls*, which is available online at international.gc.ca

While Canada's export control regime focuses on "export or transfer" rather than "origin," item 5400 of the Export Control List respects U.S. controls on the re-export of U.S.-origin goods by requiring a permit to export U.S.-origin goods and technology from Canada. GAC usually considers a good to be of U.S. origin if it contains greater than 50 per cent U.S. content. GEP No. 12 allows the export or transfer of U.S.-origin goods and technology without an individual export permit, except to Cuba, North Korea, Iran, Syria or any destination on Canada's Area Control List.

Export permits are not required for most controlled goods or technology destined to a final consignee in the U.S. Items that do require an export permit to the U.S. are identified on the Export Control List with a statement indicating that the control applies to "all destinations."

No goods or technology may be exported or transferred from Canada to a country on the Area Control List without an individual export permit. The countries currently listed include Belarus and North Korea.

A number of specific export controls are imposed by legislation administered by government departments other than GAC. These controlled products include wheat and barley, certain cultural property, rough diamonds, endangered species, ozone-depleting substances, nuclear substances, select equipment and information, hazardous waste, and certain wild plants and animals.

b. Sanctions

Canada has two main statutes that authorize the imposition of trade and economic sanctions: the *United Nations Act* and the *Special Export Measures Act*. In addition to export controls under the EIPA, regulations passed pursuant to these acts impose various other measures, such as limitations on official and diplomatic contacts, and restrictions on

"Canada's regime for export controls and sanctions is administered by Global Affairs Canada (GAC), with enforcement assistance from the CBSA."

economic activity between Canada and states that are the targets of sanctions, and the creation of "designated persons" lists – and the seizure or freezing of their property situated in Canada as well as a prohibition on doing business with them anywhere in the world. Export controls are normally limited to arms and related material and technical assistance, but may be broader for a particular state, such as Canada's very extensive sanctions on Syria and sector-specific sanctions on Russia.

4. CONTROLLED GOODS REGIME

Public Works and Government Services Canada manages the Controlled Goods Program (CGP), which requires mandatory registration and regulation of persons and entities who examine, possess or transfer defence goods as defined in Canada's *Defence Production Act*. The CGP was created in 2001 to strengthen the Canada-U.S. agreement on defence trade controls, and is essential for maintaining the Canadian exemption with respect to the U.S. International Traffic in Arms Regulation (ITAR) regime.

In October 2011, the CGP began implementing the Enhanced Security Strategy, which imposes heightened security requirements on registered persons and entities. These requirements were adopted to allow Canadian registrants to make use of the new ITAR dual-national rule, which amends the treatment of dual- and third-country nationals in a manner that resolves the conflict that existed between ITAR restrictions and Canadian human rights laws that prohibit discrimination based on nationality.

5. INVESTOR-STATE DISPUTES

Canada is party to a number of trade and investment agreements that allow foreign investors to bring claims against the Canadian government for a breach of an obligation owed to the investor (by either the federal or provincial governments) under one of Canada's investment treaties.

NAFTA's investor-state provisions have given rise to a number of claims brought against Canada. Obligations owed to investors under Canada's investment treaties include:

- The requirement to accord national treatment and a minimum standard of treatment
- The prohibition against the adoption of certain performance requirements (e.g., domestic content requirements)
- The commitment to pay compensation for expropriation

Canadian investors abroad can also bring similar claims against their host country's government under the numerous investment treaties between Canada and foreign countries.

6. CANADA'S BLOCKING LEGISLATION: THE *FOREIGN EXTRATERRITORIAL MEASURES ACT*

The *Foreign Extraterritorial Measures Act* (FEMA) provides for the enactment of orders to prevent Canadian companies from complying with extraterritorial measures of other countries.

There is currently only one order in force under FEMA: the Foreign Extraterritorial Measures (United States) Order. This Order creates a dangerous "catch-22" for related Canadian and American companies by prohibiting a Canadian company from complying with American extraterritorial measures that restrict trade between Canada and Cuba.

If the company complies with U.S. law, it faces serious sanctions under FEMA. On the other hand, if it does not comply with U.S. law, it may face serious sanctions under U.S. laws that prohibit trade with Cuba. The FEMA order also imposes an obligation on Canadian companies to "report" communications received that relate to an extraterritorial measure of the U.S. pertaining to Cuba, and imposes strict penalties for non-compliance to this obligation.

FEMA applies to any company incorporated and carrying out work in Canada, meaning that a subsidiary of a U.S. company registered in Canada and carrying on activities in Canada, even if minor, would be captured under the FEMA order and subject to its reporting and compliance obligations. As a result, FEMA issues often arise in the context of mergers between Canadian and U.S. companies where the Canadian companies have existing Cuban businesses or when a U.S. company establishes a Canadian affiliate or subsidiary.

7. PROACTIVE TRADE COMPLIANCE

Failure to comply with the numerous laws and regulations governing trade with Canada can result in serious penalties and prosecution, as well as disruptions to business operations. It is important for companies intending to do business in Canada to retain experienced trade counsel, both to ensure compliance and to identify strategies that enhance their ability to operate competitively in the Canadian market.

Learn more about our services in this area at
gowlingwlg.com/international-trade-canada

L: ENVIRONMENTAL PROTECTION

THE TRUE NORTH

Many animals call Arctic Canada home, but the polar bear is perhaps the best known. With the impact of climate change threatening their habitat, polar bears are now recognized as a species of "Special Concern."

Canada is an expansive country with a substantial industrial base, plentiful natural resources, extensive bodies of water and significant coastal, Arctic, forested and agricultural regions. As such it faces a wide range of potential environmental issues.

Canada's *Constitution Act, 1867* divides legislative power between the federal Parliament and the provincial legislatures.

While the Act sets out many specific areas of jurisdiction, it does not explicitly dictate who has the power to create environmental laws. As a result, Canadian courts have decided that this power is shared between the two levels of government.

The government is able to enact environmental law if it falls under one of the powers listed in the *Constitution Act, 1867*. For example, federal environmental laws are often enacted under the federal Parliament's jurisdiction to legislate criminal law, fisheries, and peace, order and good government. Provincial environmental laws are generally premised on the provincial power to legislate property and civil rights, and on matters of a purely local nature.

Municipal governments also play a role in Canadian environmental law, but to a much lesser extent. As municipal jurisdiction is not addressed in the *Constitution Act, 1867*, it is instead defined by each province's governing statute for matters concerning local government.

In addition to government-created law, environmental obligations and liabilities may be incurred pursuant to contract, common law and civil law.

1. FEDERAL ENVIRONMENTAL LAWS

a. *Canadian Environmental Protection Act, 1999*

The *Canadian Environmental Protection Act, 1999* (CEPA) is Canada's primary environmental regulatory statute. It establishes the federal authority to regulate a broad range of environmental concerns, ranging from toxic substances to environmental emergencies.

i. Toxic substances

Any substance listed in Schedule 1 of CEPA is classified as toxic and is subject to a series of specific controls. In particular, requests for samples or information on the substance can be issued by the minister of the environment. CEPA also outlines procedures for substances that are newly introduced to Canada. It is prohibited to import or manufacture quantities of any substance not listed on the Domestic Substances List above a certain volume, until that substance can be properly assessed by Environment and Climate Change Canada and Health Canada. Additionally, CEPA imposes a duty to report and a duty to take remedial action on persons who own or are in control of a spilled toxic substance. Anyone who contributes to the release of a toxic substance may also be subject to the same duties. Under CEPA, the minister of the environment is given authority to issue orders in the case of an environmental emergency.

ii. Enforcement

A variety of enforcement powers are provided for under CEPA. Any person in breach of the Act's provisions may face monetary penalties or, in certain cases, imprisonment. Officers and directors may be subject to prosecution if they authorize, assent to or acquiesce in the commission of an offence, or if they fail to take all reasonable measures to ensure compliance. However, alternatives to the standard prosecution process may be available through Environmental Protection Alternative Measures agreements.

In June 2012, key provisions of the *Environmental Enforcement Act* came into force, amending CEPA's sentencing and penalty provisions, and a host of other federal environmental legislation. Most notably, the new penalty provisions introduced mandatory minimum fines and dramatically increased maximum fines. Further, as a result of the changes, minimum and maximum fines are now doubled for subsequent convictions. A conviction is deemed to be a subsequent conviction if the offender was previously convicted of a substantially similar offence under any federal or provincial environmental or wildlife protection act. Under the new regime, smaller corporations are subject to lower fines than large-revenue corporations.

iii. Emissions

The National Pollutant Release Inventory (NPRI) — as authorized by CEPA — makes the reporting of emissions mandatory where the amount of emissions is equal to, or in excess of, the reporting threshold, and where one or more of the substances emitted is included in the NPRI Substances List. Any facility required to report its emissions must submit a detailed account to Environment and Climate Change Canada. This information is made accessible to the public.

b. *Canadian Environmental Assessment Act, 2012*

The *Canadian Environmental Assessment Act, 2012* (CEAA) replaced the former *Canadian Environmental Assessment Act*. Under the new Act, projects cannot be required to undergo a federal environmental assessment unless they are specifically designated under the regulations or by the minister of the environment. This differs from the former Act, under which many types of projects — even very small ones — could require an environmental assessment if they involved federal government funding or required certain federal regulatory approvals.

The Regulations Designating Physical Activities apply to projects ranging from transmission lines to industrial facilities, depending on if the project is located in a wildlife area or migratory bird sanctuary, and require the proponents of selected projects to submit a project description for screening by the Canadian Environmental Assessment Agency (the Agency). After a proposal has been submitted, the Agency has 45 days to determine if a federal environmental assessment is required. If the project falls under the auspices of the National Energy Board or the Canadian Nuclear Safety Commission, an environmental assessment is automatically triggered and no preliminary screening is conducted by the Agency.

Some projects may be subject to both CEAA and provincial environmental assessment legislation — as discussed later under "provincial environmental laws." If the minister of the environment is satisfied that the substantive requirements of CEAA can be accomplished through a provincial assessment process, they may substitute the provincial process for the CEAA process. For major projects that engage both CEAA and provincial environmental assessment legislation, a joint federal-provincial review panel may be established.

A project will be permitted to proceed only when the minister, or other applicable decision-maker, is satisfied that the project is not likely to cause significant adverse environmental effects — or, if such effects are likely, the governor in council then determines that they are "justified in the circumstances." Once the decision is made, a decision statement is issued, which sets out the conditions with which the proponent must comply. Failure to comply with the conditions is an offence under CEAA and can result in fines or an injunction.

c. *Fisheries Act*

The ***Fisheries Act*** contains provisions to ensure the conservation and protection of fish and fish habitats essential to sustaining commercial, recreational and Indigenous fisheries. It prohibits the deposit of deleterious substances into water frequented by fish. It also prohibits carrying out work that results in "serious harm to fish that are part of a commercial, recreational or Indigenous fishery, or to fish that support such a fishery," unless the work is authorized by a permit or the regulations.

Under the ***Fisheries Act***, the federal government exercises certain regulatory authority over water pollution and water quality. A number of sector-specific regulations have been made under the ***Fisheries Act*** that establish effluent standards and impose monitoring and reporting requirements. For example, there are separate regulations directed at the mining industry, the pulp and paper industry, and large wastewater systems.

d. *Transportation of Dangerous Goods Act, 1992*

The shipping, handling and transportation of dangerous goods are regulated by the ***Transportation of Dangerous Goods Act, 1992*** (TDGA), as well as provincial statutes. The TDGA creates a complete and comprehensive system of regulation. All provinces have directly adopted an identical regime with respect to intra-provincial transportation.

Nine classes of "dangerous goods," ranging from organisms to explosives, are defined in a schedule to the Act. The Act also addresses issues such as labelling requirements and emergencies, and provides a full suite of enforcement measures. Additional specific and detailed requirements can be found in the Transportation of Dangerous Goods Regulations.

e. Other federal legislation

In Canada, special-purpose legislation applies to the approval of fertilizers, pesticides, and food and drugs. The sale, manufacture, distribution, import or export of substances may be prohibited if they are not otherwise approved under the applicable legislation.

f. Review of federal legislation

In June 2016, the Canadian government launched a review of federal environmental assessment and regulatory processes, including reviews of CEAA, the ***Fisheries Act***, the ***Navigation Protection Act*** and the ***National Energy Board Act***. The Canadian government is also currently conducting a separate review of CEPA, which began in March 2016.

2. PROVINCIAL ENVIRONMENTAL LAWS

Environmental laws and their enforcement vary from province to province. Matters under provincial jurisdiction notably include:

- Air emissions
- Water and wastewater treatment and discharges
- Water withdrawals
- Waste management
- The release of contaminants, including issues relating to contaminated lands and brownfield redevelopment

- Pesticide use
- Underground and above-ground storage tanks
- Hazardous materials and residual hazardous materials management
- The transportation of dangerous substances

Provincial environmental laws prohibit the discharge of pollutants into the environment, but the definitions of a "pollutant," a "contaminant" and the "environment" vary across the provinces.

A new emission source or facility that may impact the environment typically requires an environmental approval, which may be subject to strict conditions. Existing sources of emissions may also be subject to further controls through the issuance of administrative orders.

Canada's three federal territories, the Northwest Territories, Yukon and Nunavut, are not specifically empowered by the *Constitution Act*, *1867*. Their legislative powers are derived from the powers granted to them by the federal government through enabling legislation. For this reason, environmental law in the three territories is generally similar to federal environmental law.

a. Environmental assessment

Several provinces also have environmental assessment laws, the details of which vary from province to province. In Ontario, environmental assessment legislation primarily applies to public sector undertakings. However, significant private sector undertakings may be required to undergo a comprehensive environmental assessment in order to identify and evaluate the need for the undertaking, the alternatives to the undertaking, and alternative methods of accomplishing the undertaking.

In Québec, environmental assessment processes have been applied in the north of the province since 1975 — with the *James Bay and Northern Québec Agreement* — and in the south since 1980. The *Environment Quality Act* sets out a rigorous process to assess the impacts of major projects on communities and the environment. Different regimes apply depending on whether any part of the project takes place on territory subject to the *James Bay and Northern Québec Agreement* and the *Northeastern Québec Agreement*, and where the process involves an active participation of the Indigenous communities living there (e.g. Crees, Inuit and Naskapis). In southern Québec, the process also favours the participation and consultation of the public through an environmental public hearing board called the *Bureau d'audiences publiques sur l'environnement* (BAPE).

Under Alberta and British Columbia laws, environmental assessments for a wide range of public and private sector proposals are required. These laws tend to target larger natural resource projects exceeding prescribed operational or other criteria.

Given Canada's division of constitutional powers, many proposals will trigger both provincial and federal environmental assessment requirements. This dual jurisdiction is commonly addressed by provincial and federal laws intended to harmonize environmental assessments and, when possible, facilitate the substitution of a federal environmental assessment for a provincial assessment and vice versa.

A fundamental feature of both provincial and federal environmental assessments is the consideration of constitutionally entrenched Indigenous and treaty rights. These rights differ in many ways from those exercisable by the public at large. In many environmental assessments, Indigenous groups rely on judicial principles governing consultation with Indigenous communities, Indigenous consent respecting lands subject to Indigenous rights (including land title), and criteria governing justifiable government infringement of such rights. In certain jurisdictions, specific environmental processes have been entrenched in constitutionally protected agreements negotiated between the federal and provincial governments, and Indigenous groups — such as the *James Bay and Northern Québec Agreement*.

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"The *Canadian Environmental Protection Act*, *1999* (CEPA) is Canada's primary environmental regulatory statute."

b. Environmental enforcement

A breach of provincial environmental laws may be enforced through voluntary abatement measures, administrative orders, administrative fines or prosecutions. For example, in Ontario, which introduced stiff provincial penalties for major environmental offences in 2000, a repeat corporate offender may face a fine of up to $10 million for each day the offence occurs or continues. A repeat individual offender may face up to $6 million per day, plus five years less a day in prison. There may also be a forfeiture of profits gained through non-compliance and liability for cleanup costs, as well as a series of other remedies. Similarly, other provincial regimes — such as those in Québec — can rely on strong enforcement measures to sanction non-compliance of environmental laws and regulations within their jurisdiction, which include specific provisions with respect to directors' and officers' liability.

c. Contaminated sites

For land development, property sales and other decisions, provincial laws governing contaminated sites tend to be central considerations. Most provinces apply site investigation and remediation guidelines developed through various inter-provincial efforts. British Columbia's *Environmental Management Act* differs from many other provinces in three respects:

- Relying less on regulators' broad discretion to apply guidelines, the Act prescribes legally binding standards for contamination (in part per million terms), investigation methodologies and remediation.
- Remediation approvals are informed largely by recommendations by private sector "approved professionals."
- The Act further enhances plaintiff remediation cost recovery remedies by establishing a cause of action that supplements common law remedies (and thus is analogous to the United States Superfund law).

In Québec, the land protection and rehabilitation regime, introduced by Bill 72, entered into force in 2003. It requires mandatory site characterization study and rehabilitation work for certain events or activities, such as a change in use of land in certain circumstances and the cessation of designated activities. The process promotes transparency by requiring the publication of contamination, decontamination and use restriction notices in the land register. Municipalities are also required to maintain a list of contaminated sites within their borders.

The regime in Québec relies on qualified experts to certify the site assessment reports that are required under the *Environment Quality Act*. The Land Protection and Rehabilitation Regulation determines the limit values for a range of contaminants, and defines the types of industrial activities contemplated by the regulation. It also establishes the conditions under which groundwater quality must be monitored downstream of the lands where some of those activities take place.

The information about the existence of contaminated sites is made public through various means. In Québec, the province publishes an inventory containing information on sites that have been contaminated by industrial and commercial activities, or accidental spills, and have been brought to the authorities' attention.

d. Climate change

Climate change is a significant and current law reform issue in most Canadian provinces. Different approaches have been implemented and others are being carefully considered.

British Columbia began legislating greenhouse gas (GHG) emissions in 2007 and in 2008 introduced a carbon tax, which applies to the purchase or use of fossil fuel in the province. This was followed by low-carbon fuel standards implemented in 2010, and legislation to manage GHG emissions in the liquefied natural gas industry. More recently, British Columbia has created a Climate Leadership Team, which seeks to establish a more stringent GHG emissions reduction target, increase carbon tax, include the social cost of carbon in its environmental assessment process and develop a low carbon transportation strategy.

Regulations adopted in Québec established a cap-and-trade system to regulate GHG emissions and meet the Québec government's GHG reduction targets. On January 1, 2013, the regulatory regime added compliance obligations for certain Québec emitters to offset their reported GHG emissions with allowances. Allowances can be acquired at inter-jurisdictional auctions, government reserve sales and from other participants in cap-and-trade programs that have excess to allowances for sale. In the case of industrial emitters other than fuel distributors, allowances are also allocated by the government at no charge, but on a declining basis. Emissions can also be offset by credits from certain government-recognized GHG reduction projects that have been validated in accordance with the protocols set by the regulations. Cap-and-trade in Québec is harmonized with the California regime, and is intended to be linked with similar

cap-and-trade regimes adopted by other Canadian and U.S. jurisdictions that are members of the Western Climate Initiative.

In May 2016, the Ontario government passed legislation establishing a cap-and-trade program. Cap-and-trade in Ontario is ultimately intended to be linked with similar cap-and-trade regimes adopted by other member jurisdictions in the Western Climate Initiative. The first four-year compliance period begins on January 1, 2017. Subsequent compliance periods will be three years in duration. Corporations that emit 25,000 tonnes or more of GHGs are required to participate. Participants will only be able to emit the amount of GHGs permitted by their emission allowances. As in Québec, free allowances will be available to mandatory participants, but the number of available free allowances will decrease over time. In fall 2016, the provincial government is expected to release a draft carbon offset regulation detailing eligible carbon offset protocols. It is also expected that, beginning in 2017, cap-and-trade participants will be able to use offset credits in place of emission allowances up to a set limit.

In 2016, Alberta developed a new strategy on climate change based on recommendations put forward by the Climate Change Advisory Panel. The final strategy will focus on four keys areas:

- Phasing out emissions from coal-generated electricity and developing more renewable energy
- Implementing a new carbon price on GHG emissions
- Legislating an oil sands emission limit
- Employing a new methane emission reduction plan

3. MUNICIPAL MEASURES

Municipalities may regulate activities through legislation, including sewer-use bylaws, noise bylaws and property-standards bylaws. In addition, municipalities in Ontario and Québec integrate environmental approvals with planning approvals.

Some municipalities require comprehensive environmental site investigations and public notification prior to issuing certain permits. For example, before issuing a planning approval or building permit, a municipality may require verification of contamination for the subject property, and may impose a remedial plan plus financial assurance as conditions of approval. In Québec, a municipality cannot issue a construction permit or approve a subdivision of land where the land in question is listed in the municipal registry of contaminated lands — unless the project or subdivision is consistent with an approved rehabilitation plan.

4. COMMON LAW AND CIVIL LAW

Common law causes of action relating to environmental matters include nuisance, negligence, strict liability and trespass. Although judicial decisions may vary, the common law principles generally apply to every common law jurisdiction in Canada. In Québec, which is a civil law jurisdiction, contractual and extra-contractual disputes are governed by the *Civil Code of Québec*. Additional opportunities for litigation exist through class-action legislation in specific provinces and through specific provisions within certain provincial legislation.

M: REAL ESTATE & URBAN DEVELOPMENT

Real estate is a broad category that covers buying, selling, developing, leasing and financing across a wide range of sectors — from mining, forestry, and oil and gas to light-to-heavy industrial, commercial, residential, recreational, retail, office, condominiums, subdivisions, urban development, brownfields and mixed-use developments.

As a result, Canada attracts a range of business and individual investors from far and wide seeking to invest in the country's varied real estate assets.

MULTICULTURALISM

In 1971, Canada was the first country in the world to adopt multiculturalism as an official policy. This public park in Edmonton hints at the different communities that make up the country's diverse cultural identity.

1. FOREIGN INVESTMENT

Understanding the principal issues involved in acquiring, developing, leasing and/or financing property in Canada is critical for foreign investors looking to properly assess the risks and rewards associated with any proposed investment.

The provinces have primary responsibility for property law in Canada. In all provinces except Québec property law has developed through the English common law process. In Québec, property law is governed by the *Civil Code of Québec*, which is derived from the *Napoleonic Code*. There is no constitutional protection for property rights in Canada. Consequently, property can be expropriated by government and quasi-governmental authorities (however, appropriate compensation must be paid by the expropriating party). All contracts and agreements dealing with real estate should contemplate the potential risks and consequences of either part or all of the lands being expropriated.

Interests in land are generally held directly in fee simple or by leases as leasehold interests. Condominium or strata title ownership is also common throughout Canada. All provinces maintain a registry of public land titles whereby ownership can be verified and through which interests in land are registered. Canada has highly sophisticated land registration systems in place in each province to deal with the ownership of real property.

During the past several years, public concern has increased in the Greater Vancouver Regional District (GVRD) over the steep rise in home prices. For many GVRD residents, owning a home has become beyond their reach, and the affordability and availability of rental units is also becoming increasingly problematic.

The situation in Vancouver has repeatedly been referred to as a "crisis" and a "threat" to the region's economy. This has led to political pressure on the British Columbia government to intervene to make home ownership more affordable and to increase the supply of rental units. In response to this situation, in July 2016 the provincial government enacted the *Miscellaneous Statutes (Housing Priority Initiatives) Amendment Act, 2016* (Bill 28), effectively placing a 15 per cent tax on foreign home buyers. The funds collected from this tax are earmarked for British Columbia housing initiatives established by the provincial government.

2. INVESTMENT VEHICLES

There are several legal structures through which to invest in Canadian real estate, including:

- A corporation (either federally or provincially incorporated)
- General partnership
- Limited partnership
- Co-ownership (often referred to as a "joint venture")
- Trust
- Real estate investment trust
- Personal ownership
- Any combination of the above

The choice of an appropriate investment structure will be influenced by several factors, including liability issues and business considerations, as well as the rules and regulations governing each foreign investor's home country. Tax planning requirements are another important consideration, and foreign investors would be wise to seek tax planning advice before purchasing real property in Canada in order to minimize tax consequences and maximize benefits.

a. Real estate investment trusts (REITs)

A real estate investment trust (REIT) is a trust established to consolidate the capital of a large number of investors for the purpose of investing in real estate, often through the direct acquisition of income-producing real estate assets. In addition to investing in income-producing properties, REITs may also buy, develop, manage and sell a wide variety of real estate assets. Investors in the trust are usually issued units, which represent an undivided beneficial interest in the trust, and are then allocated a pro rata share of the income and losses of the trust.

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

b. Joint venture structures

Commercial real estate properties may also be held through a joint venture structure. A joint venture is a relationship between two or more entities that have

invested their assets or carry on business together in order to realize a profit. There are several alternative joint venture structures, with the most common being joint venture corporations, partnerships, co-ownerships and co-tenancies. Joint venture corporations are generally structured so that each party holds shares in the corporation and enters into a shareholders' agreement to govern the corporate relationship. In general, joint venture corporations enjoy many of the same advantages as corporations, including limited liability, ease of administration, and a certainty of legal rights and obligations.

A joint venture may also hold property in either a general or limited partnership. A partnership agreement will typically be used to govern the relationship between the persons carrying on the business and to allocate profits and losses between the parties. One of the primary advantages of the partnership structure is its flexibility, as it allows for varied and other non-proportionate sharing of the profits and losses.

A tenancy in common or undivided co-ownership — which is a relationship between two or more parties with a direct or indirect ownership interest in property — is another joint venture structure that is frequently used. Each co-tenant or co-owner has an undivided interest that provides an equal right to use and possession. Co-tenants or co-owners will typically enter into a co-ownership agreement that governs this relationship and the ability of each party to deal with its interest. Co-tenants bear no responsibility for the debts of other co-tenants or co-owners, and have no right to act as agent for any other co-tenant or co-owner. Each co-tenant or co-owner is considered its own entity, and thus each co-tenant is entitled to sell or finance its interest in the joint venture property.

In Canada, there have been many situations in which joint venture arrangements were not structured properly, resulting in serious disputes between parties. Joint venture agreements should be vetted by counsel to ensure that they not only incorporate the basic business terms, but also give consideration to practical business, operational, management and termination issues.

3. ACQUISITIONS AND DISPOSITIONS

a. Acquisitions

To acquire real estate in Canada, parties typically enter into an agreement using one of the following documents:

- A letter of intent
- An offer to purchase
- An agreement of purchase and sale

Notwithstanding what the parties call their document, this agreement should contain all necessary business terms for the transaction, including the description of the land, purchase price, deposit(s), closing date, title and/or due diligence periods, representations and warranties, and any other special terms and conditions that the parties agree to. Some provinces and jurisdictions have real estate boards that dictate the form that is typically used, but parties are generally permitted to use their own form if they decide not to use the local real estate board's prescribed form. It is always advisable to have a lawyer review any preliminary deal document, such as an offer or agreement of purchase and sale, before it is signed.

When purchasing, it is important to seek advice with respect to the various federal, provincial and, sometimes, municipal taxes that may be exigible in connection with a particular transaction, such as land transfer tax, withholding tax for foreign investors, harmonized and provincial sales tax, capital gains tax, developmental and educational charges and taxes, and many others. It is also generally best to have local professionals involved in your real estate transactions.

b. Dispositions

Whether you are buying or selling, it is always important to put all of the critical business terms in the letter of intent or agreement of purchase and sale. Certain Canadian cities have established real estate boards that provide standard form agreements of purchase and sale, as well as other precedent agreements.

While using these types of precedent agreements is appropriate for most purposes, for more sophisticated acquisitions and dispositions it is wise to consider longer form agreements. These forms address many more issues, including the allocation of the purchase price among the real property, building and chattels (if any), conditions precedent for either or both of the buyer and the seller, HST exemption status of the real estate or the buyer, scope of representations and warranties, scope and limitations on due diligence and deliveries.

4. DUE DILIGENCE

Once the agreement of purchase and sale is signed, it is generally the responsibility of the purchaser (usually through counsel) to conduct due diligence concerning the property being acquired. This includes acquiring the title to the real estate and any personal property assets as part of the agreement of purchase and sale, and performing other due diligence activities with respect to any number of the following:

- Off-title enquiries
- Adjoining lands searches
- Environmental investigations
- Heritage designations
- Survey and lease reviews
- Road access
- Zoning compliance
- Utilities
- Conservation authority
- Registered and unregistered easements
- Municipal agreements
- Airport zoning bylaws

In addition, when purchasing a building or structure, it is also prudent to conduct structural, mechanical, electrical and plumbing investigations.

5. TITLE INSURANCE

Although title insurance is a recent phenomenon in Canada, it is readily available across the country. In fact, certain provinces, such as Ontario, require lawyers to inform residential purchasers that they can rely on either of the following:

- A solicitor's opinion
- Title insurance offered by the Law Society of Upper Canada title insurer
- A third-party title insurance provider

Due to what tend to be more sophisticated and complex title registration systems across the country, title insurance may not be the best option for every transaction. One of the selling features of title insurance in Canada is the cost savings on due diligence searches, but this is only relevant up to a certain point.

6. LAND-USE PLANNING

A number of provinces in Canada have implemented land-use planning legislation, bylaws and regulations to control the manners in which real estate is developed.

Although land-use planning is the responsibility of the provincial government and is supervised at the provincial level, significant planning functions have been delegated to regional and municipal governments. Land use is controlled through instruments such as the official plan, a long-range general plan for a region or municipality, and zoning bylaws, which regulate the permitted uses for each parcel of land within the municipality along with a range of other matters (such as parking requirements and the type, size, height, and location of buildings and structures).

For purchasers of land, both the official plan and particular zoning bylaws are crucial. Most municipalities require that site plans be approved before the construction of any new development begins. Site plans set out the details of a development — including the location of buildings and related facilities, such as landscaping, services, driveways and parking spaces. Most municipalities require that developers enter into an agreement ensuring construction and ongoing maintenance in accordance with the site plans.

Land-use planning legislation not only affects the subdivision and transfer of land, but it also often applies to long-term leases and rights that are given over, or in connection, with land. In Ontario, for example, any subdivision of land requires the consent of the local committee of adjustment or subdivision control committee, pursuant to the *Planning Act* (Ontario). This requirement also applies to mortgages, as well as the granting of any other interest in land (such as a lease), for 21 years or more (inclusive of renewals) where the mortgage or interest is granted over only part of a landholding. The failure to obtain such consent when otherwise required will result in the failure of the deed, mortgage or lease to create any interest in the real property. Although there are a number of exemptions to the consent requirement, most contracts for the purchase of real property in Ontario are made subject to any required consent, and the cost and responsibility for obtaining such consent is usually allocated to the vendor.

Anyone wishing to subdivide land in Ontario, or to subdivide and sell lots, must obtain governmental consent and may be required to submit a draft plan of subdivision for approval. Normally, the municipality will require the developer to enter into development agreements whereby the developer agrees to provide sewers, roads and other services for the subdivision, and dedicate certain lands for public use and other public benefits. In Québec, the *Act respecting land use planning and development* makes each municipality responsible for administering its territory for municipal purposes.

7. LEASING

Leasing is a highly complex area. There are several ways to lease property in Canada.

a. Ground leases

Property may be leased as well as purchased. One form of leasing arrangement is a long-term ground lease, in which a tenant leases vacant land and develops it. Once the development is complete, the ground tenant sublets space to retail, office or industrial tenants (depending on the type of development). Ground leasehold interests may be bought and sold in a manner similar to fee simple property interests.

b. Commercial, industrial and retail leasing

In Canada, most commercial office and retail space, as well as much of the standard industrial space, is available only through a commercial lease. Most commercial lease transactions start with an offer or agreement to lease. Unlike in the United States, an offer or agreement to lease is typically a binding agreement that contains the business terms agreed upon by the parties, including the space, term, rent and any tenant inducements.

Most commercial leases in Canada are typically on a net/net rental basis, which requires tenants to pay, in addition to basic rent, a proportionate share of the realty taxes, insurance, utilities and other maintenance charges commercial buildings typically incur. In a retail lease, a tenant may also be required to pay rent based on a percentage of its annual gross sales.

c. Residential leasing

Residential leases are regulated by provincial legislation. In some cases, the applicable provincial legislation will override the terms of the lease agreement, regardless of the intention of the parties. In some provinces, for instance, even a landlord's ability to increase residential rent is limited by provincial regulation.

8. FINANCING

a. Sources of financing

Most real estate financing is arranged through institutional lenders such as banks, credit unions, caisses populaires, insurance companies, trust companies and pension funds. However, there are also a number of non-institutional and private lenders that lend money in the Canadian financial market. As is the case in other countries, credit terms will vary from lender to lender and will depend on the nature of the transaction and the risks involved.

The Canadian banking system is widely considered the safest and most efficient in the world, ranking as the world's soundest banking system for the past three years according to reports by the World Economic Forum. The banking and lending industry in Canada is highly regulated, with a number of federal statutes governing it, such as the *Bank Act, Trust and Loan Companies Act, Credit Unions and Caisses Populaires Act, 1994*, and the *Insurance Companies Act*. The strength of Canada's banking regulatory regime was especially lauded in the most recent debt crisis.

b. Interest rates

Interest rates on real estate financings can be either fixed for a specified period of time, or variable, based on a "prime rate" determined by the lending institution on a periodic basis. The prime rate is based on a rate announced by the Bank of Canada from time to time. A borrower may consider borrowing in other currencies and has a choice of interest rate pricing, including applicable Government of Canada Bond Rates, the London Interbank Offered Rate (LIBOR) and bankers' acceptances. Certain fees, such as commitment and processing fees, are normally charged by lenders. Typically, it will be the borrower's responsibility to pay for all of the lender's legal and other costs in arranging property financing. The *Interest Act of Canada* dictates, among other things, how interest rates are to be presented to the public to ensure fairness and transparency.

c. Primary and collateral security

Lenders, whether they are financial institutions or third-party arm's-length lenders, usually take both primary and collateral security in real property and related assets to secure the loan. Typical primary security includes a mortgage or charge, a debenture containing a fixed charge on real property or — in some cases where more than one lender is involved — a trust deed securing mortgage bonds or debentures (and including a specific charge over real property). Collateral security often includes general and/or specific assignments of leases and rents, general security agreements, assignments of contracts and insurance policies, and personal guarantees.

d. Foreign lenders

Because many foreign lenders in Canada are subsidiaries of the world's major banks, they typically participate by way of syndicated loans, which are often arranged by major Canadian lending institutions. However, there are also Canadian lenders who participate in syndicate lending as well. There has been a great deal more syndicate lending since the real estate dip in the early 1990s. Whether lending through a syndicate or directly, foreign lenders may be subject to certain withholding and other taxes on the interest paid to them.

9. ENVIRONMENTAL CONCERNS

Canada's environmental legislation is both sophisticated and advanced due to the country's abundant natural resources. All levels of government have enacted detailed statutes, laws, regulations, bylaws, guidelines and recommendations concerning the protection of the environment. These laws attribute liability for environmental damage to both property owners and polluters of the environment. Tenants often make the mistake of assuming that, since they do not own a property, they are not liable; however, in some provinces and jurisdictions, merely being in occupation, management or control of real property may attribute liability.

A property owner has certain duties and obligations relating to the discharge of contaminants and hazardous materials into the environment from its property. They must also note that liabilities associated with improper waste management practices can be inherited by subsequent owners of a property.

10. ENVIRONMENTAL RISK ASSESSMENT

Purchasers should assess the environmental risks associated with the purchase of a property. In Canada, government officials do not "certify" that a property is free from such risks. Rather, purchasers can ascertain a property's environmental status by inspecting applicable company and public records. In many cases, a purchaser will want to do an "environmental audit," which may include conducting scientific testing and a technical analysis of the property. Lending institutions often require such an audit before advancing any funds.

The conducting, delivery and review of environmental audits can be a complex area. One should ensure that the consultants retained to do the environmental investigations are approved by the recipient of the report (e.g. the lender or municipality); otherwise, the investigation may not be accepted and will have to be conducted again.

11. DEVELOPMENT CONTROLS

Property development is provincially regulated, primarily at the municipal level. Municipalities typically control land use and the density of development through official plans and zoning bylaws. Many municipalities impose development charges on new developments within their jurisdictions. Certain provinces restrict and regulate the ability of an owner to subdivide property.

The construction of new projects is also subject to provincial and municipal legislation. In addition to regulating the maintenance of existing structures, building codes set specific standards for the construction of buildings. Before construction commences, most municipalities require building permits, payment of any applicable fees and confirmation that the property developer has obtained all necessary regulatory approvals.

12. REAL ESTATE BROKER AND MORTGAGE BROKER LEGISLATION

Generally, a person who wishes to dispose of or acquire real estate will seek the assistance of a real estate broker. Real estate brokers are subject to specific regulations in Canada. Each province has legislation that regulates the trade in real estate, which is designed to better protect consumers and instil confidence in the buying and selling of real estate. Provinces have various types of governing bodies that regulate the purchase and sale of real estate, the conduct of real estate agents and the minimum standards for duty of care to the public when engaged in the purchase and sale of real estate.

Mortgage brokers, lenders and administrators are also subject to specific regulations in Canada. These regulations are governed by various pieces of provincial legislation. In Ontario, the *Mortgage Brokerages, Lenders and Administrators Act, 2006* went into full effect in 2008. The Act requires all mortgage brokerages, administrators, brokers and agents to obtain a licence to do business in Ontario. Similar legislation either exists or is under consideration in most of the other provinces.

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N: INTELLECTUAL PROPERTY

ALGONQUIN PARK

Canada's landscape was the source of its first major national art movement, best known through the paintings of the so-called "Group of Seven."

Today's economy is driven by innovation, and the proper protection of innovation is vital.

This chapter of *Doing Business in Canada* provides an overview of Canada's intellectual property regime in five key areas: copyright, industrial designs, patents, trademarks and the enforcement of IP rights.

1. COPYRIGHT

Canada is a signatory of the Berne Convention, and has acceded to the principal multilateral treaties seeking to harmonize copyright protection around the world. Accordingly, foreign businesses wishing to do business in Canada will find many similarities between their domestic copyright laws and those in Canada.

Nevertheless, Canadian copyright laws do possess certain subtleties that should be noted. In particular, for any work to be exploited in Canada, it is important to ensure that the chain-of-title has been properly secured in accordance with Canada's *Copyright Act*.

It is also noteworthy that a significant copyright reform bill was recently passed by Canada's Parliament and introduced into law.

a. What can be protected?

Copyright protection extends in Canada to any original literary, dramatic, musical and artistic work. These terms are given broad definition — for instance, computer programs fall within the concept of "literary" works. Copyright can also subsist in other subject matter, such as sound recordings, broadcast signals and performers' performances.

b. How is copyright protection obtained?

In Canada, copyright arises automatically upon the creation of an original work. An original work is one that has not been copied from another source, and that is otherwise produced through the exercise of non-mechanical skill and judgment.

c. What rights are conferred?

Copyright in relation to a work means the exclusive right in Canada to reproduce, publish and perform in public the work, or any substantial part thereof. The broad concept of reproduction includes many individual rights, depending on the type of work. For example, in the case of a dramatic work, the right of reproduction includes the sole right of converting it into a novel or other non-dramatic work.

Authors of original works enjoy certain moral rights that they can assert. They enjoy a right to be associated with the work where reasonable in the circumstances as its author by name or pseudonym, and the right to remain anonymous. They also enjoy the right of integrity, meaning that the work cannot be modified or used in association with a product, service, cause or institution to the prejudice of the author's reputation.

d. How long does copyright protection last?

Generally, copyright protection lasts in Canada for 50 years following the death of the author, though the term of protection may vary depending on the circumstances of creation and publication.

Moral rights for a work last for the same amount of time as the copyright protection.

e. Who is the author of the work?

The term "author" is not defined under the *Copyright Act*, but it is understood to mean the person or persons from whom the original expression originates. For most works in Canada, an "author" must be an actual person, which is true even where a work is made pursuant to a contract.

The concept of "work made for hire" does not exist here. An employee or contractor will remain the work's author even if ownership of copyright comes to vest in the employer or contracting party.

f. Must copyright be registered?

Registration of copyright is optional in Canada and is not necessary to enforce a work in Canadian courts. However, registration does confer certain presumptive benefits in that it will be deemed evidence of copyright subsistence and ownership, as described in the registration. As well, a defendant will not be permitted to assert a lack of knowledge of copyright subsistence in the case of a registered work, and this increases the monetary remedies available to a plaintiff who establishes infringement.

g. Who first owns the copyright?

Generally, the author of a work is the first owner of copyright. An important exception to this principle applies for works created in the course of an employment relationship — where copyright will be first owned by the employer, unless the parties agree otherwise. Where a work is created by joint authors, the copyright will be owned jointly, as determined by the *Copyright Act*. In Canada, works created under the direction or control of a government department are subject to Crown copyright owned by the government, and are not works deemed to be in the public domain.

h. How is copyright assigned or licensed?

Copyright can be assigned freely in whole or in part, but no assignment is effective in law unless it is in writing and signed by the copyright owner or its duly authorized agent. The same

requirements apply to making an effective exclusive licence. Non-exclusive licences and permissions do not need to be in writing, although documenting them is highly recommended.

Moral rights of an author cannot be assigned but may be waived. Notably, assigning the copyright in a work does not, in itself, necessarily constitute a waiver of the moral rights therein.

i. Fair dealing and other exceptions

Canada's *Copyright Act* provides that a number of specific activities do not infringe copyright. Most of these activities are very specific and apply only in particular, defined circumstances. In contrast, the concept of "fair dealing" has been defined more broadly as a "user right."

In Canada, it is not an infringement of copyright to engage in fair dealing with a work for the purposes of research, private study, criticism, review, education, parody, satire or news reporting — although certain requirements to credit the work's author and source must be met for some of these purposes. These permitted fair-dealing purposes are exhaustive, and conduct must fall within one of the categories mentioned above (and also be fair) for fair dealing to apply.

j. Are there copyright collectives in Canada?

Canada has a long history of administering copyright protection through copyright collectives, and a well-defined statutory regime governing these collectives is now codified in the *Copyright Act*. There are several copyright collectives operating in Canada, which address many of the copyright rights conferred under the *Copyright Act*.

k. How does technology fit into the mix?

Recent amendments now in force prohibit the use or sale of technology that circumvents digital locks — also called technological protection measures, or TPMs. Other amendments now in force put in place a "notice and notice" regime for Internet service providers (ISPs) and search engines that, if followed, should limit their exposure to infringement claims.

2. INDUSTRIAL DESIGNS

It is often said that beauty is in the eye of the beholder. While many competitive products share similar functional features, industrial design aspects often set these products apart and serve to attract (or repulse) a customer's eye.

When knock-off producers can't afford to reproduce the functional features or qualities of the genuine article, the visual aspects are relied upon to catch the buyer's attention. To cite another classic cliché, imitation is the sincerest form of flattery — but some look-alikes are just too hard to take. Industrial design protection extends to address these issues and more.

a. What is an industrial design?

An industrial design relates to those features of a finished article that appeal to the eye. Such visual features may include aspects of shape, configuration, pattern and ornamentation applied to the finished article, whether alone or in combination. Functional features, materials of manufacture and methods of use are not protectable by industrial design registration — patent or other protection should instead be considered.

Industrial design and copyright are often confused as providing similar protection. Though they can overlap in scope, often they do not, and proving copying to enforce copyright can be difficult. Copyright generally extends to protect literary, artistic, dramatic or musical works, some examples of which may be incorporated into the design of an article — such as a sculptural shape or an artistic graphical image. Care must be taken when assuming that copyright protection applies, as copyright protection may cease once 50 or more articles incorporating the work are produced.

b. Why register an industrial design?

Unlike some other jurisdictions, Canada does not offer protection for unregistered designs, *per se*. Other IP rights may apply, such as copyright and/or passing off.

Registering a design with the Canadian Intellectual Property Office (CIPO) assists with a legal claim to ownership, and provides the owner with the right to prevent others from making, importing, selling or renting articles incorporating the registered design or a substantially similar design.

c. Who can apply to register?

An applicant for a registered design in Canada must be a proprietor (i.e. owner) of the design. While the author of the design may be a proprietor, if the design was made for another person under a contract, that person is the proprietor and proper applicant. If an employee authors a design in the course of employment, it is owned by the employer. Care should be taken to obtain proper ownership of the design —

such as by way of written assignment — especially when one hires a company to produce a new design or otherwise purchases a design from someone else.

When more than one author creates a design, joint proprietorship should be investigated.

d. When to file an application

Under Canadian law, early filing is encouraged as only original designs may be protected. If an author has created a design and has made it available to the public — or if it is the subject of a Canadian application — this may prevent other similar designs from being registered. The date of creation or authorship is not important when determining who is entitled to register the design.

While an application does not need to be filed in Canada before the design is made publicly available anywhere in the world, the applicant is given a one-year grace period to file in the country. The application must be on file in Canada by the end of the grace period, regardless of whether a priority claim to an earlier field application was made.

e. Term of protection

The term of protection for a registered design is a maximum of 10 years from the date of registration, provided a renewal payment is made at the fifth anniversary — or within any grace period thereafter.

f. Should a search be conducted?

Like patents and trademarks, a pre-filing search or pre-product introduction search is often indicated. Design searches assist with the analysis of whether or not the proposed design is registrable — i.e., is it a sufficiently original design — and whether the making, selling, etc., of the design may infringe the design rights of another.

Unlike patents and trademarks, design applications are kept secret by CIPO unless — and until — the design is registered.

g. The application process

A design application includes the following elements:

- Name and address of the applicant/proprietor.
- Title of the design, which is the ordinary commercial name of the article to which the design is applied.
- A description setting out the visual features of the design.
- Sufficient views, in drawings or photographs, of the complete article to represent all the visual features of the design set out in the description. When more than one figure is included, the figures are numbered and a brief descriptionof the figure is included.

If the applicant does not have an office or place of business in Canada, the name and address of a representative in the country is also necessary.

A filing fee is not a filing date requirement. Presently, the filing fee is $400 plus $10 per sheet for each sheet of figures over 10 sheets.

Design applications are examined for formalities and then originality. One or more office actions may issue raising objections to the application. A period of time is provided to reply and an extension of time is available at no government charge.

If the application is allowed, the design proceeds to registration without notice to the applicant.

If no complications are encountered, registration may be obtained in about nine months. Publication (registration) by CIPO may be deferred upon written request and payment of a fee.

A refusal to register a design may be appealed to the Patent Appeal Board and then, if necessary, the Federal Court of Canada.

Drawing requirements — in terms of number of views, format, style and quality — are similar to the United States' requirements, rather than the more lax requirements of a community design in Europe, for example.

Broken lines may be used to illustrate a portion, or portions, of the article that do not form part of the design. A single view showing environment is permitted. Cross-sectional, enlargement, fragmentary and other views may be permitted, following CIPO's style guide. Photograph requirements are also similar to U.S. requirements. Colour may be included in a photograph, but colour *per se* is not a feature of a design in Canada.

The application may show more than one variant (embodiment) of the design, provided that the variants do not differ substantially from one another. However, CIPO's practice does not permit variants to coexist in a single application where portions of the article appear differently in the variants through the use of broken lines. Divisional applications are only permitted when a design application is filed showing more than one design.

A priority claim may be made if a prior application was filed in another qualifying jurisdiction to register the same design within the previous six months. The priority application details — i.e., jurisdiction, filing date and application number — must be provided to CIPO before the expiry of the six-month period. A certified copy of the priority application is not required unless requisitioned by CIPO, which rarely occurs.

h. Canadian adherence to the of the Hague Agreement

Canada has taken steps to amend its legislation to adhere to the *Geneva Act* of the Hague Agreement to accept international applications — as office of the applicant's Contracting Party — and international applications filed elsewhere that designate Canada. Changes to the regulations are still required and currently remain unavailable. CIPO is not expected to be in a position to handle any Hague applications until late 2016 at the earliest.

3. PATENTS

Canada enjoys a vibrant economy and a culture of technological innovation in areas such as communication, Internet-related devices and software, clean and renewable technologies, tools and methods used in the harvesting and processing of natural resources, and agricultural and pharmaceutical products and practices.

Canada is a signatory of the Paris Convention, and has acceded to the principal multilateral treaties that seek to harmonize patent protection internationally. Canada also benefits from IP bilateral agreements with a number of G-20 members. Accordingly, foreign businesses pursuing business in Canada will find many similarities between their domestic patent laws and those governing Canada.

By their very nature, patents provide their owner with an exclusionary right to an invention. It is natural for companies to capitalize on their research and development expenditures to protect their competitive edge in the Canadian marketplace. However, Canadian patent laws and regulatory practices do possess certain subtleties that should be noted. Accordingly, foreign companies need to be aware of unique aspects of Canadian patent law and CIPO practice, which can significantly influence the scope and costs of obtaining patent protection in Canada.

In particular, care should be taken to ensure that applicable patent protection has been properly secured for any significant company technologies to be exploited in Canada. It is important to take note of the unique Canadian patent system offerings, such as different examination acceleration programs, factors affecting patent filing ability and patent examination advantages — any of which may be used to maximize Canadian patent coverage.

a. Acceptable subject matter for patent protection

It is important to recognize that most, but not all, technology may be patentable in Canada if given careful consideration from a Canadian perspective.

A Canadian patent may be obtained for any new invention, including processes, machines, methods of manufacturing or a composition, or any new and useful improvement to one of the above that is applicable to industry. The key is that there must be at least one new and innovative element to the invention or improvement. That being said, Canadian patents cannot be issued to protect a scientific principle or theorem in the abstract without a practical application.

Developments in Canadian patent law have confirmed that business methods are currently patentable in Canada, which provides for an increased scope of patent protection in computer-related arts concerning some forms of software and business processes.

Claim format and content can make a big difference between acceptance or rejection for certain technologies. For example, methods that provide practical therapeutic benefits to subjects are considered "methods of medical treatment," and are not patentable in Canada. However, the content may be redrafted to instead claim an allowable "use." Also, higher life forms — such as mice, or other mammals, and plants — are not patentable, but a higher life form may be protected by directing claims to a cell consisting of patentable nucleic acid.

It is important to note that support for the required claim form or content must be found in the patent application description as filed in Canada. Therefore, consideration should be given to the way in which the subject matter is described in order to best capitalize on Canadian patent protection for the invention.

Another important consideration for Canadian patent protection is innovation associated with professional skill — i.e., those personal skills reflecting learned behaviours that can be improved with practice and are prone to refinement through personal experience. A Canadian patent application seeking protection for a professional skill will ultimately be rejected by CIPO. The professional-skill distinction can have important ramifications for the patentability of a company's innovations, so close attention should be paid to the description and claim format in order to avoid rejection.

b. Process to obtain patent protection

The granting of Canadian patents is within the exclusive jurisdiction of the Canadian federal government — under the control of CIPO — and is governed by the Canadian ***Patent Act*** and ***Patent Rules***.

Patent protection is requested by filing a formally prepared application with CIPO, which should include background, description, drawings and claims that provide sufficient detail of the invention and its operations for a notional person skilled in the area to create it. Also included in the filing are the requisite CIPO patent application fees and details concerning the invention's inventor(s).

Once filed, the patent application's claims are examined by an assigned patent examiner for novel, inventive and industrial-applicability considerations in view of pertinent technology publicly available before the filing date, as well as any format considerations. Once deemed allowable by the patent examiner, the patent is issued after payment of the patent issue fee.

c. Patent rights and terms conferred by patent issuance

Enforcement of an issued Canadian patent can be obtained from the Federal Court of Canada or the Canadian provincial courts.

A Canadian patent is a monopoly granted by the Canadian government that affords the patent holder an exclusive right to manufacture, sell or use an invention throughout the country for a period of 20 years from the date of the application. A patent owner or licensee may bring a court action against someone who infringes on the Canadian monopoly to the invention claimed by the patent.

d. Ownership of a Canadian patent

Generally, the individual inventor that contributed to the invention claimed in the patent is the first owner of the patent. An invention created by joint inventors would be jointly owned. An important exception to these principles applies for inventions created in the course of an employment relationship, where the owner would be the employer unless the parties agree otherwise.

e. Transferring of patent ownership through assignment or licence

Patents can be assigned freely in whole or in part, but no assignment is effective in law unless it is in writing and signed by the current patent owner or owners. In the case of joint ownership, it is recognized that assignment by one party cannot dilute the existing patent ownership rights of the other party — unless there is an agreement to the contrary. The same requirements apply to make an effective exclusive patent licence. Non-exclusive licences and permissions do not need to be in writing, although documenting them is highly recommended.

f. Cost reduction through deferred or reduced patent fees

Patenting an invention in multiple jurisdictions can significantly escalate the costs to protect the technology. Seeking patent protection in Canada provides an opportunity to defer and reduce these costs relative to other jurisdictions.

In Canada, the examination of a patent application is not automatic upon filing and must be requested by the applicant. Requesting examination of a patent application can be deferred for five years from the Canadian application filing date. During this time, the applicant can further assess the best manner in which the patent application should be pursued without incurring significant costs. An advantage of delaying examination is that examination results from corresponding patent applications in other countries can be influential in the Canadian examination process, and can expedite prosecution of the Canadian application at reduced cost.

An advantage to help maximize patent coverage for a Canadian patent is that there is no limit to the total number of claims, or the number of independent claims, included in a patent application. There are also no restrictions on the use of multiple dependent claims — i.e., those claims that reference more than one claim — and no excess claim number or multiple dependent claim surcharges. The only surcharge that may impact the number or content of claims is a nominal excess-page printing fee for those patent applications exceeding 100 pages in length.

Furthermore, Canada has a "small entity" designation that allows businesses employing 50 or fewer employees and universities to pay reduced patent application filing, examination and annual-maintenance fees.

g. Accelerated examination program for designated green and clean technology patents

Examination of a Canadian patent application based on clean or green technology can be accelerated to reduce the time to obtain patent protection. To apply for accelerated examination, the applicant must file a declaration indicating that the application relates to commercial technology that would help to resolve or mitigate environmental impacts, or conserve the natural environment and resources.

There is no government fee associated with requesting accelerated examination of green- or clean-technology patent applications. Accordingly, companies involved in clean or green technologies should consider this route to obtain accelerated Canadian patent protection.

h. Accelerated examination programs under patent prosecution highway (PPH) initiatives

Another instance in which Canadian patent protection may be accelerated is where patent protection has already been obtained in other jurisdictions.

Canada co-operates with a number of other partner countries in patent prosecution highway programs. Through this scheme, an applicant with at least one patent claim that has been found allowable by a partner office in one jurisdiction can have the corresponding patent application examination advanced in the partner office of another jurisdiction. This allows patent results obtained in other countries to be used to streamline examination in the corresponding Canadian patent application or, alternatively, allows the Canadian patent application to be used to streamline examination in another country or countries.

i. Advanced examination of Canadian patent applications

Accelerated examination of a patent application can also be obtained by the applicant or any other person who alleges that failure to accelerate it will prejudice their rights. This is typically used in situations where a pending patent application is perceived to be infringed, but the applicant may use it more broadly to expedite the examination process in other situations.

The process of accelerating examination is relatively straightforward and inexpensive. It is granted automatically in response to a request containing a broad affirmation that the failure to advance the examination could prejudice that person's rights, as well as the payment of a small fee. In order to request advanced examination, the contents of the Canadian patent application must be open to public inspection — i.e., published by CIPO — but this can be requested alongside the advanced examination request where required. An advantage of the advanced examination request is that there is no need to provide any evidence or details to support the affirmation. Currently, an advanced examination procedure typically results in the issuance of a first examination report within three months of the advanced examination request.

j. Acceptable delays for patent application filing in Canada

Similar to most other countries, Canada is a first-to-file jurisdiction, meaning a patent is issued to the first inventor to file a patent application. To obtain a Canadian patent and avoid later technical challenges to its validity, it is important that the application is drafted in the correct form and with a sufficient and enabling description of the invention. It is also recommended that the subject matter of the invention not be disclosed to the public until the application has been filed.

Once the decision has been made to file a patent application, it is important to note that patent systems around the world have strict patent application filing timelines. Failure to meet these filing timelines may result in a loss of the right to obtain patent protection in certain jurisdictions.

However, the Canadian patent system offers a few acceptable delays for filing, such as a 12-month grace period, 12-month late international Patent Cooperation Treaty (PCT) filing and no on-sale bar.

The 12-month grace period provides the opportunity to file a patent application within 12 months of the applicant disclosing the invention to the public. Accordingly, the Canadian patent system offers filing flexibility in providing this 12-month grace period — measured from the time of the first public disclosure of the invention to when the formal patent application is filed in Canada. It should be noted that a provisional patent application filed in Canada, or elsewhere, does not negate the requirement to have the Canadian application filed within the 12-month period measured from the first public disclosure.

For international PCT patent applications, an applicant can file in Canada as a national entry of a PCT patent application up to 42 months after the PCT priority date simply by filing a late national entry request and paying a nominal fee. This late national entry provision allows the applicant an additional 12 months after the standard 30-month PCT national phase entry deadline.

In some jurisdictions, such as the U.S., if a product or service has been "on sale" for more than 12 months prior to filing the patent application, it may be barred from obtaining patent protection in that jurisdiction. However, in Canada, early market entry may not bar entitlement to patent the marketed products — so long as the sale is not considered an enabling public disclosure of the invention made more than 12 months prior to the filing of the Canadian patent application.

k. Procedural flexibility in obtaining Canadian patent protection

The examination process before the Canadian patent office is relatively flexible compared to other jurisdictions, and this flexibility can help maximize patent scope and minimize prosecution costs.

For example, during the examination of the patent application, voluntary amendments to the claims or other parts of the application may be filed at any time in Canada. As well, final examination reports are only rarely issued at times when it is clear that the examiner and applicant have reached an impasse. This allows for ample opportunity to negotiate with the examiner.

Furthermore, when interpreting the patent claims, the courts may not consider any submissions made by the patentee during the application prosecution when a patent is subsequently litigated. This is in contrast to other countries, where a patentee may be estopped from taking a position with respect to the scope of the claims that is contrary to the one taken during prosecution.

l. Reduced relationship potential between patent applications of opposed parties

Circumstances can arise where one Canadian patent application can be affected by another, such as in situations where both applications are directed toward similar subject matter. It does not make a difference whether the applications are owned by the same party or by opposing parties.

In Canada, there is no interference or opposition procedure to challenge a competitor's co-pending patent application — so there is limited opportunity for one party to oppose a patent being granted to another.

Furthermore, Canada does not use terminal disclaimers between applications owned by the same party. As a consequence, the applicant must amend the claims of the applications to distinguish one from the other.

Although there is no Canadian continuation application procedure (unlike in other jurisdictions), the applicant can file either claim amendments to a further invention any time before allowance, or a divisional application any time before issuance of the parent patent.

The preferred practice for filing divisional applications in Canada is to include or add all desired claims, in order to allow the Canadian examiner to determine whether separate inventions are claimed. This attempts to avoid later allegations of "double patenting" in the divisional application, and allows a broader range of inventions to be claimed within a single application.

4. TRADEMARKS

A trademark is a word, logo, sound or other business device that serves as a distinctive indicator of the source of particular goods or services. In Canada, while trademarks do not need to be registered to be protected, the scope of rights afforded by registration and the available means of enforcement are greater and more robust than for unregistered trademarks.

As such, trademark registration is a good investment for any owner who plans to use or protect a trademark in Canada. It must be noted that a trademark registration in another country with no use or reputation in Canada conveys no protection in Canada.

Canadian trademark law shares many similarities with U.S. trademark law, but also has its own particularities. As registering a trademark under the Canadian *Trademarks Act* can be technical, it is advisable to consult a lawyer or agent with expertise in this area to oversee the process and advise on protecting and licensing trademarks in Canada.

a. Registered and unregistered trademarks

If an unregistered trademark has been in use and possesses a reputation or goodwill in Canada, the common law will protect it under the doctrine of passing off. However, the scope of protection for unregistered trademarks is generally narrower than that for registered trademarks. Protection for an unregistered trademark is generally limited to the geographic boundaries of its established goodwill or reputation.

On the other hand, obtaining a registration for a trademark confers many advantages, including the exclusive right to use the trademark across Canada, without geographic restriction, in relation to the goods or services specified in the registration.

Registration can be obtained for a trademark in relation to goods and services. In Canada, unlike in many other countries, a single trademark registration can cover multiple classes of goods and services.

Business names may be registrable as trademarks if such a name is also used as a trademark in association with goods or services — in other words, when the business name is also used to distinguish a product or service of one company from that of another. If a business name is not used as a trademark, it may nonetheless be protected under the doctrine of passing off in a similar manner to an unregistered common law trademark.

In Canada, there is no formal requirement for the use of trademark notices such as ® or TM. However, the use of such notices can be helpful when asserting something as a trademark. When the trademark is being used under licence by a third party, the use of similar notations to direct consumers to a legend (stating the owner's name and that the mark is being used by a third party under licence) is highly recommended, as it gives rise to a statutory presumption of proper licensing.

b. Entitlement, prosecution and opposition

There are numerous procedural and substantive requirements for the application, processing and registration of a trademark in Canada. Before applying for a trademark, it is advisable to conduct a trademark search to ensure that the trademark is registrable and that the applicant is the party entitled to the registration of the trademark.

There are currently three possible bases for registration of a trademark in Canada: the use of the trademark in Canada, the registration and use of the trademark abroad, or the proposed use of the trademark in Canada. Resolution of competing claims to a trademark will likely depend on which party first used or made the trademark known in Canada, or was the first to file an application on the basis of foreign registration or proposed use, depending on the circumstances. Recent legislative changes that are expected to come into force sometime in 2017 will remove the requirement to state a basis for Canadian applications.

Prior to registration, it is possible for a third party to oppose an application for a trademark on specific listed grounds, such as confusion or technical defects in the application. In Canada, technical grounds can be fatal to an application with no opportunity to remedy them, further underlining the need for marks to be prosecuted by experienced trademark counsel.

c. Term of trademark protection

Registered trademarks currently enjoy a 15-year term renewable upon payment of a fee. No proof or declaration of continuing use is required. Recent legislative changes that are expected to come into force sometime in 2017 will reduce the renewal period to 10 years.

Nevertheless, registered trademarks are liable to be expunged from the register after an initial grace period if — after a request to show use by the registrar or any other interested party — the trademark owner cannot show that the trademark has been "used" (for the purposes of the *Trademarks Act*) during the previous three years.

ARTISTIC OWNERSHIP

Totem pole designs and their meanings are as diverse as the cultures that create them. This example is from the Yukon.

d. Assignment and licensing of trademarks

The *Trademarks Act* allows registered trademarks to be assigned. Since trademark registrations in Canada can cover multiple goods or services, it may be possible to only partially assign a trademark with respect to some of the goods or services — provided there would be no likelihood of confusion between the two resulting registrations. Territorial assignments of registered marks are generally not permitted under the *Trademarks Act*.

Canada also permits the licensing of trademarks, provided certain conditions are met. For a trademark to be properly licensed and to avoid the risk of invalidity, the trademark owner must control, under the licence, the character or quality of the associated goods or services. While trademark licences can be both oral and written, a bare assertion of control or mere evidence of corporate control of a subsidiary will be insufficient and may render the trademark invalid.

e. Use of trademarks in Québec

It is important for all trademark owners to appreciate that special rules apply to the use of trademarks in Québec, due to the *Charter of the French Language* (the Charter) in that province. The Charter provides that every marking on a product or document, as well as public signs, posters and other commercial advertising, must be drafted in the French language, though it may be accompanied by a translation.

However, a regulation in the Charter creates an exception for certain trademarks: a "recognized trademark" may be used exclusively in a language other than French, unless a French version has been registered. If a French version of the trademark has been registered, it must be used instead.

In the past, both unregistered and registered trademarks have been held to be covered by the exception. However, in the absence of a registration, it may not be possible to prove the existence of a trademark to the satisfaction of the authorities. L'Office québécois de la langue française, the body that is responsible for enforcing the Charter, takes the view that the "recognized trademark" exception generally requires registration. The requirement is a commercial reality in Québec, and extends to the packaging of goods that are sold in that province whether or not they are also intended for other markets.

Trademarks and other terms composed of descriptive elements are most likely to be challenged. Therefore, businesses operating (or selling goods) in Québec that wish to make use of the exception should register their trademarks —

especially where the mark contains descriptive terms — and would be well-advised to seek guidance from Canadian trademark counsel as to compliance with the terms of the Charter and the current position of l'Office.

5. ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

IP rights — including patents, trademarks, copyright and industrial designs — are generally enforced through proceedings brought before the Federal Court of Canada. While the provincial courts have concurrent jurisdiction for enforcement of IP rights, the country-wide jurisdiction of the Federal Court gives it the ability to grant an injunction throughout Canada in a single proceeding. Over 95 per cent of all IP cases are brought to the Federal Court.

The only exception is where the IP right relates to trade secret law, which, as a matter of property and civil rights, can be enforced only in the provincial courts. For passing off matters, while only the provincial courts can enforce the common law right, the Federal Court has jurisdiction under Section 7 of the *Trademarks Act* to hear essentially the same action.

The Federal Court of Canada consists of approximately 38 trial court judges who can sit anywhere in Canada. While the Federal Court has its headquarters in Ottawa, it is essentially a circuit court, with judges travelling throughout the country to hear cases. Any member of any bar of Canada can appear in the Federal Court, regardless of the province in which the court is sitting. A successful plaintiff is generally entitled to its damages and a permanent injunction — assuming the right has not expired — and some of its legal expenses. Depending on the IP right, the successful plaintiff may also elect to appropriate the infringer's profits.

While Canadian courts may grant interlocutory injunctions, they are rarely granted in patent, copyright and design matters, and only occasionally granted in trademarks. Proving irreparable harm — i.e., harm that is not compensable in damages — is key to obtaining an interlocutory injunction.

a. Patent enforcement

In general, patent litigation proceedings are commenced with a Statement of Claim and proceed through oral and document discovery, leading to a trial by judge alone.

Proceedings by way of action generally take between two and four years to get to trial. A right of appeal is available to the Federal Court of Appeal and, with leave, to the Supreme Court of Canada.

Frequently in infringement proceedings, a defence and counterclaim of invalidity are also raised by the defendant. Alternatively, a potential infringer could commence a proceeding seeking a declaration of non-infringement and/or impeachment of the patent.

i. Section 55.2 of the *Patent Act*

Separate and apart from actions for infringement, a procedure is available for certain pharmaceutical patents that is similar to *Hatch-Waxman Act* proceedings in the U.S. Under this provision, a generic drug manufacturer seeking to come to market by reliance on an originator's Notice of Compliance must address any patent that has been listed with the minister of health. The initial step is to forward a Notice of Allegation by the second person, at which point the patentee has 45 days to commence an application seeking an order that prohibits the minister of health from issuing a Notice of Compliance to the generic.

These proceedings are summary in nature and are not full actions. Consequently, there is no right of discovery. Furthermore, because they are summary in nature, any decision is not final, and an action for infringement and/or impeachment may be commenced separately and apart from the Section 55.2 proceeding.

b. Trademark enforcement: Passing off, infringement and depreciation of goodwill

The owner of an unregistered trademark may enforce its rights through an action for passing off. To succeed, the owner of the unregistered mark must show the following:

- That the owner has a commercial reputation or goodwill created through use of its mark
- That another person has sold goods or services in a way that misrepresented them as originating from the trademark owner
- That the owner's reputation or goodwill has been damaged

Mechanisms for enforcing a registered trademark provide a greater ambit of protection than those available to an unregistered trademark. In addition to an action for passing off, the owner of a registered trademark may also bring an action for trademark infringement or depreciation of goodwill.

In the Federal Court, trademark owners may also enforce their rights by means of a summary proceeding called an application. An application proceeds on a paper record and does not involve any discovery process.

The remedies available against a party who infringes a trademark or depreciates the value of its goodwill include injunctive relief, monetary damages or profits, as well as an order for the destruction of the infringing articles.

Recent amendments to the *Trademarks Act* also make certain types of trademark infringement and counterfeiting criminal offences punishable by fine or imprisonment.

c. How is copyright enforced and what relief is available?

In Canada, copyright can be enforced by either an action with trial or by a summary application proceeding in the Federal Court. An application proceeds on a paper record and does not involve any discovery process.

An exclusive licensee may commence proceedings in its own name to enforce its rights, but will generally be required to join the copyright owner as a party unless the court orders otherwise.

Upon proof of infringement, a copyright holder may obtain a broad range of remedies, including an award of damages, an accounting of profits, permanent injunctive relief and an order of delivery-up of infringing materials.

At any time prior to judgment, a plaintiff can also elect to recover "statutory damages" instead of other compensatory monetary remedies. (The right to seek punitive damages is not affected by the selection of statutory damages). The maximum award of statutory damages is $20,000 per work infringed. A lower cap of $5,000 applies to non-commercial infringements.

The *Copyright Act* also makes certain types of copyright infringement a criminal offence.

d. Industrial design

Industrial designs are also enforced via an action for infringement in a manner similar to that set out for copyrights, trademarks and patents. With respect to industrial designs, infringement can apply only to elements of design — there is no protection for purely functional elements that may have been taken by a competitor.

A successful plaintiff may obtain an injunction and damages for infringement.

e. Trade secrets, unfair competition claims and ancillary litigation

As noted previously, a breach of trademark secrets can be enforced only in provincial courts. Consequently, where there is a breach of a trade secret and potentially an infringement of a patent, the preferred venue for resolving both matters would be the provincial court with jurisdiction over the defendant.

Similarly, other types of proceedings can often be joined together. For instance, a patent and a trademark case can be joined, depending on the circumstances. In addition, sometimes an attack based on the *Competition Act* can be joined with a *Patent Act* defence. Consequently, IP litigation is not always a matter of simply enforcing one right to the exclusion of other causes of action, but often involves a portfolio of issues — both core IP and related matters that touch on areas including trade secret law and competition law, among others.

O: PRIVACY LAW

Privacy is important to Canadians. With advances in technology, organizations are collecting, storing, transferring and disclosing more personal information about their consumers and employees than ever before. This accumulation of personal information increases the risks for organizations doing business in the country. In an age of social media, cloud computing, global networks and international data flows, incidents involving data security breaches and identity theft frequently make headlines in Canada — particularly given the advent of class action lawsuits to remedy privacy breaches. As a result, privacy protection is an increasingly pressing public-policy concern.

THE ROCKIES

As Canada's most visited mountain range, the Rockies are an international destination for sports, sightseeing and escape from the daily grind.

Canada has enacted comprehensive federal privacy legislation that applies to the private sector. In addition, certain provinces have enacted both comprehensive and industry-specific private sector privacy legislation.

1. THE PRIVACY LANDSCAPE IN CANADA

a. Federal

In Canada, the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) regulates the collection, use and disclosure of personal information in the private sector. "Personal information" is broadly defined in the Act as any "information about an identifiable individual," whether public or private, with limited exceptions.

PIPEDA applies to federal works, undertakings and businesses, and to private sector organizations that collect, use or disclose personal information in the course of commercial activities in provinces that do not have substantially similar legislation. PIPEDA's application to personal employee information is limited to organizations that are federal works, undertakings and businesses.

Examples of these organizations include:

- Airlines
- Banks
- Broadcasting
- Interprovincial railways
- Interprovincial or international trucking, shipping or other forms of transportation
- Nuclear energy
- Activities related to maritime navigation

PIPEDA is a general law that applies to the collection of personal information regardless of the technology used. This law applies to all personal information that flows across provincial or national borders in the course of commercial transactions.

Compliance with PIPEDA is subject to an overriding standard of reasonableness whereby organizations may only collect, use and disclose personal information for purposes that a "reasonable person would consider appropriate in the circumstances." This requirement applies even if the individual has consented to the collection, use or disclosure of their personal information.

In provinces with privacy legislation that the federal government has deemed to be "substantially similar" to PIPEDA, the Act does not apply. Currently, only Alberta, British Columbia and Québec have "substantially similar" privacy legislation in place. However, PIPEDA continues to apply to federal works, undertakings or businesses that operate in those provinces.

In addition, health information custodians — such as physicians, nurses and hospitals — in Ontario, New Brunswick, and Newfoundland and Labrador are exempt from PIPEDA with respect to personal health information, as these provinces have specific health information privacy statutes that have been deemed "substantially similar" to PIPEDA. Organizations that operate interprovincially or internationally are required to deal with both provincial and federal privacy legislation.

The *Digital Privacy Act* was passed by Parliament and received royal assent in June 2015. The Act makes several important amendments to PIPEDA, including new mandatory breach reporting requirements for organizations and enhanced enforcement powers for the privacy commissioner of Canada. It is important to note that some of these amendments have not yet come into force.

b. Provincial

Alberta, British Columbia and Québec have also enacted comprehensive private sector privacy legislation, entitled the *Personal Information Protection Act* (PIPA) in Alberta and British Columbia, and *An Act respecting the protection of personal information in the private sector* (*Québec Privacy Act*) in Québec.

While these provincial laws are similar in principle to PIPEDA, there are important differences in the details. These laws apply generally to all private sector organizations with respect to the collection, use and disclosure of personal information — not just with respect to commercial activities — and to employees' personal information. The *Québec Privacy Act* also applies to private sector collection, use and disclosure of personal health information.

c. Legislative overview

All Canadian privacy legislation, including PIPEDA, reflects the following 10 principles set out in the Organisation for Economic Co-operation and Development Guidelines, created in the early 1980s:

- Accountability
- Identifying purposes
- Consent
- Limiting collection
- Limiting use, disclosure and retention
- Accuracy
- Safeguards
- Openness
- Individual access
- Challenging compliance

As outlined in the "Federal" section above, the standard of reasonableness is considered the overarching rule in Canadian privacy legislation. One cannot avoid this standard by obtaining consent to an objectively unreasonable collection, use or disclosure of personal information. In most cases, organizations must have either the express or implied consent of the individual in order to collect, use or disclose their personal information.

All four principal private sector statutes apply similar principles:

- Personal information may only be collected, used or disclosed with the knowledge and consent of the individual.
- The collection of personal information must be limited to what is necessary for identified purposes.
- Personal information must be collected by fair and lawful means.

Personal information must be protected by safeguards appropriate for the level of sensitivity of the information. For example, highly sensitive information, such as financial data, must be provided with a proportionately high level of security that should include physical, organizational and technological protection measures. As well, individuals must be provided with easy access to information about an organization's privacy policies and practices.

Alberta, British Columbia (with regard to certain designated databases), Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Saskatchewan, the Northwest Territories and Yukon have legislation specifically governing the collection, use and disclosure of personal health information. A similar law has also been passed in Prince Edward Island, but it has not yet been enacted. All Canadian provinces and territories have enacted legislation that regulates the collection, use and disclosure of personal information in the public sector.

In specific industry sectors, additional requirements will apply depending on the nature of the consent sought. For example, several provinces, including Ontario and Nova Scotia, impose font size requirements on requests for consent and notice prior to obtaining a credit bureau report.

2. EMPLOYERS

In accordance with constitutional limits placed on federal legislation, PIPEDA applies only to the employment information of employees of federally regulated organizations, such as banks, airlines and telecommunications companies. Provincial privacy legislation applies to employee information outside of those sectors. Unlike PIPEDA, the Québec *Private Sector Act* does not expressly exclude from the scope of its definition information relating to "professional/employment status" — such as an individual's name, title or business address, or telephone number at work.

Under the Alberta PIPA and British Columbia's PIPA, employers are permitted to collect, use or disclose "personal employee information" without the consent of the employee if it is reasonably required for the purposes of establishing, managing or terminating an employment relationship. PIPEDA does not have a similar provision dealing with the collection, use and disclosure of personal information in the workplace.

However, PIPEDA does permit reliance on implied consent if the collection, use or disclosure of the information is for purposes that a reasonable person would consider appropriate in the circumstances. Again, the concept of reasonableness is central to whether an employer is required to obtain explicit consent.

3. REPORTING PRIVACY BREACHES

Unlike the United States, where the majority of states have enacted mandatory data breach notification rules, Canada currently has limited requirements for organizations to proactively notify individuals or the appropriate regulatory bodies of a data breach. The exceptions are Alberta's PIPA, New Brunswick's *Personal Health Information Privacy and*

Access Act, Newfoundland and Labrador's *Personal Health Information Act,* and Ontario's *Personal Health Information Protection Act*, all of which require mandatory data breach notification. However, the exception is likely to become the rule in the foreseeable future. Section 10 of the recently enacted *Digital Privacy Act* adds a new provision to PIPEDA, which will require mandatory breach notification as soon as this section comes into force.

Alberta was the first Canadian jurisdiction to require mandatory privacy-breach notification in the private (non-health-related) sector. Organizations subject to Alberta's PIPA are required to notify the province's information and privacy commissioner if personal information under the organization's control is lost, accessed or disclosed without authorization, or if it has in any way suffered a privacy breach, where a real risk of significant harm to an individual exists as a result of the breach. In those circumstances, failure to notify the commissioner of a breach is an offence.

The notification requirement is only triggered if the harm threshold is met, which is defined as "where a reasonable person would consider that there exists a real risk of significant harm to an individual." The commissioner has interpreted "significant harm" to mean "a material harm ... [having] non-trivial consequences or effects." Examples may include possible financial loss, identity theft, physical harm, humiliation, or damage to one's professional or personal reputation.

Furthermore, the commissioner requires that a "real risk of significant harm" must be more than "merely speculative" and not simply "hypothetical or theoretical." A breach relating to highly sensitive personal information, such as financial information, is more likely to meet this standard and require reporting.

If a breach meets the threshold of being a "real risk of significant harm" and is reported appropriately, the commissioner will review the information provided by the organization to determine whether affected individuals need to be notified of the data breach. If so, the commissioner can direct the organization to notify individuals in the form and manner prescribed by PIPA regulations.

Once section 10 of the *Digital Privacy Act* amending PIPEDA comes into force, organizations that suffer a data breach that creates a "real risk of significant harm" to one or more individuals will be required to take the following measures, as soon as feasible:

i. Report the incident to the commissioner.

ii. Notify all individuals affected by the breach, and inform them of any steps they can take to minimize harm. Make sure that sufficient detail is provided to the affected individuals to enable them to understand the significance of the breach.

iii. Where the organization has notified affected individuals, it must also notify any other organizations or government entities of the breach if it believes that such action may reduce the risk of harm.

iv. Maintain a record of every security data breach and make such records are available to the commissioner on request.

The *Digital Privacy Act* defines "significant harm" broadly to include "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 damages to or loss of property." The Act determines the existence of a "real risk of significant harm" by considering the sensitivity of the personal information involved in the breach, the probability that the personal information will be misused and any other factors that may be prescribed by regulation.

As well, the Act will amend PIPEDA to create offences for non-compliance with data security breach obligations. After this section comes into force, an organization that fails to report and record a breach — or that hinders the commissioner's efforts to investigate a complaint or perform an audit — may face fines of up to $10,000 for a summary offence, or up to $100,000 for an indictable offence.

4. CROSS-BORDER TRANSFERS AND OUTSOURCING

Cross-border transfers and the outsourcing of Canadian personal information to foreign countries have become subjects of much focus in Canada. A great deal of this attention has centred on concerns that U.S. authorities could use the *USA Patriot Act* to obtain Canadians' personal information if it is located in or accessible from the United States.

PIPEDA and related provincial legislation do not prohibit the transfer of personal information outside of Canada. However, public sector privacy legislation in British Columbia and Nova Scotia imposes restrictions on public bodies (and organizations that process personal information on their

behalf) with respect to the transfer of personal information. Furthermore, privacy regulators have generally held that notice of such transfers should be provided to affected individuals — along with notice that such personal information may be subject to access requests from foreign governments, courts, law enforcement officials and national security authorities, according to foreign laws.

PIPEDA requires an organization to provide a "comparable level of protection" when personal information is being processed by a third party through "contractual or other means." As such, if an organization transfers personal information to a third party, the transfer must be "reasonable" for the purposes for which the information was initially collected, the information must be protected using contractual means, and the organization should be transparent about its information-handling practices, including notifying individuals. In addition, the *Québec Privacy Act* requires organizations to consider the potential risks involved in transferring personal information outside of Québec. If the information will not receive adequate protection, it should not be transferred.

The Alberta PIPA explicitly imposes obligations on organizations that use service providers outside of Canada to collect, use, disclose or store personal information. Organizations are obligated to notify individuals that they will be transferring individuals' personal information to a service provider outside the country, and to include information on outsourcing practices in the organization's policies.

5. ENFORCEMENT

In addition to negative publicity, there are legal and financial consequences for violating privacy legislation. An injured party, be it an individual or organization, must follow the ombudsman's procedure for filing a complaint with the respective provincial authority or the federal Office of the Privacy Commissioner (OPC).

The role of the OPC is to facilitate the resolution of such complaints through persuasion, negotiation and mediation. The OPC may decide to investigate the complaint and to issue a report setting out non-binding recommendations based on the findings. In conducting the investigation, the OPC has a variety of powers, including the power to compel the production of evidence.

Once the OPC completes its investigation and issues a report, either the OPC or the complainant may apply to the Federal Court to seek enforcement and/or damages under PIPEDA. The OPC can also impose a fine for noncompliance with certain provisions of PIPEDA.

Under the Alberta PIPA and British Columbia's PIPA, the applicable provincial privacy commissioner has the power, following an investigation, to direct the organization to remedy the situation. These orders are enforceable in court and are the basis for civil actions. In Québec, orders of that province's privacy commission (Commission d'accès à l'information) can be appealed to the Québec Superior Court.

With the amendment to PIPEDA by section 15 of the *Digital Privacy Act* now in force, the commissioner can enter into compliance agreements with organizations that he or she reasonably believes have violated, or are about to violate, PIPEDA provisions. Such agreements can include any terms the commissioner considers necessary to ensure compliance with PIPEDA. If a counterparty organization breaches the agreement, the commissioner is authorized to apply to the Federal Court for a compliance order or a hearing. However, being party to a compliance agreement will not insulate the organization from claims made by individuals, or from the prosecution of an offence under PIPEDA.

P: ADVERTISING & MARKETING

With a well-educated population, a vibrant media industry, and relatively clear regulations related to advertising and promotions, Canadians produce some of the best advertising creative in the world. However, foreign advertisers should be aware of the unique aspects of Canadian law and culture that govern advertising in Canada. For example, in the province of Québec, language laws mandate equal prominence of French on all packaging, product warnings and instructions, and greater prominence of French at point-of-sale and, in many circumstances, in advertising and promotions. This requirement reduces the amount of space available to advertisers, especially in the case of packaging for national products

THE PRAIRIES

Famous for their wheat production, Saskatchewan and Manitoba are sometimes known as Canada's breadbasket. Their iconic grain elevators rise over the landscape across highways and railroads, making these huge structures de facto symbols of the Prairie provinces.

1. PACKAGING AND LABELLING

All prepackaged products sold in Canada are governed by a series of federal packaging and labelling regulations. In order to protect consumers from false claims and harmful or potentially harmful products, certain items — including food and beverage, natural health, tobacco, cosmetic products and consumer chemical products, among others — are subject to more stringent labelling requirements.

Federal packaging laws also stipulate that basic information on all products be provided in both French and English — although, outside of Québec, prominence of any particular language is not mandated. Certain foreign-made products sold in Canada also require country-of-origin identification under the *Marking of Imported Goods Order*.

2. "PRODUCT OF CANADA" AND "MADE IN CANADA" CLAIMS

The Competition Bureau has published a number of enforcement guidelines to help industry professionals and advertisers comply with legislation prohibiting false and misleading advertising — such as the federal *Competition Act*. One such set of guidelines addresses "product of Canada" and "made in Canada" claims. Under these guidelines, for a product to be represented as a "product of Canada," its last substantial transformation must have occurred in Canada and at least 98 per cent of the total direct costs of production must have been incurred in the country.

For a "made in Canada" claim, in addition to Canada being the location of the product's last substantial transformation, at least 51 per cent of the total production costs must have been incurred there. A "made in Canada" claim must also be accompanied by a qualifying statement disclosing the presence of foreign content — e.g., "made in Canada with imported parts," or "made in Canada with domestic and imported parts."

3. IP AND COPYRIGHT

Under the federal *Copyright Act*, songs, logos and, in some cases, even slogans used in Canadian advertisements are protected by copyright. The *Copyright Act* has been amended recently to allow fair dealing with such works for the purpose of parody or satire, but the extent to which these defences will apply in a commercial or comparative advertising context is not yet certain.

The use of competitors' registered marks and logos in comparative advertising may give rise to additional concerns under Canadian trademark law. For example, while in the United States, use of a competitor's trademark in truthful and non-deceptive comparative advertising is generally legal, in Canada, use of competitors' registered marks or logos — even in a fair and accurate comparative advertising context — may, in certain circumstances, be actionable as an unlawful depreciation of the goodwill associated with the registered mark or logo.

The Canadian Intellectual Property Office maintains a database of registered and pending trademarks, and does not allow registration of confusing or similar marks. For a more detailed discussion of the protection and use of IP in Canada, see the "Intellectual property" chapter.

Under Québec law, any "inscription" on a product, as well as signs and commercial advertising, must be in the French language. The legislation provides an exception, however, for "recognized" trademarks within the meaning of the *Trademarks Act* — unless a French version has been registered.

For many years, retailers in Québec had relied on the "recognized" trademark exception to display English-only trademarks on public signs, posters and commercial advertising. This position became the subject of court proceedings when the Québec regulator — the Office of French language (the Office) — began a series of highly publicized enforcement actions against a number of retailers using English-only signage, on the basis that the exception does not apply to commercial signage.

According to the Office, English-only trademarks used to designate business names on commercial signage in Québec were required to be accompanied by a French generic descriptor, phrase or expression. The retailers launched a court challenge that ultimately made its way to the Québec Court of Appeal, who ruled in favour of the retailers — concluding that they could rely on the "recognized" trademark exception, and were not required to add French descriptors to their non-French trademarks on storefront signage.

However, in May 2016, the Québec government published its proposed amendments to the French language regulations in an effort to ensure visibility of the language throughout the province. The draft regulations will affect all companies with an establishment in Québec that display a non-French trademark in the absence of a French generic term, slogan or description outside their premises.

The draft regulations provide that where a non-French trademark is displayed outside a building, a "sufficient presence of French" must also be ensured in one of three ways: (i) a French generic term or description of the products and/or services concerned, (ii) a French slogan or (iii) any other term or indication — although preference should be given to the display of information pertaining to the products and/or services to the benefit of consumers or persons frequenting the site. The draft regulations further require the French generic terms, slogan or other description to be permanently visible and shown in the same visual field as that of the sign or poster bearing the non-French trademark.

4. ENVIRONMENTAL CLAIMS

Among the enforcement guidelines issued by the Competition Bureau, as noted previously, are guidelines on the use of environmental claims in advertising. Published by the Bureau in conjunction with the Canadian Standards Association, these guidelines discourage the use of unsubstantiated and vague environmental claims — such as "eco-friendly" and "environmentally friendly" — stating that such claims may only be used if they detail the exact environmental benefit in such a way that it can be verified in relation to the specific product.

Through the use of commentary and practical examples, the guidelines provide instruction on the proper use of certain common environmental claims and symbols. "Green" marketers in Canada must ensure that all environmental claims are true — not only in relation to the final product, but also in relation to all relevant aspects of the product's life cycle (i.e., there must be an overall net positive impact on the environment).

5. CONTESTS AND PROMOTIONS

The legal rules that govern contests and promotions in Canada contain a number of unique provisions. "Lotteries" — i.e., any scheme that awards a prize based on chance and/or where money (or another valuable "consideration") is paid to participate — are illegal under the *Criminal Code*.

To avoid being considered an illegal lottery, a contest must include a skill-testing element — commonly a mathematical question — and generally must provide a no-purchase entry option. The *Competition Act* also mandates disclosure of certain material information about the contest, including any regional allocation of prizes, odds of winning and prize values.

Special considerations also apply for contests open to Québec residents. In addition to its French language rules for advertising, Québec is currently the only jurisdiction in Canada that imposes payment of duties and requires certain pre- and post-contest filings for contests open to its residents.

6. "SALE" CLAIMS

In order to advertise a "sale" price in Canada, you must have established a "regular" price at which either (i) a substantial number — i.e., more than 50 per cent — of the items have been sold during the relevant time frame (known as the "volume test"), or (ii) the item has been, or will be, offered for sale in good faith for a substantial period of time — i.e., more than 50 per cent of the relevant period (known as the "time test").

Even if the term "regular price" is not used, any higher price referenced directly or indirectly in a "sale" advertisement will be considered the "regular price" of the product or service in question. If this amount is not identified as the seller's own regular price, it will be considered to be the price that other sellers in the market generally charge for the same product or service.

Due to the difficulty of predicting the volume of "regular price" sales of any product or service, most retailers in Canada do not rely on the volume test. Instead, they typically use the time test, in which they keep track of the length of time that each item is offered at a price lower than the ordinary selling price, and ensure that this "on sale" period is less than half of the relevant period. The relevant period can be a six-month, 12-month or even a quarterly period, provided that the items are not seasonal and that the time period is followed consistently.

7. PUFFERY AND HYPERBOLE

In Canada, the scope for arguing that an advertising claim is just "puffery" — a hyperbolic boast, or a vague and purely self-congratulatory statement of opinion — is probably narrower than in certain other jurisdictions, the U.S. in particular.

If the claim can be seen as relating to the performance, efficacy or length of life of the product, it cannot be made without substantive evidence of an "adequate and proper test" to support it. As well, if the claim can be interpreted as likely to influence the consumer's purchase decision, in terms

of the general impression it creates, it cannot be dismissed as simply "puffery." However, if a claim is so exaggerated or fanciful that no reasonable consumer would ever take it seriously, or if it is clearly expressed solely as a matter of opinion not subject to objective assessment, even Canadians — and our courts — may be prepared to dismiss it as a "mere puff."

8. CANADIANA ISSUES

Canadian regulations also extend legal protection to certain symbols and icons of Canada. For example, the use of real or costumed RCMP officers, or the words "Royal Canadian Mounted Police," "RCMP" or "Mountie" in advertising requires consent from the RCMP. Additionally, the use of images of the Canadian flag, the 11-point maple leaf symbol, coins and bank bills in advertising is subject to certain conditions or limitations. However, the national anthem, "O Canada," is in the public domain and is therefore fair game.

9. ADVERTISING IN QUÉBEC

Beyond the above-mentioned language issues, Québec has a unique culture and heritage, which it has tried to protect through a number of regulations. The most important regulation for foreign advertisers to note is Québec's *Consumer Protection Act*, as it applies to anyone who advertises or sells products or services to consumers in Québec, and imposes strict requirements on the nature and accuracy of advertising. Many Canadian advertisers choose not to open contests to Québec residents due to the additional rules enforced by the province's alcohol and gaming authority, the Régie des alcools, des courses et des jeux. In many cases, national advertisers are forced to make a choice: create parallel advertising campaigns for English and French Canada, or miss out on advertising to the second-most populous Canadian province.

Québec law also prohibits — with limited exceptions — commercial advertising directed to children under 13 years of age.

10. PENALTIES FOR FALSE AND MISLEADING ADVERTISING

The Competition Bureau is empowered under the federal *Competition Act* to pursue administrative remedies in relation to misleading advertising and other deceptive marketing practices. The Bureau also has the ability to prosecute misleading advertising, where misrepresentations are made knowingly and recklessly, as a criminal offence.

In most cases, the Bureau will deal with misleading advertising as a civil offence. This route offers a wide range of enforcement remedies, including cease-and-desist orders, the required publication of information notices — i.e., corrective advertising — directed to affected parties, and/or administrative monetary penalties.

For a first offence, corporate offenders may face penalties of up to $10 million. For subsequent offences, corporations face up to $15 milion in penalties. Under the civil route, the Bureau does not need to prove — as they would in a criminal proceeding — that the false or misleading advertising was engaged in deliberately or recklessly. The potential penalties under the criminal provisions include fines and jail.

11. PRIVATE REMEDIES FOR FALSE AND MISLEADING ADVERTISING

In addition to certain remedies available under the common law — e.g., trade libel — or an action for copyright/trademark infringement, the *Competition Act* provides a statutory right of civil action for damages suffered as a result of misleading advertising. However, proof that the advertiser acted "knowingly or recklessly" is required.

The relevant provision of the *Competition Act* has also been used as the basis for obtaining injunctions in misleading advertising cases. The basic test for obtaining an interlocutory injunction in Canada requires that:

- There is a serious issue to be tried.
- The plaintiff will suffer irreparable harm if the injunction isn't granted.
- The "balance of convenience" favours the plaintiff.

Advertising Standards Canada, the country's main self-regulatory body for the advertising industry, also administers a confidential trade-dispute procedure for comparative advertising disputes, which is not unlike the NAD process in the U.S. In the right circumstances, it can offer a lower-cost and relatively expeditious alternative to litigation.

12. CANADA'S ANTI-SPAM LEGISLATION

On July 1, 2014, Canada's Anti-Spam Legislation (CASL) came into force, with significant implications for advertisers wishing to promote their goods or services through the use of "commercial electronic messages" (CEMs) sent to an "electronic address" — including email accounts, instant-messaging accounts and other analogous technologies.

CASL prohibits the sending of a CEM to a recipient unless the sender has either the express or implied consent of the recipient to do so — CASL stipulates conditions for obtaining express consent and sets conditions for what will constitute a valid "implied" consent under the legislation. It also imposes certain message disclosure requirements on the sender and requires that recipients are given the ability, at no cost, to unsubscribe from receiving CEMs in future. CASL also amends the *Competition Act* to make it an offence to send a CEM that is false or misleading in a material respect, or to send or make a false or misleading representation in the sender information, subject matter information, URL or other locator of a CEM.

The Canadian Radio-television and Telecommunications Commission has now begun enforcement of the legislation after being inundated with consumer complaints as soon as it came into force. For a more detailed discussion of the legislation and its requirements, see the chapter on CASL.

"The use of images of the Canadian flag, the 11-point maple leaf symbol, coins and bank bills in advertising is subject to certain conditions or limitiations."

13. DIGITAL MARKETING

From native advertising to behavioural advertising, to new social apps, platforms and tactics, the digital world is constantly evolving and giving rise to complex and unique legal challenges. Unfortunately, Canada is currently lagging behind some other jurisdictions in terms of providing organizations with direct guidance on how to navigate a digital sphere that is littered with legal landmines. That said, there are resources available that help provide valuable insight into digital marketing practices in Canada.

One such resource is the Competition Bureau's *Deceptive Marketing Practices Digest*, which speaks to issues such as the need to disclose a "material connection," making proper disclosures in digital marketing and how to avoid deceptive practices such as "astroturfing" — commercial representations that masquerade as the authentic experiences and opinions of impartial consumers, such as fake consumer reviews and testimonials. Furthermore, the Office of the Privacy Commissioner of Canada has released its *Guidelines on Privacy and Online Behavioural Advertising*, which are designed to help organizations involved in online behavioural advertising ensure that their practices are fair, transparent and in compliance with Canadian law.

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Q: CANADA'S ANTI-SPAM LEGISLATION

Canada's Anti-Spam Legislation,[1] or CASL for short, came into force on July 1, 2014. It is one of the most prescriptive and punitive anti-spam laws anywhere in the world.

With penalties of up to $10 million, CASL compliance has become a priority for anyone doing business in Canada. This chapter focuses both on the requirements for sending electronic messages under CASL and the requirements regarding express consent for the unsolicited installation of computer programs, which came into effect on January 15, 2015.

FISHING

When Giovanni Caboto, the 15th-century Italian navigator and explorer now better known as John Cabot, first stumbled on the cod-rich waters of Newfoundland over 500 years ago, he remarked "the sea there is full of fish that can be taken not only with nets but with fishing baskets."

[1] The full name of the Act is: *An Act to Promote the Efficiency and Adaptability of the Canadian Economy by Regulating Certain Activities that Discourage Reliance on Electronic Means of Carrying out Commercial Activities, and to Amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, SC 2010, c 23.*

1. OVERVIEW

With respect to spam, CASL imposes two primary obligations. First, CASL prohibits the sending of unsolicited commercial electronic messages. This means that, subject to certain exceptions, before sending an electronic message that encourages participation in a commercial activity — including most standard promotional or advertising emails and texts — the sender must have either the express or implied consent, as defined under CASL, of each recipient. Second, even where consent exists, CASL requires commercial electronic messages to contain certain disclosures and an unsubscribe mechanism. This chapter briefly reviews the essential requirements of the legislation.

CASL's computer software provisions are aimed at preventing the installation of unauthorized malware and spyware computer programs; however, they have varying degrees of impact on all types of software applications. Section 8 of CASL requires express consent to install a computer program on another person's computer system in Canada during the course of commercial activity. Enhanced disclosure and consent requirements apply where the software performs certain prescribed functions.

2. COMMERCIAL ELECTRONIC MESSAGES (CEMS)

CASL applies specifically to "commercial electronic messages." A CEM is defined as any message sent to an electronic address that has as its purpose, or one of its purposes, the encouragement of participation in a commercial activity. This includes, but is not limited to, messages that:

- Offer to purchase or sell goods or services
- Offer to provide a business, investment or gaming opportunity
- Contain advertisements related to any of the above

An electronic message that requests the recipient's consent to receive further electronic messages is itself a CEM and, as such, may only be sent with prior consent.

To constitute a CEM, the message must be sent to an "electronic address" by any means of telecommunication. This includes email, texting, instant messages, messages to telephone accounts, or messages sent to any "similar account", such as certain forms of social media messaging or other digital messaging systems where a message is sent by one person to one or more specific electronic addresses.

However, CASL does not apply to interactive two-way voice communications between individuals, voice recordings sent to telephone accounts or to the transmission of facsimiles.

CASL also does not apply to electronic messages that are displayed to the general public. For example, CASL will not apply to display advertisements such as banner or box advertisements, or to a normal tweet on Twitter or to a Facebook wall post. It will, however, apply to private messages sent through those social media platforms to one or more recipients.

a. Jurisdiction

CASL applies to any CEM that is either sent from a computer within Canada or accessed by a computer in Canada. Because of this, even organizations operating solely outside of Canada will, in most cases, be required to comply with CASL if they communicate with Canadian clients or customers.

b. Consent

Consent is the cornerstone of CASL and most of the legislation's complexity lies here. In order to send any CEM, unless the message is otherwise exempt — as discussed later in this chapter — the sender must have the consent of the recipient to send the message. It is important to note that under CASL, the onus is always on the sender to prove consent.

There are two principal types of consent under CASL: express consent and implied consent.

i. Express consent

CASL creates prescriptive requirements for express consent to receive CEMs. Express consent requires clear and informed consent on the part of the person consenting to receive the messages. The form of consent must be opt-in, rather than opt-out, and the person must be aware of the nature of the messages that they are agreeing to receive.

Opt-ins cannot be buried in the terms and conditions of another service or contract, and must instead require a positive or explicit action on the part of the person providing his or her consent. Most commonly, express consent is obtained through a checkbox or a confirmation button on a form, web page or digital application. Any such checkbox cannot be pre-checked, and consent should never be assumed.

CASL also requires the following information to appear with any request for express consent:

- An identification of the types of messages that will be received and the purposes of the consent
- The name by which the person or organization requesting consent carries on business, or their legal name
- If seeking consent for another person or organization, the name by which that person or organization carries on business, or their legal name, and an indication as to which person or organization is seeking consent for the other (e.g. if seeking consent for an affiliate)
- The mailing address, and either a telephone number providing access to an agent or a voice messaging system, an email address, or a web address of the person or organization seeking consent
- A statement indicating that the person whose consent is sought can withdraw their consent

Once express consent is obtained, the sender may continue to send messages of the type identified in the request for consent until the recipient withdraws their consent.

ii. Implied consent

Implied consent is based on the existence of a prescribed relationship between the sender and recipient, or on the presence of a specific set of circumstances.

Under CASL, implied consent may exist where the sender of the CEM and its recipient have an "existing business relationship." An existing business relationship applies in the following cases:

i. Where there has been a purchase or lease of a product, good, service, land, or an interest or right in land, within the previous two years by the message recipient from either the sender or the person who caused or allowed the message to be sent

ii. Where the recipient accepted a business, investment or gaming opportunity, or engaged in the bartering of anything mentioned in (i) within the previous two years from either the sender or the person or organization that caused or allowed the message to be sent

iii. Where a written contract currently exists between the recipient and either the sender or the person or organization that caused or allowed the message to be sent, or where such a contract expired within the previous two years

iv. Where an inquiry or application was made by the recipient in respect of anything in (i) or (ii) from either the sender or the person who caused or allowed the message to be sent, within the previous six months

As these provisions make clear, implied consent for an existing business relationship has a time limitation, which must be tracked by those relying on the implied consent. Tracking these time limits can be problematic, especially since it requires monitoring the expiry of consent for each address, and it may be difficult to establish the exact times when recent transactions took place, or when the timer began to run. Due to this difficulty, it is often advisable to seek express consent for any ongoing commercial electronic messaging.

Regardless of the time frame given for the use of implied consent from an existing business relationship, if the recipient indicates that he or she no longer wishes to receive ongoing messages, the sender must cease sending CEMs to that recipient within 10 business days.

A second form of implied consent exists if the recipient has conspicuously published his or her electronic address, or has given the address to the sender, without indicating that he or she does not wish to receive CEMs. Importantly, in order to use this form of implied consent, the message must be relevant to the business, role, functions or duties of the recipient of the message.

iii. Referrals

CASL allows for the limited sending of messages to new contacts based on referrals. Essentially, CASL will deem the sender to have consent to send a single message to a recipient where another individual has referred that person to the sender and has provided their electronic address. In order for this to apply, the individual who made the referral must be in certain types of prescribed relationships with both the sender and the recipient, and the referral message must contain prescribed disclosures and the prescribed unsubscribe mechanism.

iv. Records of consent

CASL places the onus of proving the existence of consent on the person or organization claiming to have it. As such, it is important for organizations that send CEMs to retain records sufficient to establish that they have CASL compliant consent if they are ever faced with enforcement action.

The regulator, the Canadian Radio-television and Telecommunications Commission (CRTC), has indicated that to help establish adequate proof of consent, organizations that send CEMs should retain records, such as any signed consent forms or completed electronic forms from individuals, documentation of the organization's consent processes, records of their policies and procedures in respect of CASL compliance, and a record of all unsubscribe requests and their resulting implementation.

v. Statutorily defined categories of messages

A number of prescribed classes of electronic messages are exempt from the requirement to obtain consent, either express or implied, from the recipient. It should be noted that these messages are not exempt from the application of CASL. Rather, the sending of electronic messages under these categories is analogous to implied consent, as it is still necessary to comply with other CASL requirements, such as including the message disclosure requirements and unsubscribe mechanism discussed below.

Such categories of electronic message include, but are not limited to, messages sent solely:

- To provide a requested quote or estimate regarding a product or service
- To provide warranty or product recall information about a product the recipient has purchased
- To facilitate or confirm a commercial transaction entered with the recipient
- To deliver a product or service that the recipient is entitled to receive under the terms of a transaction between the sender and recipient

c. Message disclosure requirements

Even where a sender has obtained express consent or has implied consent to send a CEM, any commercial electronic message sent pursuant to that consent must clearly and prominently include prescribed information within the message. It must also include an unsubscribe mechanism, allowing the recipient to easily opt-out of future CEMs from the sender.

i. Required information

- The name by which the person or organization sending the message carries on business, or that person or organization's legal name
- If the message is sent on behalf of another person or organization, the name by which the person or organization on whose behalf the message is sent carries on business, or their legal name
- If the message is sent on behalf of another person or organization, a statement identifying both the person or organization sending the message and the person or organization on whose behalf the message is sent
- The mailing address and either a telephone number providing access to an agent or a voice messaging system, an email address or a web address of the person or organization sending the message or the person or organization on whose behalf the message is sent

If it is not possible to include all of this information directly in a message — such as in the case of some commercial messages sent by text message — a clearly labelled link may instead be included that leads directly to a web page with the required information.

ii. Unsubscribe mechanism

All CEMs not exempt from CASL must include an unsubscribe mechanism, whether the consent to send the message is express or implied. The unsubscribe mechanism — which is usually in the form of an unsubscribe link at the end of the message — must enable recipients to indicate, at no cost to them, that they wish to no longer receive CEMs from the sender, or the person on whose behalf the messages are sent. The unsubscribe mechanism must be sent using the same

electronic means by which the message was sent, and include a link to a website or electronic address to which the request can be sent. The unsubscribe mechanism must be simple and easy to use, and must be accessible for 60 days following receipt of the message. The sender must ensure that any unsubscribe request is implemented within 10 business days.

d. Exemptions

There are a small number of complete exemptions from the application of CASL, the most important of which are discussed below. Please note that additional exemptions, such as for charitable solicitations and political messages, are not discussed here.

i. Personal or family relationship

CASL does not apply to messages sent to narrow classes of family or to those with whom the sender has a close personal relationship, so long as the relationship has previously included direct, voluntary two-way communication.

ii. Not a commercial electronic message

Messages that do not meet the definition of a CEM, as they do not "encourage participation in commercial activity," or are not sent to an "electronic address" are outside the scope of CASL.

iii. Business-to-business exemption

Messages sent internally within an organization that concern the activities of the organization are exempt from CASL. More importantly, messages sent from an employee or other representative of an organization to an employee or representative of another organization are exempt if the organizations have an existing relationship and the message concerns the activities of the recipient organization.

iv. Response to an inquiry or complaint

Any message sent in response to an inquiry or complaint, or which is otherwise solicited by the recipient, is exempt from CASL.

v. Satisfying a legal right

Messages sent to enforce a right, satisfy a legal obligation, or provide notice of a legal right, are exempt from CASL. This will include messages sent to collect debts or provide notice of the sender enforcing any contractual right or remedy.

e. Use of third-party lists

CASL does not go so far as to eliminate the possibility of using third-party electronic address lists. However, those using such lists must take caution, as CASL imposes a number of requirements on the use of third-party electronic address lists with respect to opt-outs and disclosure, in addition to those discussed previously in this chapter.
A robust agreement is required between the list-provider and user to ensure that these requirements are satisfied, and to provide the list user with assurances that all necessary consents have been obtained and have not been withdrawn. Such an agreement might provide for indemnities against third-party claims arising in connection with misrepresentation or failure to comply with the agreement or with CASL.

f. Amendments to the *Competition Act* and the *Personal Information Protection and Electronic Documents Act* (PIPEDA)

CASL also amended the ***Competition Act*** in two important ways. First, the amendments make it an offence to send a CEM that is false or misleading in a material respect. Second, the amendments make it an offence to send or make a false or misleading representation in the sender information, subject matter information, uniform resource locator (URL) or other locator of a CEM. This latter amendment may make it difficult for businesses to include claims that require qualification, or a disclaimer, in the subject lines or URLs of CEMs, as it may be impossible to effectively include such qualifying language in the limited space.

Additionally, CASL amended PIPEDA to ensure that PIPEDA's exceptions to the requirement for consent to collect, use and disclose personal information do not apply where electronic addresses are collected by the use of a computer program created expressly for that purpose, or where any personal information is collected or used by accessing a computer system in contravention of an act of Parliament. CASL requires the Office of the Privacy Commissioner of Canada, Competition Bureau and CRTC to consult one another and to co-ordinate their CASL enforcement activities.

g. Transitional provisions

CASL provides a three-year transition period for "existing business relationships," (defined in section b.(ii) above) that existed prior to July 1, 2014, and included the sending of CEMs prior to that date. In such a case, implied consent will be deemed to exist for a period or three years, expiring January 1, 2017, unless the recipient withdraws their consent earlier, in which case their decision must be respected.

The CRTC has also indicated that "valid, express" consents provided prior to January 1, 2014, with respect to the sending of CEMs may be relied on after January 1, 2014, until the message recipient withdraws consent.

h. Enforcement to date

Since CASL came into force, the CRTC has received over 245,000 complaints, and continues to receive almost 1,000 complaints per day. The CRTC has indicated it will review these complaints, and will take action where appropriate.

To date, the CRTC has actively enforced the legislation, including issuing one notice of violation imposing a $1.1-million penalty for alleged violation of the consent requirement under CASL and for using an unsubscribe mechanism that did not function. The CRTC has also entered into undertakings with three companies for violations of CASL. In particular, it alleged that each of these companies had sent CEMs to individuals — including in some instances their own registered users — that included an unsubscribe mechanism that was not "clearly and prominently set out" and that could not be "readily performed," as well as a variety of consent defects. The penalties imposed via undertaking have ranged from $48,000 to $200,000.

3. INSTALLATION OF COMPUTER PROGRAMS

a. Consent to install a computer program

Section 8 of CASL requires anyone who installs, or causes to be installed, tta computer program on another person's computer system, in the course of commercial activity to obtain the prior express consent of the owner, or an authorized user, of that system in the manner prescribed by CASL.

CASL does not apply where the owner or authorized user of a computer system intentionally installs software on their computer system. CASL applies, however, where a computer program or a subset of a program is installed without the knowledge of the owner or authorized user of the computer system. CASL also applies where a previously installed computer program causes updates to be installed automatically without the user's knowledge and intent.

The application of CASL's software provisions does not stop at Canada's borders. Section 8 applies to anyone who installs software in Canada, and to persons inside Canada who install software on computer systems outside of Canada. In both cases, the installation must be done in the course of commercial activity for CASL's software provisions to apply.

CASL uses the terms "computer system" and "computer program" broadly. Under CASL, a "computer system" means a device — or a group of interconnected or related devices — that contains computer programs or other computer data, and that performs a logic and control function pursuant to computer programs. As a result, computer systems may include automobiles, industrial equipment, smart appliances and other consumer products that may not normally be considered to constitute "computer systems." CASL considers "computer programs" to include data that when executed in a computer system cause it to perform a function, including both software applications and updates to them.

b. Computer program consent requirements

CASL requires the following information to be clearly and simply set out when consent to install a computer program is sought:

- The reason why consent is sought
- The name by which the person or organization requesting consent carries on business, or that person's legal name, and if applicable the name of any person or organization on whose behalf consent is sought and an indication who is seeking consent for whom
- The mailing address and one other piece of contact information (i.e., telephone number, email address or web address) for the person or organization seeking consent or any person on whose behalf consent is sought
- A statement indicating that the person whose consent is sought can withdraw their consent
- The function and purpose of the computer program to be installed

The person who obtains consent should keep a record of it, as that person will bear the onus of proving the consent once the computer program is installed.

c. Deemed consent

CASL deems the computer system's owner or authorized user to have expressly consented to the installation of a computer program if that person's conduct is such that it is reasonable to believe that he or she did consent to the installation, and the computer program is:

- A cookie, HTML, JavaScript, operating system or a program that is executable only though another

computer program to which the user has already expressly consented

- Software installed by a telecommunications service provider solely to protect the security of all or part of its network from a current and identifiable threat, or to update or upgrade all or part of its network
- Software installed solely to correct a failure in a computer system or a program installed on it

d. Additional disclosure and consent requirements

CASL imposes additional disclosure and consent obligations where the computer program being installed performs any one of a list of prescribed functions — provided that the person installing the computer program knows and intends such functions will cause the computer system to operate in a manner that is contrary to the reasonable expectations of the owner or authorized user of the computer system.

The prescribed computerprogram functions are:

- Collecting personal information stored on the computer system
- Interfering with the user's control of the computer system
- Changing or interfering with settings, preferences, or commands already installed or stored on the computer system without the knowledge of the user
- Changing or interfering with data that is stored on the computer system in a manner that obstructs, interrupts or interferes with lawful access to or use of the data
- Causing the computer system to communicate with another computer system without authorization of the user
- Installing a computer program that may be activated by a third party without the knowledge of the user
- Performing any other function listed in CASL's regulations

When the foregoing applies, the person seeking to install the computer program must provide the computer system's owner or authorized user with a description of the material elements of the computer program that perform the specified function(s) — including the nature and purpose of those elements, and their foreseeable impact. These elements must be brought to the attention of the owner or authorized user of the computer system clearly and prominently — separate from other information provided in a request for consent, and separate from the software licence agreement.

The person seeking to install the computer program must also obtain written acknowledgement (in paper or electronic form) that the person from whom consent is sought understands and agrees that the program performs the specified functions. The request for consent must not be bundled with requests for consent to general terms and conditions of use or sale, and must be separate from any consent requested under CASL's CEM provisions.

CASL provides an exception to these enhanced consent and disclosure requirements where the specified computer program function only collects, uses or communicates transmission data. For CASL's purposes, "transmission data" means data that:

- Relates to the telecommunications functions of dialing, routing, addressing or signalling
- Either is transmitted to identify, activate or configure an apparatus or device (including a computer program) to establish or maintain a communication
- Is generated during the creation, transmission or reception of a communication and identifies or purports to identify the type, direction, date, time, duration, size, origin, destination or termination of the communication
- Does not reveal the substance, meaning or purpose of the communication

e. Additional obligations

CASL imposes additional obligations on a person or organization that installs a computer program on another person's computer such that the "enhanced disclosure and consent" requirements outlined above apply.

For one year after such installation, the person who installed the computer program must ensure that the consenting person is provided with an electronic address through which they can request to remove or disable the program if they believe that its function, purpose or impact was not accurately described when consent was requested.

If the consent was given based on an inaccurate description of the program's material elements, then the person who installed the program must assist the person who gave the consent to remove or disable the computer program as soon as feasible, without cost to the person who gave the consent. This assistance is required where the person who gave the consent requests it within one year after installation.

f. Updates and upgrades

Software updates and upgrades involve the replacement or supplementation of a computer program's software with newer software in order to improve the program or bring it up-to-date. In the course of commercial activity, where an update or upgrade is being installed on someone else's computer, the consent of the owner or authorized user of the computer must be obtained in accordance with CASL.

g. Transition provisions

CASL provides a transition period for updates and upgrades to computer programs that were installed prior to the effective date of CASL's computer software provisions. Programs that were installed before January 15, 2015, may be upgraded or updated without express consent until January 15, 2018. In these circumstances, CASL provides that the necessary consent is implied. However, if the computer system's owner or authorized user withdraws their implied consent for such updates and upgrades, their choice must be respected. After the expiry of the three-year transition period, express consent will be required to install updates and upgrades to existing computer programs — except where one of the other exceptions applies.

The CRTC has also indicated that "valid, express" consents provided prior to January 15, 2015, with respect to the installation of a computer program may be relied on after January 15, 2015.

"CASL also applies where a previously installed computer program causes updates to be installed automatically without the user's knowledge or consent."

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R: BANKRUPTCY & RESTRUCTURING

The economies of the United States and Canada are closely intertwined. As operations expand across the border, so too do the complexities associated with carrying on business — particularly the insolvency of a company spanning both jurisdictions.

As such, understanding how to navigate the complexities of Canadian insolvency regimes is essential to successfully doing business in the country.

THE SUPREME COURT OF CANADA

Unlike the United States, Canada does not have a separate bankruptcy court. Rather, federal statutes assign jurisdiction to provincial courts, over which federally appointed judges preside.

1. LEGISLATION AND COURT SYSTEM

The Canadian bankruptcy and insolvency regime is divided between the federal and provincial levels of government, in accordance with the division of powers set out in Canada's Constitution. The federal Parliament has authority over bankruptcy and insolvency, while the provincial legislatures have authority over securities laws, property and civil rights — including the responsibility for determining the rights and remedies of secured creditors. As a result, the various pieces of legislation at both the federal and provincial levels may apply to businesses involved in an insolvency.

The federal statutes primarily governing insolvency proceedings are:

- The *Bankruptcy and Insolvency Act* (BIA), which sets out Canada's bankruptcy regime and is the statute used to liquidate a business. It also provides a proposal regime to allow debtors to reorganize and reach compromises with their creditors.
- The *Companies' Creditors Arrangement Act* (CCAA), which is strictly a restructuring statute, sets out a framework for the reorganization of insolvent companies with debts totalling over $5 million. It provides for plans of arrangement to allow debtors to reach compromises with their creditors or a sale of the business under the supervision of the court.
- The *Winding-up and Restructuring Act*, which is primarily used to wind up regulated bodies such as banks, insurance companies and trust corporations.

The principal provincial statutes affecting insolvency proceedings are:

- The *Personal Property Security Act* (PPSA)
- The *Courts of Justice Act, Judicature Act* and *Rules of Civil Procedure* (Rules of the Court)

All common law provinces have enacted PPSA legislation that establishes a regime for creating valid security interests, determining priorities among creditors and enforcing security interests. This legislation is similar to the various uniform commercial codes in effect in the U.S. In Québec, however, creation of security interests and determination of priorities follows the provisions of the *Civil Code of Québec*. Registration is made in the Register of Personal and Movable Real Rights. For more information on PPSA legislation, see the chapter on secured financing.

Unlike the U.S., Canada does not have a separate bankruptcy court. Rather, the BIA and CCAA assign jurisdiction to provincial courts, over which federally appointed judges preside. These courts are of general jurisdiction; however, some provincial courts have established commercial court branches for insolvency proceedings.

In Ontario, judicial authorities have established a specialized branch called the "Commercial List," through which insolvency proceedings move relatively quickly due to its limited mandate and an experienced judiciary. In some other jurisdictions without a formal Commercial List, court registries will assign judiciary with commercial insolvency experience to certain insolvency matters in an effort to obtain similar expedited results. As both the BIA and CCAA are federal enactments, they contain provisions requiring orders made by one provincial court to be recognized and enforced by other provincial courts.

2. RESTRUCTURING

A restructuring of a corporation's debt, or a "workout," usually occurs in one of two ways: informally without court process by agreement between the debtor and its creditors, or formally under either a proposal as outlined in part III of the BIA or a plan of arrangement under the CCAA.

a. Commencing restructuring proceedings under the BIA and CCAA

A proposal under the BIA or a plan of arrangement under the CCAA is effectively a contract between an insolvent debtor corporation and its creditors. In either case, the debtor makes a written offer to settle the provable claims of various classes of its creditors.

A CCAA plan of arrangement can be made with any particular class or classes of creditors, whereas a proposal under the BIA must include an arrangement with the corporation's preferred creditors — which includes claims of the trustee, employee claims and landlord claims — and unsecured creditors. In both cases, various classes of secured creditors may be involved. Any class of creditors not included cannot be bound by the plan or arrangement.

In order to facilitate successful restructurings, the CCAA and BIA provide for a stay of proceedings against a debtor corporation by its creditors, although the CCAA stay is often broader in scope. Both statutes also allow the debtor corporation to remain in possession of its assets during the restructuring process, and provide for interim financing to the debtor corporation known as "debtor-in-possession" financing, or "DIP" financing. Lenders providing DIP financing

are eligible for "super priority" security over the debtor's assets. Both statutes have been updated to contain specific guidelines for determining the classification of creditors.

The BIA and the CCAA set out a two-stage approval process. Creditors in each class vote on the proposal or plan of arrangement. The threshold for voter approval is by majority (in number) and by two-thirds (in value) of the claims of each class voting in person or by proxy. If this threshold for approval is reached, an application is made to the court for approval of the proposal or plan of arrangement.

Both the BIA and CCAA provide for a neutral party to monitor the progress of the debtor restructuring. Under the BIA, a proposal must provide for the appointment of a trustee who has a general duty to monitor the debtor's business and financial affairs during the restructuring, and to report on any material adverse changes. The trustee must also report on the reasonableness of the debtor's cash flow statement.

Similarly, the CCAA requires the appointment of a monitor who must be a licensed trustee in bankruptcy. The monitor carries out a role similar to that of the trustee under the BIA, and is responsible for assisting the debtor with the management of the business during the restructuring, as well as the preparation of the plan of arrangement or a sales process. The monitor must also file periodic reports with the court and creditors, and has become more involved with the restructuring process as a whole.

b. Differences between BIA and CCAA restructurings

Despite the similarities between the two acts, there are notable differences that should be taken into account.

Benefits of proceeding under the CCAA:

- Due to the generally liberal judicial approach to the interpretation of the Act, and the lack of detailed rules of procedure, the CCAA offers significantly more flexibility to a debtor corporation than proceedings under the BIA.
- There is no statutory time limit for filing a plan under the CCAA, whereas the BIA sets a maximum period of only six months to file a definitive proposal.
- Under the CCAA, the court has the discretion to make third parties who are not creditors of the debtor subject to the stay of proceedings during the restructuring period.
- Under the BIA, if the unsecured creditors reject a proposal or if the court refuses to approve it, the debtor corporation is automatically declared bankrupt. Rejection of a plan of arrangement under the CCAA does not have this automatic effect.

Benefits of restructuring under the BIA:

- A stay of proceedings under the BIA is obtained by filing a notice of intention with an administrative officer, while under the CCAA, a stay must be obtained by seeking a court order.
- The CCAA applies only to corporations or corporate groups with an aggregate of at least $5 million in debt; the BIA has no such restriction.
- Since the BIA contains a detailed code of procedure for restructurings — which is absent from the CCAA — and mandates a shorter time frame, costs are generally lower in a proposal under the BIA, as fewer court applications are required.

c. Cross-border insolvencies

The BIA and CCAA outline procedures for cross-border insolvencies. These provisions are set out in a modified version of the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on Cross-Border Insolvency. The international protocols are aimed at advancing the fair and efficient administration of insolvencies in multiple jurisdictions and have worked well in practice.

It is generally the preference of the Canadian courts that cross-border insolvencies proceed as a single process with one jurisdiction becoming the main proceeding. In order to determine if the Canadian action should be the main proceeding, the Canadian court will assess whether there is a real and substantial connection between the matter and the jurisdiction of Canadian courts. Judges will generally ask the following questions:

- Where are the creditors located and will they know about the proceeding in Canada?
- Is Canada the location of the principal operations or assets of the company?
- Does the management of the company take place in Canada?

If the court is satisfied that the insolvency action should, for the most part, happen in Canada, the other jurisdiction (most often the U.S.) will usually have to agree and recognize the Canadian court's authority. While that recognition is not guaranteed, courts on both sides of the U.S.-Canada border have recognized the special relationship between the two jurisdictions, and bankruptcy and insolvency matters tend to proceed relatively smoothly — even when assets lie in both countries.

3. RECEIVERSHIPS

The BIA also provides for the enforcement of security and the appointment of receivers. A secured creditor planning to enforce its security on all, or substantially all, assets of an insolvent debtor must give prior notice of this intention and wait 10 days after sending the notice before taking any further steps — unless the debtor consents to an earlier enforcement. At this time, it is likely that a receiver will be appointed. The receiver must give notice of its appointment to all creditors, issue reports on a regular basis outlining the status of the receivership, and prepare a final report and statement of receivership accounts when the appointment is terminated. These reports are available to creditors upon request.

A receiver (or receiver and manager) is appointed in one of two ways: privately, by a secured creditor in accordance with a security instrument, or by a court order.

a. Private appointment of a receiver

Where a security agreement provides for the private appointment of a receiver, the powers of the receiver must also be set out in that instrument.

Unlike a court-appointed receiver, a private receiver's loyalties lie primarily with the creditor that appointed it, and it will work to maximize recoveries for that creditor. Privately appointed receivers usually have broad powers, including the power to carry on the business and to sell the debtor's assets by auction, tender or private sale.

Although private appointments can reduce costs and delays, and provide the secured creditor with greater control over the realization process, it is often advisable to obtain a court appointment. This is especially true where there are major disputes among creditors or with the debtor, or in any case where it is clear that the assistance of the court will be required throughout the receivership. It is also often important for potential purchasers of insolvent businesses' assets to have the ability to obtain court approval of asset sales and an order vesting title in the purchaser.

b. Court appointment of a receiver

Jurisdiction for the court appointment of a receiver is found in the provincial rules of court and in section 243 of the BIA (National Receiver). A receiver can be appointed under the rules of court alone, but it is more common for the appointment to be made under both the BIA and the rules of court.

Court appointment of a receiver typically begins with a secured creditor commencing an action or application against the debtor. The receiver is then appointed in a summary proceeding within the action or application. The order appointing the receiver normally:

- Stays proceedings against the receiver
- Provides the receiver with control over the assets of the debtor
- Authorizes the receiver to carry on the debtor's business
- Authorizes the receiver to borrow money on the security of the assets
- Authorizes the receiver to sell the debtor's assets with the approval of the court

If necessary, the court order may authorize the receiver to commence and defend litigation in the debtor's name.

Whereas the duty of a privately appointed receiver is primarily to the secured creditor who appointed it — subject to a general duty to act in a commercially reasonable manner — the court-appointed receiver is an officer of the court and has a duty to protect the interests of all stakeholders of the debtor corporation. By the nature of its appointment, a court-appointed receiver may not be entitled to seek indemnities from those who sought the appointment. However, in practice, secured creditors do, in some cases, provide indemnities.

A court appointment may be necessary if the debtor opposes the appointment of a receiver and will not let the receiver take possession. In some provincial jurisdictions, the courts will grant possession orders and affirm the appointment of a private receiver with powers set out in the security documents, thereby avoiding a court appointment.

Other circumstances exist where a court appointment may be preferable. For example, in large, complex matters where the assets and operations of the debtor are located in a number of jurisdictions and security interests are in competition, it is generally in the interest of all concerned to arrange for appropriate management and realization of the assets — pending an ultimate determination by the court of the rights of the various secured creditors.

4. BANKRUPTCY

The administration of bankruptcy is carried out by trustees in bankruptcy, who are licensed and supervised by the federal government. When a debtor becomes bankrupt, a trustee is appointed and all of the bankrupt's assets are vested in the trustee. Claims of creditors, other than secured creditors, are stayed. The trustee has a duty to review the validity of all security over the bankrupt's assets and to apply to the court to set aside security that is not valid. Subject to confirmation of the validity of its security and a very limited stay provision, a secured creditor is entitled to take possession and dispose of all collateral over which it holds security, notwithstanding the occurrence of a bankruptcy.

BANKRUPTCY MAY OCCUR IN ONE OF SEVERAL WAYS

- The debtor makes a voluntary assignment into bankruptcy.
- The court grants a bankruptcy order on the application of one or more creditors.
- Unsecured creditors or the court refuses to approve a restructuring proposal under part III of the BIA.
- The proposal is subsequently annulled by the court.

In most cases, creditors elect a board of inspectors to guide the general conduct of the bankruptcy proceedings. The trustee requires the consent of a majority of the inspectors to sell assets, carry on the business of the bankrupt, commence or continue legal proceedings, or compromise any claims made by or against the bankrupt estate.

The major classes of creditors in a bankruptcy are secured creditors, preferred creditors and unsecured (ordinary) creditors. A secured creditor may be represented by an agent or a receiver for the purpose of realizing assets subject to its security.

a. Priorities under the BIA and CCAA

Preferred creditors have priority over unsecured creditors and are able to include in their claims the costs of administration of the bankruptcy, the fees of the trustee, employees' claims, municipal taxes and claims of a landlord. Claims by the Crown are not preferred claims and, with a few significant exceptions, are mostly unsecured. Unsecured creditors are entitled to share *pro rata* in the realization of the bankrupt's assets after the payment of preferred creditors, and are subject to the claims of secured creditors.

The BIA and CCAA create a "super priority charge" for lenders that provide interim financing to debtor companies. Such interim financing is permitted only by court order and requires that existing secured creditors are provided notice. A super priority will survive in a bankruptcy if a debtor-in-possession restructuring has failed.

The federal and provincial governments have attempted to create a statutory deemed trust or lien against assets in priority to contractual types of security. The objective is to ensure preferential treatment of debts due to the federal and provincial governments, and to employees for certain liabilities. These efforts have been met with limited success. Many of the claims involved are not effective in a bankruptcy. However, claims made by the federal government for source deductions for employees which have not been paid by the employer have priority over most secured creditors. As well, there are super priority claims created in the BIA and CCAA for wages and pension arrears, and a federal government plan (the Wage Earner Protection Program, or WEPP) to provide for the payment of wage arrears in an insolvency.

b. Avoidance transactions

Under the BIA and certain provincial statutes, the trustee may impugn or set aside certain transactions or payments entered into or made by the bankrupt. These are generally fraudulent preferences, fraudulent conveyances and transfers under value. There are limitation periods that apply in each case, and different rules and onuses of proof depending upon whether a transaction or payment was at arm's length. In practice, Canadians are not as aggressive as their U.S. counterparts in bringing these proceedings.

c. Interim receiver

An interim receiver is appointed to preserve and protect an estate pending the outcome of insolvency proceedings. Under the BIA, an interim receiver may be appointed by the court in three instances:

i. On or after the filing of an application for a bankruptcy order

ii. On the filing of a notice of intention to file, or the filing of a proposal under part III of the BIA

iii. When an enforcement notice is about to be sent or has been sent by a secured creditor indicating its intention to enforce its security

In all cases, the appointment is of short duration and the court specifically sets out the powers of the interim receiver — usually instructing them to take possession of the assets and control the debtor's receipts and disbursements, but not otherwise interfere with their day-to-day business. The interim receiver is the watchdog of the assets during the hiatus between the filing of the application and its hearing, or during the time prior to the appointment of a receiver or the approval of a proposal.

Prior to the amendments to the BIA in 2009, interim receivers were often appointed with a mandate similar to that of a receiver. However, these amendments ensure that the interim receiver carries out a truly "interim" role.

S: LOBBYING

Communications between individuals representing a corporation or its employees and government officials may be subject to strict reporting requirements. Specific rules apply to the lobbying of officials in the Canadian federal government in some provinces and municipalities.

Each of these governmental bodies has its own rules, and it is wise to gain an understanding of them before undertaking communications with government officials.

OTTAWA

The federal Parliament building is reflected off the glass facade of a bulding in Ottawa's political and business district.

At the federal level, the *Lobbying Act* provides that certain types of communications between individuals and "public office holders" must be reported. Under the Act, individuals who work with or deal with governmental officials or employees may have an obligation to disclose information relating to these discussions. Corporate employees may also be subject to the *Lobbying Act,* depending on the nature of their work and the time invested in interacting with Government of Canada employees, such as politicians, officials and representatives of Canada.

1. REGISTRABLE COMMUNICATIONS

Not all types of communications with public office holders constitute lobbying activities. However, if they fall into one of the following categories, it is likely that the communications should be registered:

- The development of any legislative proposal by the Government of Canada, or by a member of the Senate or the House of Commons
- The introduction, passage, amendment or defeat of a bill or resolution in the federal Parliament or in a provincial parliament
- The making or amendment of any regulation as defined in subsection 2(1) of the *Statutory Instruments Act*
- The development or amendment of any policy or program of the Government of Canada
- The awarding of any grant, contribution or other financial benefit by or on behalf of the Government of Canada
- The awarding of any contract by or on behalf of the Government of Canada
- The arrangement of a meeting between a public office holder and any other person to discuss the subjects above

As well, in some provincial jurisdictions, any communications made in the normal course of selling an individual's or a corporation's products or services, or in entering into a contract with a provincial government, are also registrable as lobbying activities.

ICE FLOWS

The Arctic Archipelago is a group of 36,563 islands to the north of the Canadian mainland.

2. LOBBYING

a. Public office holder

Pursuant to the *Lobbying Act*, the term "public office holder" refers to any officer or employee of the Government of Canada, including:

- A member of the Senate or the House of Commons and any person on their staff
- An appointee to any office or body by or with the approval of the governor in council or a minister of the Crown, other than a judge receiving a salary under the Judges Act or the lieutenant-governor of a province
- An officer, director or employee of any federal board, commission or other tribunal as defined in the Federal Courts Act
- A member of the Canadian Armed Forces
- A member of the Royal Canadian Mounted Police

If an individual representing an interest group or the employee of a corporation enters into discussions with a public office holder, they may be considered to be involved in lobbying activities.

b. Designated public office holder

The *Lobbying Act* includes a specific category of individuals called "designated public office holders" (DPOHs), who are defined as officials responsible for high-level decision-making in government. These include:

- A minister of the Crown or a minister of state and any person employed in his or her office
- The leader of the Opposition or the senior staff in the offices of the leader of the Opposition, both in the House of Commons and the Senate
- A member of Parliament and any person on their staff
- A senator and any person on their staff
- Any public office holder who occupies the senior executive position in a department — whether by the title of deputy minister, chief executive officer or by some other similar title
- An associate deputy minister or an assistant deputy minister, or a person who occupies a position of comparable rank

- The chief of the defence staff, the vice-chief of the defence staff, the chief of maritime staff, the chief of land staff, the chief of air staff, the chief of military personnel or a judge advocate general
- Any position of senior adviser to the Privy Council to which the office holder is appointed by the governor in council
- The comptroller general of Canada

Lobbyists are obligated to provide information to the Office of the Commissioner of Lobbying about their communications with DPOHs. The *Lobbying Act* requires lobbyists to produce a monthly report detailing when they lobby a DPOH, need to change their initial registration, or when they terminate or complete their lobbying undertaking. If a lobbyist initiates oral and arranged communication with a DPOH — e.g., a meeting or telephone conference — that amounts to lobbying as defined under the Act, they will need to include it in the report.

The monthly report must provide:

- The name of the DPOH
- Position or title of the DPOH
- The name of the branch or unit, and the name of the department or other governmental organization in which the DPOH is employed
- The date of the communication
- The subject matter of the communication

c. Employees or in-house lobbyists

At the corporate level, registration is required when one or more employees communicate with public office holders on behalf of their employer, and those communications constitute a significant part of one employee's duties (or would constitute a significant part of one employee's duties if they were performed by a single person). This evaluation must be conducted on a monthly basis.

A rule of 20 per cent applies when evaluating whether a significant part of an employee's duties is invested in communications with public office holders. If 20 per cent or more of an employee's time each month — or of a number of employees' total time each month — is allocated to communications with public office holders, the activities are likely registrable.

Evaluating whether 20 per cent or more of an employee's duties are in relation to communications with public office holders involves tracking time spent in preparation — i.e., in research, drafting, planning, compiling, travelling, etc. — and time spent actually communicating with public office holders. For instance, a one-hour meeting may require seven hours of preparation and two hours of travel time. In this case, the time related to lobbying a public office holder would be a total of 10 hours.

Under the *Lobbying Act*, the legislative reporting obligation (relating to both public office holders and DPOHs) rests with the company employee who occupies the most senior position in the business and who is paid for the performance of these duties — usually the president, CEO or executive director. If a report is not filed, or if it is filed incorrectly, incompletely or late, then liability rests with the CEO, who is then subject to possible investigation or prosecution.

Although a CEO charged with a strict liability offence under the Act could argue that they took all reasonable care and exercised due diligence in order to comply with the *Lobbying Act*, the onus would lie on them to prove that such care was taken. Of even greater concern than the stiff financial penalties that may be levied under the *Lobbying Act* is the damage to reputation that would result from having the business' name tainted in the media and by opposition party politicians.

d. Infractions and enforcement

The Office of the Commissioner of Lobbying has significant investigatory powers and a mandate to enforce compliance. As an independent agent of Parliament, the commissioner can ask DPOHs to verify the accuracy and completeness of contact report information submitted by lobbyists and, if necessary, report to Parliament the names of those who do not respond.

The commissioner also has the power to prohibit lobbyists convicted of an offence from communicating with the government as paid lobbyists for up to two years, and can publish the names of violators in parliamentary reports. As well, the *Lobbying Act* provides for criminal monetary fines of $50,000 on summary convictions for lobbyists who do not comply with the requirements of the Act, and $200,000 on proceedings by way of indictment — not to mention the possibility of up to six months of imprisonment for the former and up to two years of imprisonment for the latter.

T: FRANCHISE LAW

With a vibrant economy and close proximity to the United States, Canada is the natural first destination for U.S. franchise companies looking to expand internationally.

There are approximately 1,300 franchise brands and over 78,000 franchise units operating throughout Canada, crossing almost 50 different sectors of the economy, including retail, hospitality, automotive and health care — accounting for one out of every five consumer dollars spent in Canada on goods and services, and approximately $68 billion in annual sales.

OLYMPIC STADIUM, MONTRÉAL

Canada has been host to multiple Olympics, the World's Fair, the Pan Am and Parapan Am Games, and other international events over the last century.

While Canada is an attractive destination for international expansion, franchisors must be aware of the franchise-specific disclosure laws currently in effect in five of the Canadian provinces.

1. FRANCHISE DISCLOSURE LEGISLATION

The provinces of Alberta, Manitoba, New Brunswick, Ontario and Prince Edward Island have each enacted franchise disclosure legislation. The rights and obligations under the franchise legislation of these five provinces are very similar, with the general aim being to regulate the franchise marketplace and to protect both prospective franchisees and those already party to a franchise relationship. The law is remedial and is intended to address the perceived imbalance of power in the franchisor-franchisee relationship. It adopts three key principles:

- The obligation imposed on franchisors to provide disclosure
- The duty of good faith and fair dealing imposed upon franchisors and franchisees
- The right of franchisees to associate

Failure to comply with any of these obligations gives rise to significant remedies for franchisees. Furthermore, a franchisee cannot contract out of the rights granted to it or grant a waiver of the obligations imposed on franchisors under the legislation.

The franchise legislation in the five provinces also deems unenforceable any provision in a franchise agreement that restricts the application of the laws of the province, or that restricts the jurisdiction or venue to a forum outside of the province with respect to claims enforceable under that province's franchise legislation.

On October 5, 2015, the province of British Columbia introduced its own franchise legislation, titled the ***Franchises Act***, which is expected to come into force in 2017 upon completion of the drafting of the Regulations. The legislation is similar to that of the five aforementioned provinces.

2. THE DISCLOSURE OBLIGATION

A franchisor wishing to grant a franchise in any of the five provinces noted above must provide the prospective franchisee with a disclosure document at least 14 days before the earlier of either: (i) the signing of the franchise agreement, or any agreement relating to the franchise, by the prospective franchisee, or (ii) the payment of any consideration relating to the franchise.

A disclosure document must contain all of the information prescribed by the regulations under the legislation, as well as all other "material facts" (as discussed below) that would reasonably be considered relevant to a prospect's decision to acquire the franchise. The disclosure document must also contain the franchisor's financial statements in either audited or review engagement form. Large, mature franchisors may be exempt from the requirement to include financial statements if they meet certain criteria.

a. Material facts

A "material fact" is broadly defined to include any information about the business, operations, capital or control of the franchisor or the franchise system that would reasonably be expected to have a significant effect on the value or price of the proposed franchise, or on the decision to acquire the franchise.

The requirement for the disclosure of information beyond that specifically prescribed by provincial legislation has led to some of Canada's most significant franchise-related court decisions. As a result, disclosure documents must, in many circumstances, be customized to include information applicable to the subject matter of the franchise grant or the location of the proposed franchise.

b. Certification

A disclosure document must be certified as complete disclosure in accordance with the applicable provincial statute. A signed and dated certificate is not a mere formality but a mandatory requirement. Failure to provide a proper certificate will result in a determination that no disclosure was provided to the franchisee.

The certificate must be signed and dated in the manner prescribed by the applicable provincial statute. In particular, an incorporated franchisor must ensure that the certificate is signed by two of its officers or directors (or one, if there is only one). It must be signed personally and not on behalf of the franchisor.

c. Remedies

Franchise legislation has been broadly interpreted by the courts to ensure that the purpose of the legislation is met

and that a prospective franchisee is provided with the information necessary to make an informed decision.

In the event of a franchisor's failure to comply with its disclosure obligations, there are two separate remedies available to a franchisee: rescission and claims for misrepresentation.

A franchisee has the right to rescind a franchise agreement if a franchisor fails to properly comply with the disclosure requirements. Following a valid rescission, the franchisor is obliged to put the franchisee back into the position it had been in prior to the purchase of the franchise. A franchisor faced with a rescission claim is required to:

- Refund all monies paid to the franchisor by the franchisee
- Purchase all inventory, equipment and supplies purchased by the franchisee pursuant to the franchise agreement at the price paid by the franchisee
- Compensate the franchisee for all losses incurred to establish and operate the franchised business

Two separate time periods are available to a franchisee to rescind:

i. No later than 60 days after receiving the disclosure document, if the disclosure document did not comply with the delivery requirements of the legislation or if the contents of the disclosure document did not meet the legislation's requirements

ii. No later than two years after entering into the franchise agreement, if the franchisor never provided the disclosure document

The courts' interpretation of the rescission remedy has blurred these two time periods by holding that a materially non-compliant or deficient disclosure document is no disclosure at all, entitling a franchisee to rescind within two years after entering into the franchise agreement. As a result, strict compliance with the delivery requirements and the prescribed contents of a disclosure document is a necessity. The provision of a generic "standard form" disclosure document will not suffice to protect a franchisor from claims of non-compliance — particularly in cases where additional material information regarding the proposed franchise is known to the franchisor and is not fully disclosed.

In addition to the rescission remedy, franchisees have the right to bring a claim for damages for misrepresentations made in the disclosure document or for a franchisor's failure to comply with the disclosure requirements. Accordingly, if a franchisee misses the time period for rescission, it can still seek damages for breach of the disclosure obligation.

Claims for misrepresentation can be made against not only the franchisor, but also against individuals, including any director or officer of the franchisor who signed the certificate of disclosure. "Misrepresentation" is defined broadly to include an omission, and a franchisee is deemed to rely on a misrepresentation in a disclosure document and on the information contained in the disclosure document provided.

3. THE DUTY OF FAIR DEALING

Franchise legislation in Canada imposes on all parties to a franchise agreement a duty of fair dealing in the performance and enforcement of the agreement. This includes the duty to act in good faith and in accordance with reasonable commercial standards.

The courts have interpreted the duty of fair dealing to require that the franchisor enforce the franchise agreement in a manner that takes into account the interests of the franchisee (but not to the exclusion of the franchisor's interests) without malice or ulterior purpose. In effect, the obligation imposes limitations on a franchisor's discretion in enforcing its strict contractual rights where such exercise negatively impacts the interests of the franchisee. A breach of the duty of fair dealing is imposed on both the franchisor and a franchisee, and entitles the non-breaching party to claim damages for the breach.

"There are approximately 1,300 franchise brands and over 78,000 franchise units operating throughout Canada, crossing almost 50 different sectors of the economy."

4. THE RIGHT OF ASSOCIATION

Franchisees have the right to associate with other franchisees and to form or join an organization of franchisees without penalty or interference from the franchisor. Any provision in a franchise agreement that restricts this right is void, and a franchisee has a right of action against the franchisor for breach of this right. The right of association has been used by the courts to protect a franchisee's right to participate in a class action claim.

5. RIGHTS CANNOT BE WAIVED

Under the franchise legislation, rights given to a franchisee and obligations imposed on a franchisor cannot be waived. Accordingly, a release by the franchisee as a condition to the franchisor's consent to a renewal or transfer of its franchise must expressly exclude rights and obligations imposed by the legislation.

Therefore, the applicable provisions in the franchise agreement requiring a release by the franchisee on renewal or transfer must expressly state that the release excludes these rights and obligations — or the condition requiring delivery of the release will be rendered void. However, the courts will uphold a release given by a franchisee of existing known claims as part of a negotiated settlement of a dispute.

6. PROVINCE OF QUÉBEC

The province of Québec is a civil law jurisdiction. While Québec has no franchise-specific legislation, both the *Civil Code of Québec* and the *Charter of the French Language* apply to franchising.

Québec's *Civil Code* contains provisions governing "contracts of adhesion," which include franchise agreements and other standard form agreements of a franchisor. One interesting provision of the *Civil Code* states that any terms of a contract that are not fully known to a party, such as a franchisee, at the time of signing will not be enforceable. This could affect the usual franchise agreement term that requires franchisees to comply with the operations manual, and would require franchisors to arrange for a confidential disclosure of the manual to a prospective franchisee before the franchise agreement is signed.

The *Civil Code* also contains a statutory duty of good faith. This duty is broader than the duty of fair dealing included in the provincial franchise legislation, as it applies to the negotiation as well as the performance and enforcement of franchise agreements.

The *Charter of the French Language* mandates French as the required language of doing business in Québec and in the workplace in Québec. "Doing business" applies to forms, advertising (including websites), posters and signs. In addition, if a French version of a trademark has been registered, it must be used by a franchised business in Québec.

While the Charter requirements typically result in the equal use of French and English, there are some provisions, such as those governing the use of signs and posters, where the use of the French language must be "markedly predominant." This usually means a French-to-English ratio of two-to-one in size of wording or number of items.

In the workplace, working documents must be available in French, including software if French-language versions exist.

Franchising is a significant and well-recognized means of doing business in the province of Québec, and although there are specific laws intended to preserve and entrench the French language in the province, they are usually not difficult to comply with.

Learn more about our services in this area at
gowlingwlg.com/franchise-canada

U: OIL & GAS

ENERGY SOURCES

Canada's vast supply of energy sources includes oil, coal, natural gas and uranium.

Canada's wealth of natural resources has contributed to the country's status as a strong global player on the oil and gas stage.

Understanding the legal framework related to petroleum and natural gas rights is key to successfully doing business in Canada in this sector.

1. LAND OWNERSHIP IN CANADA

Land in Canada is held publicly by either the federal or provincial government in the name of Her Majesty the Queen (Crown lands), or privately by individuals, corporations or other stakeholders (freehold lands).

a. Crown lands

In Canada, most mineral rights are owned by the Crown, but the extent of Crown ownership varies from province to province. For instance, in Alberta, the Crown owns 81 per cent of the mineral rights, compared to only 20 per cent in Manitoba.

While the provincial government has general authority over its natural resources, federal jurisdiction can overlap these provincial responsibilities. Examples of this include where Indigenous interests are affected, if a project crosses provincial or international boundaries, or where a project takes place offshore. When a jurisdictional overlap occurs, both federal and provincial regulators may become involved.

The Crown does not conduct exploration or development of oil and gas resources on its own. Instead, mineral rights are granted to individuals, companies or other entities under a tenure system based on English common law principles. Each province has its own legislation by which its tenure system is administered.

Pursuant to the applicable legislation, exploration documents or production/development documents are granted. Exploration documents are granted to encourage exploration rather than production, and usually cover a much larger geographical area than production/development documents. These documents are typically referred to as licences or permits. Production/development documents are granted for a term or period of time that may be extended indefinitely if certain continuation criteria are met. These documents are typically referred to as leases.

It is important to note that any Crown instrument is subject to the terms of the document itself, along with the applicable provincial or federal legislation incorporated by reference. This legislation specifies many additional material details, such as the amount and manner of calculating the related royalty payments. Additionally, different legislation and regulations for land tenure and project development may exist in different jurisdictions for different types of oil and gas resources, such as oil sands or shale oil.

b. First Nations, Métis and Inuit lands

The Canadian Constitution recognizes three groups of Indigenous peoples: First Nations, Métis and Inuit. Land ownership that has been recognized by treaties or settlement agreements between these groups and the federal government and/or provincial governments is typically held by the governing body of the respective group and is akin to Crown land ownership.

- **First Nations**: "First Nations people" refers to status and non-status "Indian" peoples as defined in the *Indian Act* of Canada. First Nations reserve lands are managed and regulated by Indian Oil and Gas Canada, which is a special operating agency within Aboriginal Affairs and Northern Development Canada.
- **Métis**: Alberta has eight Métis settlements, all located within the northern region of the province and comprising approximately 1.25 million acres of land. Settlement lands are owned in fee simple by the Métis Settlements General Council, and are co-managed with the Alberta government. The law concerning Métis rights in other jurisdictions remains uncertain.
- **Inuit**: Inuit are the Indigenous peoples who reside in Nunatsiavut (Labrador), Nunavik (Québec), Nunavut and the Inuvialuit Settlement Region of the Northwest Territories. Each of these four Inuit groups has settled land claims, and exploration, development and production of oil and natural gas resources in these areas is subject to those settlement agreements.

c. Freehold lands

A fee simple estate is the highest form of non-government land ownership that exists in Canada. It is usually characterized by the issuance of a certificate of title and is subject only to the rights of the federal and provincial governments. An individual, corporation or other entity with a fee simple estate may choose to explore and develop the natural resources on their lands, or to sell or lease these rights to another party. When a fee simple owner of mineral rights enters into a freehold lease, they are called the "lessor" and the party who leases the mineral rights from the fee simple owner is called the "lessee."

There is no standard freehold lease in the Canadian context. Contracting parties may choose to enter into a variety of lease forms that have evolved over the years. In an effort to address common concerns, the Canadian Association of Petroleum Landmen (CAPL) has developed leasehold forms, which are being more readily applied on a go-forward basis. Notwithstanding the fact that many freehold lease forms exist, most will address the following terms in some form or another:

- The mineral rights granted
- The term of the lease and provisions for continuation
- The initial and (if applicable) bonus consideration
- The drilling, delay rental and shut-in requirements
- The shut-in well payments and/or obligations
- The offset well obligations
- The royalty payments
- The applicable division of taxes
- The manner in which a default and/or termination of the lease will be dealt with

It is important to note that freehold leases, like Crown leases, are also subject to applicable provincial or federal legislation, but generally speaking all the terms of the freehold lease are contained within the document itself. Negotiating the most favourable terms prior to execution is therefore crucial.

> "Land in Canada is held publicly by either the federal or provincial government in the name of Her Majesty the Queen (Crown lands), or privately by individuals, corporations or other stakeholders (freehold lands)."

2. FEDERAL AND PROVINCIAL REGULATORS

Listed below are some of the regulatory bodies and agencies that may be involved in different oil and gas projects in Canada. Depending on the nature of the project and where it takes place, a project proponent may have to deal with regulators in several different jurisdictions.

Federal

The National Energy Board oversees matters such as pipelines or power lines that cross provincial or international boundaries, tolls and tariffs, environmental assessments and the import and export of energy.

Indian Oil and Gas Canada is tasked with fulfilling the federal government's fiduciary and statutory duties with respect to operations taking place on First Nation land. It is also responsible for approving oil and gas lease agreements for First Nation lands (in conjunction with the First Nation), collecting royalties or rent in trust for the band, and may provide consultation services to assist First Nations in their dealings with the petroleum industry.

British Columbia

The Ministry of Energy and Mines is responsible for managing provincially owned resources, as well as issuing and entering into agreements concerning rights to Crown-owned minerals.

The British Columbia Oil and Gas Commission is an independent regulator responsible for monitoring all phases of oil and gas development in the province, including approving oil and gas project applications, consulting with First Nations, ensuring projects are in compliance with provincial legislation, and granting entry to Crown lands. The Surface Rights Board of British Columbia facilitates dispute resolution between proponents and landowners, and has the power to authorize a right of entry and to determine the appropriate amount of compensation owed.

Alberta

Alberta Energy is a provincial government ministry responsible for managing provincially owned resources, and issuing and entering into agreements concerning rights to Crown-owned minerals. The Alberta Energy Regulator is an independent regulator responsible for monitoring all phases of oil and gas development in the province, including approving oil and gas project applications, ensuring that projects are in compliance with provincial legislation (including environmental legislation) and granting entry to Crown lands.

The Aboriginal Consultation Office co-ordinates and oversees consultations with First Nations in Alberta. The Surface Rights Board facilitates dealings between industry and land owners, and has the power to make an order for a right of entry and to determine the appropriate amount of compensation owed.

Saskatchewan

The Ministry of the Economy, through a few different departments, serves as the regulator for all aspects of oil and gas development — including issuing and entering into agreements concerning rights to Crown-owned minerals, monitoring all phases of oil and gas development, approving applications, and granting entry to Crown lands. The Surface Rights Board of Arbitration mediates disputes between industry and landowners, and, like its Alberta counterpart, has the power to make an order for a right of entry and to determine the appropriate amount of compensation owed.

Manitoba

The Petroleum Branch of Manitoba Mineral Resources serves as the regulator for all aspects of oil and gas development, including issuing and entering into agreements concerning rights to Crown-owned minerals, monitoring all phases of oil and gas development, approving applications, and granting entry to Crown lands. The Surface Rights Board, like the Saskatchewan Surface Rights Board of Arbitration, mediates disputes between industry and land owners, and, similar to Alberta and Saskatchewan, has the power to make an order for a right of entry and to determine the appropriate amount of compensation owed.

Atlantic Canada

Most oil and gas reserves in Atlantic Canada are offshore, triggering both federal and provincial jurisdiction over the resources. Agreements between the different levels of government have produced two primary regulatory agencies: the Canada-Newfoundland and Labrador Offshore Petroleum Board, and the Canada-Nova Scotia Offshore Petroleum Board. Both regulators consist of federal and provincial representatives and regulate every aspect of offshore oil and gas development. Onshore oil and gas development in Atlantic Canada is regulated by the provinces.

Arctic

The northern region of Canada has both on and offshore oil and gas resources. The territorial governments are responsible for onshore management, while offshore oil and gas development is regulated federally by the National Energy Board.

3. TYPICAL AGREEMENTS USED IN THE CANADIAN OIL AND GAS INDUSTRY

The following is a brief summary of some of the agreements that are regularly encountered in the Canadian oil and gas industry.

a. Farmout agreement

This arrangement involves the beneficial owner (the "farmor") — which may or may not be the legal or registered owner — providing another party (the "farmee") with the opportunity to earn all or a portion of the farmor's interest under the mineral lease. Earning is generally achieved by requiring the farmee to conduct certain drilling operations on the farmout lands. The farmor often reserves a royalty payable by the farmee, which may or may not be convertible back to a working interest by the farmor.

Some farmout agreements establish an area of mutual interest between the farmor and the farmee for a specified period, pursuant to which each is obligated to offer the other the opportunity to participate in the acquisition of adjoining mineral interests.

b. Joint operating agreement

This arrangement between mineral working interest owners governs the conduct of operations with respect to joint lands, the maintenance of the associated title documents, the ownership and disposition of production, the surrender of joint lands, the abandonment of joint wells, the ability of the joint owners to dispose of or grant security in respect of their working interests, and a variety of other matters. The Joint Operating Agreement (JOA) typically adopts an industry-accepted operating procedure in addition to its specific terms. The most widely accepted standardized operating procedure is the CAPL Operating Procedure, particularly in the Western Canadian Sedimentary Basin.

c. Pooling agreement

When the areal extent of individually leased lands is less than the drilling spacing unit prescribed by the relevant governmental authority for conservation purposes and the efficient production of petroleum substances, a pooling agreement can be used to combine two or more leases.

The working interests of the pooling parties in the resulting spacing unit will be equalized, usually on an acreage contribution basis, but occasionally on a reserves basis. This can be effected on a cross-conveyed basis — whereby the actual working interests are conveyed between the parties to the extent necessary — or on a revenue-sharing basis, without an underlying conveyance of working interests.

d. Unitization agreement

This arrangement consolidates all of the working and royalty interests in a common reservoir — which may be comprised of any number of sections of petroleum and/or natural gas rights — with a view to achieving the most economic and efficient production of the substances from the reservoir. The unit is operated as if there is one lease and one operator for the unitized zones and substances. Unit production is distributed in accordance with a participation formula based on an agreed reserves allocation.

There are typically two agreements involved: a unit agreement among the working and royalty interests, and a unit operating agreement among just the working interest owners.

e. Royalty agreement

This arrangement may create a legal interest in land or simply a contractual agreement for the payment of monies from the royalty payor to the royalty owner. The royalty is usually based on a specified percentage of the total production, and the related agreement will generally address allowable deductions and the royalty holder's right to take production in kind. Sometimes the royalty holder will be granted an option to convert the royalty to a working interest.

f. Construction, ownership and operating agreements

This arrangement is the most common type of agreement used by facility owners to address the terms of ownership, the manner in which operations are conducted (during and after construction), the allocation of facility costs, and the assignability of facility interests. This agreement also sets out the basis for allocating facility products to parties delivering petroleum substances to the facility.

4. PROTECTING YOUR INTEREST

For a working interest owner that has a registrable interest in a Crown licence, permit or lease, it is prudent practice to register that interest with the applicable registry. The extent to which a working interest is registrable differs from jurisdiction to jurisdiction, but generally it is difficult to register if you do not own an interest in all of the leased substances, or if your interest is restricted to certain zones or lands.

Whether you have a legal and beneficial interest, as a recognized lessee, or a beneficial interest only — pursuant to a further contractual arrangement in respect of that lease, such as a pooling agreement — in a freehold petroleum and natural gas lease, you can protect your interest by registering a caveat, or similar instrument, at the appropriate land tenure management office. A "caveat," Latin for "let him beware," acts as a warning to others that you are claiming an interest in a parcel of land.

5. PROJECT DEVELOPMENT

The exploration, development and production of oil and gas entails many considerations beyond simply obtaining the mineral rights. Even small-scale projects will likely require several different contracts and regulatory approvals, and larger projects can become very complex.

For example, a liquefied natural gas project shipping natural gas from northeastern British Columbia and/or northwestern Alberta to the west coast of Canada for liquefaction, and then onto foreign markets, will involve the following considerations:

- The project will fall within the jurisdiction of the Canadian federal government, and the provincial governments of Alberta and British Columbia.
- It will likely require the preparation of a detailed feasibility study, the negotiation of project development, gathering, processing, pipeline and marine transportation, and EPC offtake contracts.
- It will require significant consultation with First Nations and other stakeholders.
- The obtainment of export licences, National Energy Board approval, environmental permits and a variety of other permits and approvals may also be necessary.

V: MINING

SUPERSTACK

The INCO Superstack in Sudbury, Ontario, is the tallest free-standing chimney in the Western Hemisphere, and the second tallest in the world.

Canada is a world leader in the mining industry, both in terms of domestic production and international presence. Canada's success is due to its abundance of natural resources and top-tier production and processing capabilities, as well as its stable and favourable legal and tax regimes.

The country's wealth of mineral resources range from industrial raw materials to various precious and base metals.

Historically, over half of the world's public mining companies are listed on the Toronto Stock Exchange and TSX-Venture exchanges, and approximately 53 per cent of the equity capital raised globally for mining companies was raised on these exchanges in 2015. Canadian mining companies have interests in over 100 countries, spanning North and South America, Africa, Australasia and Europe, with the majority of these companies' assets located in the Western Hemisphere. As well, Canada has one of the largest mining supply sectors globally, with more than 3,400 companies supplying engineering, geotechnical, environmental, financial and other services to mining operations.

1. EXPLORATION AND MINING RIGHTS

Mining activities in Canada are primarily governed by the legislation of the province or territory in which a project is located. The federal government has overlapping jurisdiction in a number of areas, such as taxation and environmental protection.[1]

As a general framework, if a party wishes to explore a mineral property in Canada, it must first obtain exploration rights over the property pursuant to relevant provincial or territorial mining legislation — typically on a first-come, first-served basis. Once a party has successfully completed exploration programs and identified mineral reserves warranting project development and mine construction, it must obtain a mining lease along with environmental and other permits.

Following a physical or, in some cases, map-based or online staking process of mineral claims, the particulars of such claims are recorded with the appropriate local authority. Before any claims may be staked, a prospecting or similar licence must usually be obtained. A claimholder, or their assignee, is typically required to perform a minimum amount of prescribed assessment work on the area subject to the mineral claims, and provide information about the presence of a mineral deposit and whether development of the deposit is intended. Under this system, so long as the claim is maintained in good standing and the minimum requirements of the applicable legislation have been met, the claimholder is entitled to apply for and receive a mining lease.

A mining lease allows an individual or a company the right to extract minerals from the area(s) to which the lease applies. Mining leases are:

- Issued for a specific term, which is renewable. A mining lease in Ontario, for example, has an initial term of 21 years and is renewable for a further 21-year term.
- Subject to an annual rental charge.
- Transferable with prior written consent of the appropriate government.

In some cases, a plan of survey and evidence that surface rights have been secured must also be filed.

As with other countries, the complex environmental and social issues associated with mining development in Canada must be addressed, including consideration of local community and Indigenous rights and consultation processes. Lastly, mine closure plans to rehabilitate and restore mining properties are required by mining regulations.

2. FOREIGN INVESTMENT

Before acquiring any exploration or mining interest — whether directly or through a participation interest (be it debt, equity, option, joint venture, royalty or other interest) — it is important for investors to conduct comprehensive due diligence to confirm the existence and validity of the mineral and mining rights, and other assets acquired, as well as to identify any title defects or encumbrances. It is always advisable to carefully consider Canadian tax, environmental and contractual liabilities, which may result from the acquisition or investment. Other aspects to be considered include availability of power, water and other infrastructure, surface ownership and access, and labour and community issues.

"Canada has one of the largest mining supply sectors globally, with more than 3,400 companies supplying engineering, geotechnical, environmental, financial and other services to mining operations."

[1] mining.ca/resources/mining-facts

The legislative framework whereby large-scale investments in Canada can be reviewed by the federal government is contained in the *Investment Canada Act* (ICA). For further details on the ICA, see the chapter on the regulation of foreign investment. In addition, mergers and acquisitions are regulated federally under the *Competition Act*.

Canada is party to a number of trade and investment agreements containing investor protection provisions. These agreements generally permit an investor of a foreign country to bring a claim against the Canadian government for a breach of an obligation owed, by either the federal government or a province, to the investor under the treaty. They also protect Canadian investments in other countries.

3. TAX CONSIDERATIONS

Canada imposes tax on Canadian mining operations at three levels:

- Federal income tax is imposed on the taxable income from a mining operation carried on in Canada — generally calculated as mining revenues less deductible operating expenses, capital depreciation to the extent allowed by the tax rules, and certain deductions for exploration and pre-production development costs.
- Provincial or territorial income tax is imposed on the taxable income from a mining operation carried on in Canada in a manner similar to federal income tax.
- Provincial or territorial mining taxes are imposed based on a separate calculation of production profits, revenues and other criteria.

In general, provincial or territorial income tax that is levied on taxable income from a mining operation carried on in Canada is deductible in computing income for federal income tax purposes. As well, Crown royalties are usually deductible in computing income for federal income tax purposes.

Mining activity is very important to the Canadian economy and, as a result, Canada offers a variety of tax incentives to the mining industry. These tax incentives include enhanced deductions, allowances and credits that may be claimed against income from the mining operation, and special tax incentives for investors in mining companies.

Flow-through shares are a tax-favourable mechanism to finance an exploration or mining company that qualifies as a "principal-business corporation." The tax rules allow such a corporation to "renounce" certain Canadian development expenses and Canadian exploration expenses to investors who hold flow-through shares. In high-risk industries such as mining and oil and gas, startup corporations may not at first be profitable and therefore may not be able to make immediate use of expenses incurred from business operations. Investors who hold flow-through shares may claim the renounced expenses as deductions in computing their own income — subject to certain restrictions — up to the amount the investor paid for the flow-through shares.

Residents of Canada who own or invest in a mining project are taxed in Canada on their worldwide income, including income from the mining project. In contrast, non-residents of Canada are only subject to Canadian income tax on income from carrying on a business in Canada, income from employment exercised in Canada, and capital gains arising from the disposition of taxable Canadian property.
As a result, a non-resident who carries on a mining or exploration business in Canada will be taxed on the income from that business, and — since Canadian mineral properties are considered to be taxable Canadian property — will also generally be subject to Canadian tax on any gain from the disposition of a Canadian mineral property. In some cases, a non-resident will be protected from Canadian tax by a tax treaty. Canada has entered into tax treaties with a number of other countries, which can ameliorate the Canadian tax consequences for residents of those countries.

To help ensure that the applicable Canadian tax is collected from non-residents, special notification and withholding rules may apply to non-residents who own or invest in a Canadian mining project. For more information, see the section on "General application of Canadian tax to non-residents" in the taxation chapter.

4. CAPITAL RAISING

Raising capital through the Canadian markets is governed by provincial and territorial securities laws and regulators. For a detailed summary of the important legal and business issues that must be considered when raising capital in Canada, see the chapter on securities law and corporate governance.

National Instrument 43-101 — Standards of Disclosure for Mineral Projects (NI 43-101) establishes standards for the public disclosure of scientific and technical information regarding mineral projects. Canadian securities regulators require that any such disclosure intended to be, or reasonably likely to be, made available to the Canadian public must comply with NI 43-101.

Two of the principal requirements under NI 43-101 are:

- That the disclosure of scientific or technical information with respect to a mineral project on a property material to the issuer must be based on a technical report or other information concerning the mineral project. Such information must be prepared by or under the supervision of a "qualified person."
- That the public disclosure of mineral resources and reserves be made using the categories established by the Canadian Institute of Mining, Metallurgy and Petroleum.

5. ENVIRONMENTAL, HEALTH AND SAFETY REGULATIONS

The mining industry in Canada is subject to federal, provincial and territorial environmental laws and regulations. In most instances, the environmental assessment process requires the preparation of an environmental study and public information or consultation. A social impact study may also be required. A closure plan is required in most jurisdictions prior to the commencement of mining operations.

Health and safety issues are addressed through the relevant federal or provincial legislation that regulates minimum employment standards, labour relations, and occupational health and safety.

6. INDIGENOUS CONSIDERATIONS

Canadian governments have a duty to consult, accommodate and, in some circumstances, obtain the consent of Indigenous communities with respect to projects that may affect their rights or lands. There are few, if any, resource projects in Canada that do not require consideration of this issue. Canadian courts have also recognized that some lands are subject to Aboriginal title, in which case the consent of the Indigenous community is required for any access or development.

Other lands are subject to certain restrictions arising from either historical or modern treaty agreements with Indigenous groups, or harvesting rights such as the right of Indigenous groups to hunt, fish and trap on the land. Indigenous groups can challenge government authorizations that allow mining activities if they risk adversely impacting claimed or proven Aboriginal or treaty rights.

Although, as a matter of law, the duty of consultation is generally the responsibility of the applicable level of government and not the private sector, in practice, project proponents frequently take a lead role in engaging with affected Indigenous communities to try to find common ground for the development of a project. A common feature of such efforts are side agreements with affected Indigenous communities, which avoid the delays and costs that an Indigenous challenge may otherwise bring. This is a highly specialized and dynamic area of the law, and it is advisable to seek the assistance of experienced counsel with expertise in this area.

W: DISPUTE RESOLUTION & LITIGATION

While it is similar to the American regime, the Canadian approach to dispute resolution is informed by the unique nature of the Canadian court system and legislative regime.

Features such as the multi-level federal and provincial court system, and the varying practices and procedures used in courts and tribunals, will influence any strategy for dispute resolution in Canada.

LIBRARY OF PARLIAMENT

The Library of Parliament originated in the legislative libraries of Upper and Lower Canada, which were amalgamated in 1841. It is the main information repository and research resource for the country's Parliament.

Whether through litigation, mediation or arbitration, effectively resolving disputes in Canada requires experienced lawyers who are well-versed in local practice. Experience and skill in navigating the Canadian legal landscape is particularly important in multi-jurisdictional litigation, complex commercial litigation, class actions, employment claims, product liability claims and other like matters that arise in the course of transnational business.

1. THE COURT SYSTEM IN CANADA

The court system in Canada comprises a network of courts in each of the 10 provinces and three territories, as well as courts at the federal level. The provincial courts hear both civil and criminal matters, with trial courts and a court of appeal in each province. The provincial courts are "courts of inherent jurisdiction" and, as such, can award all legal and equitable remedies.

The Federal Court of Canada, by contrast, is a statutory court and can hear only such matters and award such remedies as are specified in its enabling statute, the *Federal Courts Act*. The Federal Court and the Federal Court of Appeal deal with claims involving specified matters under federal jurisdiction — such as admiralty, immigration and intellectual property — and claims against the federal government.

In addition to the courts, there are hundreds of specialized boards and tribunals at both the federal and provincial level that deal with specific subject matter and regulate specific industries. Examples of these boards and tribunals include:

- The Canadian International Trade Tribunal (international trade)
- The Canadian Radio-television and Telecommunications Commission (broadcasting)
- Provincial municipal boards (land-use planning and expropriation)
- Provincial securities commissions (capital markets)

Appeals from the decisions of boards and tribunals, as well as appeals of governmental or ministerial decisions, are heard by way of applications for judicial review to either the superior court in a province or the Federal Court of Canada, depending on the jurisdiction of the tribunal or government decision-maker at issue.

Appeals from the provincial courts of appeal and the Federal Court of Appeal are heard by the Supreme Court of Canada, almost always with leave to appeal being required.

2. CIVIL LITIGATION (INCLUDING ALTERNATIVE DISPUTE RESOLUTION)

a. Court proceedings

Claims in the provincial courts are generally made by way of actions and applications (for civil and commercial disputes) or prosecutions (for criminal or quasi-criminal matters). Civil actions, unless settled, are normally determined by way of trial. A very high percentage of cases settle short of trial at mediation, judicial pre-trial conferences or by the parties or their counsel directly.

Except in cases involving personal injuries, jury trials are not a common feature in civil or commercial disputes in Canada and are actually prohibited in certain types of matters, such as mortgage foreclosures and dissolutions of partnership, as well as cases where there is a claim for an injunction, or claims for partition or sale of real property. There is no right to a jury trial in Federal Court. Applications for judicial review of the decisions of boards and tribunals are normally heard by one or three judges, depending on the decision at issue.

Proceedings in the provincial and federal courts are governed by rules of procedure, which are quite similar across the country and have many aspects in common with American procedure. There are significant differences between Canada and the United States, however, in the procedure for pre-trial discovery and awards of legal costs. Many of the superior courts in the provinces have different divisions for claims of different monetary values. For example, in Ontario there is a small claims court that hears civil actions where the amount claimed is $25,000 or less, exclusive of costs and interest. Ontario also has a Simplified Procedure for claims for money or property (real or personal) up to $100,000.

Parties engaged in civil litigation are generally required to produce to the opposite party all of their non-privileged relevant documents and testify under oath at a pre-trial examination for discovery.

Failure to preserve and produce relevant documents can result in an adverse inference being drawn as to what the missing documents might have proven, an award of damages or costs, or even the striking of the party's pleading. As a result, it is a common practice in Canadian commercial litigation to send litigation hold letters to opponents and/or opposing counsel asking that they preserve all documents relevant to existing or anticipated litigation.

The obligation to disclose all relevant documents in a party's possession can be quite burdensome, particularly with the

proliferation of electronic documents. In response, Canadian courts have begun to recognize the principle of proportionality. The rules of procedure, and particularly the rules governing documentary production and examinations for discovery, must be interpreted so that the time and expense devoted to the proceeding is proportionate to the issues and the amount at stake in the action. Proportionality is not a shield that can be used to hide harmful or damaging documents. However, if the cost or degree of effort required to produce all potentially relevant documents is disproportionate to the value of the claim, the principle of proportionality can be invoked in an effort to avoid having to search for all potentially relevant documents.

At examination for discovery, as a general rule, each individual named in the proceedings and a single representative from each corporate party is subject to a pre-trial examination under oath. In general, non-party witnesses are not subject to pre-trial examination or deposition. The representative of a corporate party is required to inform himself or herself of the relevant facts and can be questioned on both his or her own personal knowledge of the matters in issue, as well as the knowledge, information and beliefs of others within the organization. If the witness does not know the answer to a question asked on discovery, the witness may be required to make inquiries of others or to review his or her records to determine the answer to the question. In some provinces, there are limits on the duration of the examination for discovery. In those provinces, a party wishing for more time, or the right to examine a non-party, may seek leave to do so from the court.

> "The provincial courts hear both civil and criminal matters, with trial courts and a court of appeal in each province. The provincial courts are "courts of inherent jurisdiction" and, as such, can award all legal and equitable remedies."

b. Interim relief

There are various interim orders that Canadian courts can grant to preserve the rights of the parties pending trial, including:

- Interlocutory injunction to prevent a defendant from engaging in specified conduct for a set period of time, where the moving party is able to demonstrate that such conduct would cause injury to it and that such injury could not be adequately compensated by damages or could not be cured (because the moving party is unable to collect damages) if the matter were to be resolved in the moving party's favor at trial.
- Mareva injunction to seize and secure the defendant's assets to ensure that such assets remain available to satisfy any judgment that the plaintiff may ultimately obtain.
- Anton Piller order, which allows the plaintiff access to the defendant's premises to inspect and remove items over which the plaintiff asserts a proprietary claim, or to secure and preserve evidence needed for trial.
- Order for interim preservation of property in the possession of a third party.
- Norwich Pharmacal order, which can be used to compel the production of documents in the possession of a third party in order to find and preserve assets, identify potential defendants and confirm whether a cause of action exists.

In a landmark decision in 2014, the Supreme Court of Canada emphasized that proportionality and the rapidly escalating costs of litigation require courts to take a good look at each case to determine whether a trial is necessary, or whether the issues in dispute can be fairly adjudicated by a motion for summary judgment instead. Since that decision there has been a marked increase in summary judgment motions being brought to resolve or narrow the issues in cases before trial.

c. Costs

In many provinces, the losing party in a civil proceeding is ordered to indemnify the winning party for some or all of the winning party's legal costs (lawyers' fees and disbursements). There are different scales of costs that can be awarded — partial indemnity, substantial indemnity, full indemnity or tariff costs — with the norm being partial indemnity. The award of costs is always at the discretion of the judge(s) hearing the matter, and the obligation to pay costs and the quantum of costs awarded may be influenced by degree of success, the conduct of the parties, offers to settle that may have been exchanged and fairness.

d. Alternative dispute resolution

i. Mediation

Mediation is growing in popularity in litigation, primarily because the early resolution of disputes minimizes the cost of litigation. A number of jurisdictions in Canada require the parties to engage in some form of mediation as part of the court process and, if a commercial contract has a mandatory mediation clause, it will likely be enforced before the parties can proceed with litigation.

At the conclusion of a successful mediation, the parties will normally memorialize the terms of the settlement in a written settlement agreement that is signed by the parties or their lawyers. A settlement agreement can be enforced through court proceedings. An oral settlement agreement is also enforceable if there is sufficient evidence to prove its existence and terms.

ii. Arbitration

Businesses in Canada frequently choose to resolve their disputes by arbitration rather than litigation. Arbitration is not necessarily less costly or time consuming than litigation, but it allows greater control over procedure, more confidentiality than a public court process and the ability to select decision-makers with expertise in the subject matter of the dispute.

All of the provinces and territories in Canada have legislation governing both international commercial arbitration and domestic arbitration. Every province has enacted an *International Commercial Arbitration Act*, which adopts the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 as the law applicable to arbitrations that are commercial in nature and international in scope.[1]

While there are differences between statutes governing domestic arbitration in each province, they have common provisions. In general, these statutes oust the courts' jurisdiction over disputes that the parties have agreed to submit to arbitration. They also require a stay of related court actions and allow the court to intervene in arbitration only in limited circumstances. The general domestic arbitration acts do not govern certain types of arbitrations — most notably arbitrations in the labour field, which are governed by separate, more specific statutes.

The arbitration statutes in many of the provinces and territories in Canada provide that the provincial law with respect to limitation periods applies to arbitration as though the arbitration proceedings were an action before the province's courts, and must be commenced within the requisite time period. Similarly, there is a limitation period — generally two years from the date of the award — to commence an application to enforce an arbitral award through a court process.

The federal *Commercial Arbitration Act* (CAA) governs commercial arbitrations involving claims where at least one of the parties to the arbitration is the federal government of Canada, a departmental corporation or a Crown corporation wholly owned by the federal government. The CAA applies to arbitration agreements whether made before or after the CAA came into force in 1985. The CAA adopts, with limited modification, the UNCITRAL Model Law for all commercial disputes, whether domestic or international, which fall under federal jurisdiction.

Domestic arbitral awards may be enforced through a simple application for recognition and enforcement in a province's superior court. Enforcement of arbitral awards made outside of Canada is enabled by federal and provincial legislation on the subject. Canada is a part of the 1958 New York Convention, and any awards subject to the convention are recognized as binding between the parties. With the court's approval, these awards can be enforced in Canada in the same manner as a local judgment or court order.

Generally speaking, a court may decline to recognize or enforce an arbitration award only on limited "public policy" grounds that are set out in the UNCITRAL Model Law, as reflected in CAA and provincial arbitration legislation such as:

- The incapacity of a party
- Decisions on matters that are beyond the agreed scope of the arbitration
- Serious procedural irregularities, e.g. where a party has been deprived of an element of fundamental justice
- The subject matter of the dispute is incapable of adjudication by arbitration under Canadian law

[1]The Model Law is designed to assist states in reforming and modernizing their laws on arbitral procedure, so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process — from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice, having been accepted by states of all regions and the different legal or economic systems of the world.

3. CLASS PROCEEDINGS

In Canada, most provinces and the Federal Court have adopted legislation allowing class proceedings. However, by virtue of a 2001 ruling by the Supreme Court of Canada, class actions may be permissible throughout the country even in the absence of express legislation.

a. Certification process

A court must certify a putative class action before it will be allowed to proceed as a class action. For this reason, the first step in a putative class proceeding is usually a motion for certification. While the test for certification varies between jurisdictions, variations on the same five factors are considered in most jurisdictions:

- The pleadings must disclose a cause of action.
- There must be an identifiable class.
- The claims or defences must raise some common issues.
- The class proceeding must be the preferable procedure for the resolution of common issues.
- There is a representative plaintiff or defendant who would represent the class interests fairly and adequately in accordance with a litigation plan.

Historically, it has been easier for plaintiffs to certify a class action in Canada than in the U.S. Multi-jurisdictional class actions — that is, a single class action that purports to represent plaintiffs in multiple provinces — are often permitted. Defendants are also often faced with multiple competing class proceedings (brought by different counsel) in the same or in multiple provinces. Canada does not have a process equivalent to the multi-district litigation used in the United States. After certification, class members must be notified and given the right to opt in or opt out of the class proceeding depending on the province.

b. Discovery process

Only the representative plaintiff(s) and the named defendants are subject to examination for discovery. Those parties are also required to produce all of their non-privileged relevant documents subject to the principle of proportionality, which is typically not as important a factor in class proceedings given the magnitude of the claims.

c. Trial and appeals

In most provinces, one judge will case manage each class action. The case management judge typically will not be the trial judge, except in Québec. However, the majority of class proceedings are disposed of through preliminary motions or settlements. Very few class actions have proceeded through a common issues trial, although trials are becoming more common.

d. Costs

In all provinces, courts may permit plaintiffs' counsel to enter into a contingency fee arrangement with the plaintiff class. Rules for payment of costs in class actions differ from those in individual actions. In most jurisdictions the losing party will not be responsible for paying the opposing side's costs on the certification motion. However, in Ontario, the rule of "loser pays" still applies.

e. Funding

Ontario has established a fund to assist plaintiffs in pre-approved cases to meet their cost obligations in the event they are not successful in the litigation. Public funding is also available for class actions in some other provincial jurisdictions. Where the plaintiff is successful and has obtained approval for funding from a provincial fund, they are generally required to pay a percentage of the recovery to the fund.

f. Industry-specific class actions

There is no restriction on the type of claim that can be advanced as a class proceeding. However, class actions are most common in the following areas of law:

- **Securities**: Security holders frequently commence class proceeding against issuers and their directors and officers seeking damages resulting from the drop in the price of their securities attributable to misrepresentations made in the issuer's public disclosure. Where the security holder purchased his or her securities on the secondary market (e.g., a stock exchange), the plaintiff must obtain leave of the court, which will be granted if the court is satisfied that the action was brought in good faith and that there is a reasonable possibility that the plaintiff will be successful at trial.
- **Product liability**: Canadian courts have certified product liability class actions, such as claims for property and personal injury damages, medical monitoring costs, refunds and disgorgement of revenues from product sales. However, courts are increasingly scrutinizing plaintiffs' evidence for some basis in fact to establish injury and proximate causation as common issues. Moreover, courts are less likely to certify if the harm pleaded seems trivial or non-existent.
- **Competition law**: In Canada, direct and indirect purchasers alleging a breach of the *Competition Act* have the ability to participate in class actions, which are often preceded by investigations by the federal regulator, the Competition Bureau. A statutory remedy is available under the Act. Courts have been inconsistent in certifying parallel class action claims in tort and in restitution.
- **Privacy**: Canadian courts have certified privacy class actions based on breach of contract and tort, and, in some provinces, statutory causes of action. Recent legislative changes have increased reporting requirements on the private sector, and it is possible that the number of such claims will increase in the future. The risk of privacy claims is also increasing due to recent appellate court decisions recognizing a new privacy tort.

CONFEDERATION BRIDGE

Confederation Bridge opened in 1997 and spans the 12.9 km (eight miles) across Abegweit Passage in the Northumberland Strait. The two-lane roadway connects Prince Edward Island (P.E.I.) to the mainland. Until its construction, P.E.I. only had ferry links to the rest of Canada, so Confederation Bridge is known locally as the fixed link.

4. PRODUCT LIABILITY

Liability for the manufacture or distribution of defective products that cause damage to persons or property may be found in either tort or contract. Redress may be sought through formal court proceedings, private arbitration, mediation, or another form of alternative dispute resolution depending on the facts of the case and any agreement between the parties. There is no principle of strict liability at common law, although this is not the case in Québec.

In 2011, the federal government enacted the *Canada Consumer Product Safety Act* (CCPSA), which is broad legislation that affects all manufacturers, distributors, retailers and importers of consumer products in Canada. Additionally, every province has legislation that provides remedies to consumers for defective products. These statutes generally provide statutory warranties of merchantability and fitness for purpose with respect to all consumer products marketed within the province. The statutes also provide for individual causes of action for breach of deemed warranties, in addition to possible government action. Remedies available include rescission of the contract of purchase and sale, and injunctive relief. Foods and drugs are similarly regulated under the federal *Food and Drugs Act*.

a. Who bears responsibility for a fault or defect?

The designer, manufacturer, importer, distributor or retail supplier of a defective product can be liable for damages arising from the use of that product. As a general rule, it is the designer that bears the ultimate responsibility for a defective product if harm derives from a design flaw, and the manufacturer that bears responsibility for a manufacturing defect. A plaintiff can bring proceedings against anyone and everyone along the supply chain. Unrelated parties may, in turn, sue one another for contribution or indemnity for any liability that they may have to the plaintiff.

The CCPSA regulates all products — including components, parts or accessories, and even packaging — that may reasonably be expected to be obtained by an individual for non-commercial use, such as for domestic, recreational and

sports purposes. The CCPSA imposes obligations and liabilities upon each member of the product supply chain. The CCPSA further provides for:

- A blanket prohibition on the marketing of unsafe products
- Support by a supplier on the safety of their product
- An obligation on a supplier to report adverse events
- Broad governmental investigatory and enforcement powers, including ordering product recalls
- Penalties in the form of fines of up to $5,000,000 and prison terms of up to two years for breaches of the CCPSA

b. In what circumstances is there an obligation to recall products?

At common law, every participant in the product supply chain has a duty to prevent harm arising from use of its product. This duty may include notification of risk and product recall in certain circumstances, not as a standalone duty, but as part of the "duty to warn."

In addition to the common law obligation, the CCPSA gives the power to the federal minister of health to order a consumer product recall where the minister believes that a recall is warranted. Recall of food and agricultural products may also be required under the *Food and Drugs Act*.

c. What test is applied for proof of causation?

The test for causation is the so-called "but for" test, under which the requirement for causation is met where it is proven that the harm would not have occurred "but for" the actions of a defendant. Generally speaking, it is not enough for a plaintiff to demonstrate an increased risk of a type of injury claimed as a result of the use of a product without demonstrating actual causation of harm.

d. Is there a duty to warn of known risks?

A manufacturer owes a duty to warn of all material risks of which it was aware — or it ought to have been aware — resulting from the ordinary use of its product. The materiality of a risk depends on:

- Reasonable foreseeability (the likelihood of the risk materializing)
- The degree of harm should the risk materialize (ranging from inconsequential product malfunction to severe health consequences)
- The obviousness of the risk (for example, a manufacturer would not ordinarily be required to warn of the danger of cutting oneself with a knife)
- The audience to whom the warning would be given (for example, sophisticated professionals as opposed to children, etc.)

The duty to warn is a continuous one. The content of the warning must be adequate, understandable and clearly communicated. The scope of the warning must be commensurate with the degree of risk or gravity of the hazard presented.

e. Is it a defence for the manufacturer to show that he or she complied with regulatory and/or statutory requirements?

Evidence that a manufacturer complied with all relevant regulatory and/or statutory requirements is not a full defence to a product liability claim. On the other hand, breach of such requirements does not establish liability. Rather, evidence with respect to regulatory or statutory requirements is relevant to, but not dispositive of, the question of whether a manufacturer ought to be found liable in civil proceedings for damages arising out of the use of its product.

f. What remedies are available?

The statutory, common law and equitable remedies that may be available in product liability actions include:

- Monetary damages
- Disgorgement of revenue or profit (for unjust enrichment or waiver of tort)
- Rescission of the contract of purchase and sale
- Monetary fines
- Injunctions
- Criminal sentencing
- Punitive damages
- Interest and costs of the proceeding

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X: WHITE COLLAR CRIME/CORRUPTION

OLD CARLETON COUNTY GAOL

Ottawa's Carleton County Gaol was built in 1862 and served as a prison until 1972. Now a heritage building, the cells have been converted into hostel rooms for young adventurers.

In Canada and around the world, regulators and enforcement agencies are taking a hard stand against improper and unethical business practices.

Almost every day, the media reports on another investigation into corporate fraud, corruption, bribery or collusion.

To ensure compliance with the complex framework of laws, regulations and governance requirements, and to detect and prevent potential violations, businesses should consult a team of legal professionals with national and international capabilities and experience.

1. FOREIGN CORRUPTION

Canada's answer to the United States' *Foreign Corrupt Practices Act* (FCPA) was the enactment of the *Corruption of Foreign Public Officials Act* (CFPOA) in 1998. Like the FCPA, the CFPOA criminalizes the act of giving a reward, advantage or benefit of any kind to a foreign public official in exchange for an act or an omission to act in connection with the performance of that official's duties, or to induce the official to use his or her position to influence acts or decisions of the foreign state.

Canada's jurisdiction over foreign bribery is wide. The CFPOA captures acts committed anywhere in the world by:

- A Canadian citizen
- A permanent resident of Canada
- A corporation, company, firm or partnership that is incorporated, formed or otherwise organized under the laws of Canada or a province

Unlike the FCPA, Canada's CFPOA is purely a criminal statute — there is no civil component. The potential penalties for corporations include unlimited fines, corporate probation, debarment from government contracting and forfeiture of criminal proceeds.

For individuals, the potential penalties include up to 14 years' imprisonment, unlimited fines, probation and debarment from government contracting.

While Canada was slow to enforce the CFPOA, since 2011 there has been an increase in enforcement. In 2011, Niko Resources Ltd. pleaded guilty under the Act and was sentenced to a $9.5-million fine and three years' corporate probation. In 2013, Griffiths Energy — a Canadian oil company operating in Chad, Africa — was sentenced to a $10.25-million fine under the Act. Also, in 2013, Nazir Karigar was convicted after trial for bribes paid to the Indian minister of civil aviation and employees of Air India to influence the sale of facial recognition software. Karigar was the first individual to be convicted under CFPOA — he was sentenced to three years in jail. In that same matter, the Canadian government is seeking the extradition of a number of other executives, including citizens of the U.K. and the U.S.

2. ANTITRUST/COMPETITION LAW

Antitrust in Canada is governed by the *Competition Act*, which is a central and established feature of Canadian economic policy. The purpose of the Act is to eliminate activities that reduce competition in the marketplace. As a whole, the Act embodies a complex scheme of economic regulation, and identifies and defines anti-competitive conduct. It provides an extensive range of criminal and administrative redress against companies engaging in behaviour that tends to reduce competition.

The key pillars of the Act's criminal provisions are sections 45 and 47, which prohibit anti-competitive conduct — including price fixing and bid-rigging, respectively. Following amendments to the Act in 2009, penalties for those criminal offences can now be up to 14 years' imprisonment and/or up to $25 million in fines. Recent case law suggests that courts may use the amendments to harshly penalize certain anti-competitive conduct to demonstrate society's "abhorrence of the crime."

3. SECURITIES PROSECUTIONS

In Canada, unlike most other jurisdictions, securities regulation is not done at the federal level, but is instead regulated by the provinces. Each of the provincial securities statutes include quasi-criminal provisions — such as prohibitions on insider trading and tipping — in addition to securities and accounting fraud provisions. Penalties for quasi-criminal securities prosecutions include jail sentences and fines. There are also overlapping *Criminal Code* provisions related to securities offences, such as insider trading, but they are rarely utilized.

4. FRAUD

By virtue of its broad interpretation in case law, criminal fraud is one of the more commonly prosecuted offences in the Canadian corporate context. The offence can be committed by or against a corporation.

Criminal fraud will arise where, through deceit, falsehood or other fraudulent means, a person intentionally defrauds the public or another person of any property, money, valuable security or any service. Where the subject-matter of the fraud exceeds $5,000, the offence is punishable by a maximum of 14 years' imprisonment.

5. CORPORATE CRIMINAL LIABILITY

Canada's Supreme Court has long held that the corporate vehicle occupies such a large portion of the industrial, commercial and sociological sectors that amenability to our criminal law is as essential for the corporation as it is for the natural person.

The *Criminal Code* allows for corporate criminal liability where a senior officer — a representative who plays an important role in the establishment of the organization's policies, or who is responsible for managing an important aspect of the organization's activities — is implicated in the crime. To establish criminal liability, the senior officer must have intent, at least in part, to provide some benefit to the organization.

The senior officer can attract corporate criminal liability on the following grounds:

- Acting within the scope of their authority, the senior officer becomes a party to the offence
- Directing others to commit the offence
- Failing to take all reasonable measures to stop a representative of the organization from committing the offence

6. REGULATORY PROSECUTIONS

There are numerous regulatory regimes in Canada that have criminal or quasi-criminal powers. Some of the more commonly used powers include the *Occupational Health and Safety Act*, various pieces of environmental legislation and a wide variety of economic legislation, and various tools available to regulatory bodies.

7. ANTI-MONEY LAUNDERING AND TERRORIST FINANCING

Taking steps to eliminate the financing available to criminal and terrorist groups is becoming an increasingly important part of the global fight against such threats. For its part, Canada enacted the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* in June 2000. The Act is intended to detect, and ultimately deter, the processing of funds that have been tainted by crime, or the transfer of funds for the purpose of carrying out terrorist activities. It accomplishes this goal by imposing a number of (sometimes onerous) obligations on certain categories of businesses. It also bestows investigative powers on the authorities for the purpose of implementing the Act. Failure to comply with the provisions of this Act can result in significant financial penalties and/or imprisonment.

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