

DOING BUSINESS IN CANADA – A CHECKLIST

While Canada's legal system will be familiar to many foreign investors and companies, the Canadian legal system and laws have a number of unique aspects that might surprise you. Understanding these unique aspects of Canadian law is critical to your business success in Canada. Gowling WLG understands the challenges of establishing and conducting business in this country. With offices in major cities across Canada, we provide effective counsel and insightful business solutions that help our clients access the full potential of the Canadian marketplace. This checklist contains a summary of some of the considerations foreign companies should take into account when doing business in Canada. More information about these topics and others are in our *Doing Business in Canada Guide*, at www.gowlingwlg.com/dbic.

BUSINESS STRUCTURES

The appropriate business structure for your Canadian operations depends on a number of factors, including the nature and location of the business; director residency or head office location; tax implications; and costs. The most common structures used by foreign companies are a Canadian subsidiary or a branch office.

Canadian Subsidiary:

You can establish a distinct legal entity in Canada, which may be wholly owned by a foreign company.

- The corporation is required to register in each province and territory in which it conducts business regardless of the jurisdiction of incorporation.
- Some jurisdictions require some directors be resident Canadians but British Columbia, Nova Scotia, New Brunswick, Prince Edward Island, Quebec, and the three territories do not require Canadian resident directors.
- Except in unusual circumstances, the foreign shareholder is not responsible for any liabilities of the Canadian entity.
- It is possible to incorporate an unlimited liability company ("ULC") in Alberta, British Columbia and Nova Scotia. A ULC is a separate legal entity similar to a corporation except the shareholder of the ULC is jointly and severally liable with the ULC for any liabilities of the ULC. These entities are taxed as corporations in Canada but are eligible for the "check-the-box" election in the US and may be taxed in the US as either a corporation or a flow-through entity.

Branch Office:

The foreign company can also conduct business directly in Canada through one or more branch offices:

- The foreign company must obtain a licence or register in each province and territory where it proposes to carry on business.
- Notable drawbacks include: business name approval in each jurisdiction; a Canadian resident attorney/agent for service is required; withholding tax rules; imposition of branch taxes; and, exposure of the foreign company to liabilities and obligations of the Canadian branch operations.

MERGERS AND ACQUISITIONS

The acquisition of a Canadian business is another common method of entering the Canadian marketplace.

- Private merger and acquisition transactions in Canada are typically effected by way of share purchase transactions or asset purchase transactions. Statutory amalgamation is less common, but may also be used.
- Public merger and acquisition transactions in Canada are typically effected by way of take-over bids (tender offers), plans of arrangement (court-approved transactions) or amalgamations.
- An amalgamation is a statutory means of combining two or more corporations in the same jurisdiction into one amalgamated corporation possessing all of the property, assets, rights and liabilities of each of the amalgamating corporations. Unlike a U.S. merger, a Canadian amalgamation does not include the concept of a surviving corporation, nor do any of the amalgamating entities cease to exist on amalgamation.
- Other business combinations such as insider bids, related-party transactions and going-private transactions are subject to detailed regulation.

SECURITIES LAW

Canada currently does not have a federal securities regulator. Each province and territory has its own set of laws, regulations, rules and policies and its own regulator; however, provincial and territorial securities regulators work together to harmonize regulation across the country through “national instruments”.

- Distribution of securities in Canada requires the filing of a prospectus, unless certain exemptions are available.
- Corporations listed in Canada must comply with policies of the applicable stock exchange and significant requirements on timely and periodic disclosure, financial reporting and corporate governance.
- There is a multi-jurisdictional disclosure system (MJDS) in place between the Ontario and Quebec securities commissions and the US SEC. Under MJDS, eligible issuers are only required to make a single disclosure filing instead of filings in each jurisdiction.
- Certain exemptions permit issuers to distribute securities without a prospectus, including distributions to accredited investors and employees and distributions of securities (other than to individuals) with an acquisition cost of not less than \$150,000 in cash, or reliance on private issuer exemptions if all shares will be closely held by a prescribed group of non-public investors.

TAXATION

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

Income Tax

Income taxes in Canada are based on residency of the taxpayer (not on the taxpayer’s citizenship):

- Corporations resident in Canada must pay federal and provincial income tax on worldwide income.
- Corporations are deemed to be resident in Canada if incorporated in or continued into Canada. Corporations incorporated outside of Canada may nevertheless be considered to be resident in Canada if their “central management and control” is located in Canada.
- Non-resident corporations are generally subject to Canadian income tax and compliance obligations with respect to their Canadian source income. Non-resident corporations that dispose of “taxable Canadian property” or carry on business in Canada are liable to pay income tax on their taxable income earned in Canada, subject to relief under a tax treaty.
- Certain payments made to non-residents are subject to withholding tax at the rate of 25%, unless reduced by a tax treaty. Such payments include dividends, management and administrative fees, rent, royalty payments and certain types of interest.
- Non-residents rendering services in Canada are generally subject to a 15% withholding tax on their fees.
- As with Canadian resident employers, non-residents with employees in Canada are generally subject to certain payroll tax requirements.
- Canada does not permit consolidated or group tax reporting.

Value Added Tax and Sales Tax

Sales of property and services in Canada are generally subject to the federal goods and services tax and harmonized sales tax (GST/HST), which is a value added tax, and may be subject to provincial VAT in Quebec or a provincial sales and use tax (PST) in other provinces.

- GST applies at a rate of 5% and HST applies at between 13% and 15% depending on the province in which the property or service is considered to be made. QST applies at 9.975% and PST applies at various rates, or not at all.
- Registration for GST/HST and QST is required for businesses that are “carrying on business” in Canada or Quebec. Other ‘nexus-like’ rules apply for PST.
- Corporations registered for GST/HST or QST purposes may often recover GST/HST and QST paid to others. There is no similar mechanism for PST.
- Non-resident corporations without a permanent establishment in Canada must post recoverable security on registering with the Canada Revenue Agency (CRA).

EMPLOYMENT

Employment laws in Canada are heavily regulated by both common law and provincial or territorial employment and labour statutory laws.

- You must comply with the laws of each applicable jurisdiction if operating in more than one province or territory.
- Federally-regulated industries, such as banking, inter-provincial trade, or aviation, are governed by federal employment and labour laws, but must also conform to certain provincial laws.
- There are significant variations from province-to-province in relation to minimum wage, hours of work, overtime pay, statutory holidays and vacation entitlements, leaves, entitlements upon termination (there is no “at-will” employment in Canada), employment equity, human rights, worker’s compensation, privacy and basic health and safety.
- Employees in Canada have a right to be members of a trade union. Unionized workplaces are regulated by provincial or federal labour relations laws that provide for collective bargaining rights.
- If you have employees in Canada, you must register with CRA, open a payroll program account for employees, and, depending on the size of the payroll, register with provincial taxation authorities.
- Employers (whether resident or non-resident) are generally required to deduct, withhold and remit various payroll taxes in respect of employees performing work in Canada (whether resident or non-resident) including: federal and provincial income tax on employment income (salaries, wages, incentive compensation, taxable benefits and allowances); Canada Pension Plan contributions; and employment insurance premiums.
- On the sale of the assets of a business in Canada, the purchaser may have statutory and common/civil law obligations toward the seller’s employees if they remain employed after the sale, including the recognition of the employee’s tenure with the seller and collective bargaining rights.
- Canadian workplaces are regulated by provincial and federal human rights codes which prohibit discrimination. Written policies related to issues including discrimination, harassment and workplace violence are mandatory.

PRIVACY LAW

Canada has enacted comprehensive federal privacy legislation that applies to the private sector and certain provinces have enacted both comprehensive and industry-specific private sector privacy legislation. These laws regulate the collection, use and disclosure of personal information. “Personal information” is broadly defined as any information about an identifiable individual (with certain exceptions). Understanding which privacy laws apply is critical.

- The federal Personal Information Protection and Electronic Documents Act (Canada) (PIPEDA) applies to: federal works, undertakings and businesses (such as airlines, interprovincial or international transportation, broadcasting, banks, nuclear energy, maritime navigation); provincially-regulated private sector organizations in provinces that have not enacted personal information protection laws substantially similar to PIPEDA; and, provincially-regulated private sector organizations that operate across provincial and international borders in the course of commercial transactions.
- British Columbia, Alberta and Québec have adopted substantially similar legislation; for that reason PIPEDA does not apply within those provinces.
- There is also sector-specific federal and provincial legislation, including legislation regulating the collection, use and disclosure of personal health information.
- Generally speaking, you must adhere to overriding principles of federal and provincial personal information protection laws:
 - Personal information may only be collected, used or disclosed with the knowledge and consent of the individual.
 - 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.

WHITE COLLAR CRIME AND CORRUPTION

Canadian regulators and enforcement agencies take improper and unethical business practices seriously.

- The Corruption of Foreign Public Officials Act (CFPOA) criminalizes foreign bribery committed anywhere in the world by a Canadian citizen, permanent resident, or a corporation, company, firm or partnership incorporated, formed or otherwise organized under any Canadian law. Penalties include unlimited fines, probation, debarment from government contracting, forfeiture of criminal proceeds (corporations), and up to 14 years' imprisonment (individuals).
- Numerous regulatory regimes in Canada have criminal or quasi-criminal powers, including the Competition Act, provincial securities statutes, occupational health and safety acts, and environmental and economic legislation.
- Under the Criminal Code, senior officers may attract personal and corporate criminal liability if he/she is a party to an offence while acting within the scope of their authority, directs others to commit the offence, or, in limited circumstances, fails to take all reasonable measures to stop the offence.

CANADA'S ANTI-SPAM LEGISLATION

Canada's anti-spam laws (CASL) are some of the most prescriptive and punitive anti-spam laws anywhere in the world.

- CASL prohibits the sending of unsolicited commercial electronic messages. Before sending any promotional or advertising emails, the recipient must have given consent in advance (subject to specific exemptions).
- CASL also requires all messages to include specific disclosures and an unsubscribe mechanism.
- CASL applies to any messages accessed by a computer in Canada; therefore, the residence of the sender is not relevant.

IMMIGRATION AND WORK PERMITS

Immigration issues should be considered well in advance whenever a foreign national wishes to enter Canada to do business. Analysis of the person, purpose of entry, and the proposed activities in Canada must be done prior to entry.

- Whether or not a foreign national entering Canada requires a work permit depends on the activities of the person in Canada. "Work" is very broadly defined, so do not assume foreign-based personnel can enter Canada without a work permit, even for short visits.
- If a work permit is required, it is imperative to understand the various options and to prepare strong application materials to support the immigration status being sought.
- Personnel who have criminal records may be inadmissible to Canada, depending on the nature of the conviction.
- The business structure used may affect the work permit options available.

ADVERTISING AND MARKETING

Foreign companies wishing to advertise their goods and services in Canada need to be aware of certain unique Canadian requirements.

- All prepackaged products sold in Canada are subject to stringent labelling requirements, including that certain basic information on all products be provided in both English and French. (For products sold in Quebec, with limited exceptions, all information on the product and its packaging must be in French (but can be accompanied by another language – such as English)).
- The ability to mark goods as "made in Canada" or as a "product of Canada" is subject to strict guidelines.
- Contests and promotions in Canada must be carefully structured, with a number of unique provisions in mind. Lotteries (i.e. schemes that award a prize based on chance alone or require a fee to participate) are illegal under the Criminal Code.

COMPETITION AND ANTITRUST

Competition is regulated in Canada by the federal Competition Act. The Competition Bureau administers and enforces the Competition Act.

- The Competition Act applies to both domestic and foreign entities doing business in Canada.
- The Competition Bureau may challenge any merger or acquisition before completion and for one year following completion, except where it has issued an advance ruling certificate.
- Investors must provide advance notice of a proposed transaction if certain transaction and party-size thresholds are exceeded.
- The Competition Act prohibits hard core cartel conduct e.g. agreements between competitors to fix prices, allocate market or customers or markets, restrict output, and big rigging, which can result in severe monetary penalties and/or imprisonment.
- Certain other conduct, including price maintenance, refusal to deal, tied selling, exclusive dealing, vertical market restriction, non-hardcore cartel agreements between competitors, and practices that could constitute an abuse of dominance, is presumptively lawful but civilly reviewable based on “effects on competition” test.

FOREIGN INVESTMENT

Foreign investment in Canada is regulated by the federal Investment Canada Act (ICA). The purpose of the ICA is to encourage foreign investment on terms that are of “net benefit to Canada”.

- Acquisition (direct or indirect) of control of an existing Canadian business, or establishment of a new Canadian business by a foreign investor is subject to notification or review.
- Foreign investment in Canada is reviewable typically only when a Canadian business is being acquired. Establishment of a new Canadian business can also be reviewable if there are reasonable grounds to believe that the investment could be injurious to national security, or the investment falls within specific business activities, such as cultural businesses, and a review is ordered.
- If an investment is reviewable, detailed information must be submitted to the Canadian government,

which will determine whether the proposed investment is likely to be of net benefit to Canada.

- Any foreign investment that “could be injurious to national security” may be reviewed by the Canadian government and, without giving reasons, the Canadian government may prohibit proposed investments by non-Canadians, impose conditions on foreign investments, or require divestiture of completed investments.
- Particular industry sectors, such as telecommunications, financial services and broadcasting, are subject to additional laws that regulate foreign investment.

INTERNATIONAL TRADE

If your business includes the cross-border movement of goods, it is important to understand Canada’s international trade regime.

- Customs duties and taxes will apply on goods imported into Canada unless reduced or eliminated pursuant to a free trade agreement. In order for goods to be eligible to take advantage of the North America Free Trade Agreement or other similar free trade agreements, they must satisfy certain “rules of origin”.
- There are numerous restrictions on exporting goods from Canada depending on the type of goods in question. Controlled products include wheat and barley, certain meat and dairy products, sugar-containing products, margarine, peanut butter, certain cultural property, military and strategic goods and technologies including certain software, US origin goods and technology, firearms, softwood lumber, steel, textiles and clothing, hazardous materials and certain wild plants and animals.

INTELLECTUAL PROPERTY

Patents

There are many similarities between international patent laws and Canadian patent laws. Canada is a first-to-file jurisdiction.

- You can obtain a patent in Canada for any new invention (including processes, machines, methods of manufacturing or a composition), or any new and useful improvement to an invention.
- Inventions or improvements must be novel, have a useful function and demonstrate inventive ingenuity, and not be obvious to someone skilled in that area.
- Public disclosure of an invention before filing may prevent issuance of a patent.
- An issued patent gives the patent holder an exclusive right to manufacture, sell or use an invention throughout Canada for a period of 20 years from the date of the application.

Copyright

Copyright protects original literary, artistic, dramatic and musical works, as well as certain other subject matter.

- Copyright automatically subsists in an original work in Canada upon the work's creation. Registration is optional and, while beneficial, is not necessary to enforce copyright in a work.
- Copyright provides the copyright owner with certain exclusive economic rights (including the right to reproduce, publicly perform or publish a work) as well as certain moral rights that remain specific to the work's author (including the right to be associated with the work by name). Moral rights can be waived but not assigned.
- The term of copyright in Canada for most works is currently life of the author plus 50 years, which may in the future be extended a further 20 years.

Trademarks

The use of a trademark in association with wares or services and that possesses a reputation or goodwill in Canada creates common law rights in the trademark and subsequent use of the same or a confusingly similar trademark for similar wares or services may be prevented under the common law doctrine of passing off.

- Protection of an unregistered trademark is limited to the geographic area in which the holder has developed a reputation or goodwill for the trademark.
- Registration affords greater scope of rights, 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 in another country with no use, reputation or goodwill in Canada conveys no protection in Canada.
- You should conduct a trademark search before applying and must comply with numerous procedural and substantive requirements for the application, processing and registration of a trademark.
- Registration of a single trademark can cover several classes of goods and services.
- Registered trademarks are valid for 15 years; renewable indefinitely upon payment of a fee.

Industrial Designs

Unlike copyright and trademark protection, industrial designs must be registered in Canada in order to establish a legal claim of ownership.

- Registration of a design assists with a legal claim to ownership and the right to prevent others from making, importing, selling or renting articles incorporating the registered design or a substantially similar design.
- To qualify for protection, an industrial design must be original and not have been published in Canada or elsewhere more than one year before the filing date.
- Term of protection is a maximum of ten years from the date of registration.

DISPUTE RESOLUTION

The court system in Canada is comprised of a network of provincial and federal courts.

- ❑ Provincial courts hear both civil and criminal matters, with trial courts and Courts of Appeal in each province. Appeals from the Courts of Appeal are heard by the Supreme Court of Canada.
- ❑ Federal courts have exclusive jurisdiction in a number of matters, such as impeachment of patents or trademarks, and concurrent jurisdiction with the provincial courts in a number of matters, such as actions against the federal Crown, judicial review of federal boards, admiralty, and patent, copyright and trademark infringement actions.
- ❑ The amount of money and/or type of non-monetary relief being sought in the lawsuit will determine the litigation process.
- ❑ As a general rule, damages awards in Canada are considerably more modest than in the United States and jury trials are much less common.
- ❑ The losing party in a civil proceeding is generally required to pay some or all of the winning party's legal costs. However, there are different scales of costs and most commonly only partial reimbursement is awarded.
- ❑ Corporations may choose to resolve disputes by arbitration over litigation and while it may not necessarily be less costly or time consuming, arbitration allows greater control over procedure, more confidentiality than public court process, and the ability to select decision-makers with specific expertise in a subject matter. All provinces and territories in Canada have legislation governing both international commercial arbitration and domestic arbitration.

THE PROVINCE OF QUEBEC

The Province of Quebec is a civil law jurisdiction.

- ❑ The private law of Quebec is primarily based on the written Civil Code of Québec, which applies to all property and private civil matters. The Civil Code of Québec will enforce unwritten contracts, partnerships and warranties, and will imply certain contractual terms and obligations on contracting parties.
- ❑ The Charter of the French Language mandates French as the official language of business and

commerce in Quebec. In the workplace, all working documents must be available in French. If marketing materials are in French and another language, the French version must be displayed at least as predominantly as the other language (i.e. the “equal prominence” rule). Commercial advertising (i.e. signage, posters, and billboards), on the other hand, is subject to the “markedly predominant” rule.

FRANCHISE LAW

Canada is an attractive destination for franchisors expanding internationally—sales from franchised units account for one out of every five consumer dollars spent in Canada on goods and services and approximately \$68 billion dollars in annual sales. However, franchisors must be aware of specific franchise laws currently in five Canadian provinces.

- ❑ Alberta, Manitoba, New Brunswick, Ontario, British Columbia and Prince Edward Island have each enacted franchise legislation that aims to regulate the franchise marketplace and to protect both prospective and existing franchisees.
- ❑ The franchise legislation is remedial and adopts three key principles: the obligation on franchisors to provide to prospective franchisees a certified disclosure document containing prescribed information, documents and other material facts; the duty of good faith and fair dealing in the performance and enforcement of the franchise agreement; and the right of franchisees to associate and to form or join an organization of franchisees without penalty or interference from the franchisor.
- ❑ There are significant remedies available to a franchisee for breach of the franchise legislation including the right to terminate the franchise agreement or bring an action for damages if the franchisor fails to comply with the disclosure requirements.
- ❑ A franchisee cannot contract out of its rights or waive the obligations imposed on a franchisor under the franchise legislation. Any provision in a franchise agreement that restricts the application of the franchise legislation or the jurisdiction of the province is void and unenforceable.
- ❑ Québec does not have franchise-specific legislation but both the Civil Code of Québec and the Québec Charter of the French Language apply to franchising.

BANKRUPTCY AND RESTRUCTURING

Understanding the complexities of Canadian insolvency regime is essential to successfully doing business in Canada.

- The Canadian bankruptcy and insolvency regime is divided between the federal and provincial levels of government. The federal government has authority over bankruptcy and insolvency whereas provincial governments are responsible for securities laws and property and civil rights, including the rights and remedies of secured creditors.
- Secured creditors planning to enforce security over substantially all the debtor's assets generally need to give the debtor ten days' prior notice of this intention, after which time a receiver may be appointed. Receivers can be appointed privately, by a secured creditor in accordance with a security instrument, or under a court order.
- Restructuring of a company's debt may occur informally by agreement between the debtor and its creditors, or formally under either a proposal under the Bankruptcy and Insolvency Act (the "BIA") or, if the debt exceeds \$5 million, a plan of arrangement under the Companies' Creditors Arrangement Act (the "CCAA").
- The BIA and CCAA outline procedures for cross-border insolvencies. International protocols are often used to advance the fair and efficient administration of insolvencies in multiple jurisdictions.
- Bankruptcy may occur if: 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 refuse to approve a restructuring proposal under the BIA; or the BIA proposal is subsequently annulled by the court.
- Under the BIA and certain provincial statutes some transactions or payments entered into or made by a debtor may be impugned or set aside. These generally include fraudulent preferences, fraudulent conveyances and transfers under value.

ENVIRONMENT

Canada is quite sophisticated and advanced in terms of its environmental legislation due to Canada's wealth in natural resources. Federal, provincial and municipal levels of government have enacted detailed statutes, laws, regulations, bylaws, guidelines and recommendations with respect to the environment and environmental protection.

- Environmental obligations and liabilities may be incurred under statute, contract, common law, and civil law.
- Canadian environmental laws attribute liability for environmental damage to the owner of the land and to polluters of the environment. In some provinces, merely being in occupation, management or control of real property may attribute liability.

REAL ESTATE AND URBAN DEVELOPMENT

The provinces and territories have primary responsibility for property law in Canada. There is no constitutional protection for property rights in Canada; property can be expropriated by government and quasi-governmental authorities provided appropriate compensation is paid.

- Interests in land are generally held in fee simple, as leasehold interests or strata title. Each province and territory has a highly sophisticated land registration system to deal with ownership.
- Legal structures available for investment in Canadian real estate include: a corporation; partnership; co-ownership; joint venture; trust; real estate investment trust (REIT); personal ownership; or any combination of these legal structures.
- Land-use planning is the responsibility of the provincial governments. It affects subdivision and transfer of land, long-term leases and rights that are given over or in connection with land. Municipalities require site plan approval, building permits, payment of development charges or other applicable fees, and all other regulatory approvals, before construction of any new development.

This Checklist was developed to provide business executives, foreign counsel and investors with a high level overview of some the legal aspects of Canadian business operations. The information in this Checklist is current as of April 2017 and is for general information purposes only. It does not constitute a legal opinion or other professional advice.

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