DAVIES

Doing Business in Canada

2018 Edition

DAVIES

About This Guide

Davies' updated *Doing Business in Canada* is designed to provide executives, counsel and foreign investors with an overview of the legal framework governing Canadian business operations. This comprehensive guide outlines key considerations for investing and conducting business in Canada, particularly in Ontario and Québec.

The contents of this Guide are current as of June 2018, and are intended as general information and not as legal advice or opinion. We invite you to reach out to any Davies lawyer to discuss your specific legal matters. Contact one of our offices or visit our website at dwpv.com.

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CHAPTER 01

Introduction

Most general commercial law of concern to businesses is provincial law. There is considerable consistency between most of such provincial laws across Canada.

Political and Constitutional Structure

Canada is a parliamentary democracy and constitutional monarchy, with a political system originally modelled on that of the United Kingdom. Although Queen Elizabeth II is Canada's official head of state, the governments of Canada are democratically elected. Because Canada is a federal state, legislative and executive jurisdiction is constitutionally divided between the federal government and the 10 provincial governments. Each government is separately elected; federal and provincial governments are often from different political parties.

The federal government has exclusive jurisdiction over some matters; others are reserved for the provincial governments. In other areas, however, both levels of government may regulate different aspects of a particular activity. In addition, provincial governments delegate certain powers to local governments. A business may therefore be regulated at three levels: federal, provincial and municipal.

The federal Parliament has, for the most part, constitutional jurisdiction over issues concerning Canada as a whole, such as international trade, trade between provinces, national defence, citizenship and immigration, criminal law, currency, intellectual property, ports, aeronautics and broadcasting.

The federal Parliament is also responsible for the Yukon, Nunavut and the Northwest Territories, which have been given some authority to govern themselves on local matters through elected territorial councils. In certain regions, as a result of treaties or agreements, Canada's Indigenous peoples exercise limited self-government.

The 10 Canadian provinces have authority to make laws concerning matters such as property, contracts, natural resources, land use and planning, the administration of justice, education, healthcare and municipalities. Most general commercial law of concern to businesses is provincial law. There is considerable consistency between most of such provincial laws across Canada.

In practice, Canadian federal and provincial governments often cooperate, by cost-sharing programs and delegation of authority, to create consistent national approaches for matters that are under provincial legislative jurisdiction. For example, there are national standards and federal funding for healthcare. Although provinces have constitutional authority to impose income taxes, all provinces, except Québec, delegate the collection of income taxes to the federal government, thus making income tax rules and procedures relatively uniform throughout Canada.

Given its natural resources, skilled labour force, stable political and economic systems and modern capital infrastructure, Canada enjoys solid economic prospects.

Canada's Constitution includes the *Canadian Charter of Rights and Freedoms*, which guarantees certain rights of individuals. Provincial and territorial governments also have legislation protecting individual rights and freedoms.

Legal Structure

All the provinces of Canada, except Québec, are common law jurisdictions, which derive their legal systems from British common law. Québec is a mixed common law/civil law jurisdiction in which private law matters, such as contracts and property, are governed by a civil code. Although Québec civil law is historically derived from France, today it is strongly influenced by Canada's North American location and orientation.

Canada tends to look to the United States rather than Europe for its regulatory models. For example, Canadian securities laws evolve in response to developments in the United States.

Canada's courts of general jurisdiction are provincially administered, but the Supreme Court of Canada acts as a court of final appeal for all of Canada. Although Canada also has a federal court system, its jurisdiction is very limited compared with federal courts in the United States. The Canadian federal court system deals primarily with matters arising under Canadian federal statutes and claims against the federal government. Although all judges of provincial superior courts in Canada, and Federal Court and Supreme Court judges, are appointed by the federal government, the independence of the judiciary is well established, and courts are not subjected to political interference or influence. Each province also has lower courts presided over by provincially appointed judges who hear less important cases.

Economic System

Canada is an affluent, high-tech industrial society with a market-oriented economic system and high living standards. Since World War II, the impressive growth of the manufacturing, mining and service sectors has transformed the nation's economy from largely rural to primarily industrial and urban. Given its natural resources, skilled labour force, stable political and economic systems and modern capital infrastructure, Canada enjoys solid economic prospects.

Canada is a party to many multilateral and bilateral international trade and investment agreements. The 1989 U.S.-Canada Free Trade Agreement (FTA) and the 1994 North American Free Trade Agreement (NAFTA) (which includes Mexico) touched off a dramatic increase in trade and economic integration with the United States. Canada also has free trade agreements with the European Union and the European Free Trade Association, which includes Iceland, Norway, Switzerland and Liechtenstein. Canada has free trade agreements with individual countries as well, such as Korea, Israel, Ukraine, Panama, Jordan, Colombia, Peru, Costa Rica, Honduras and Chile, and has entered into exploratory discussions and negotiations with many other trading blocs and countries.

The exchange rate of the Canadian dollar is allowed to float in relation to other currencies. Canada's central bank, the Bank of Canada, sets key interest rates – in practice, independently of the federal government.

Canada offers many advantages as a place to do business:

- In a comparison of the relative costs of doing business in various countries, "Canada has managed to increase its overall cost advantage relative to the US to almost 15 percent." "Significant incentive support for R&D activities in Canada, from both federal and provincial governments, helps to position R&D services as the sector in which Canada holds its greatest cost advantage, with total costs 27.7 percent below the US baseline." (*Competitive Alternatives 2016*, KPMG)
- Canada ranks second among OECD high-income countries for the lowest number of procedures, costs and time required to establish a new business. (*Doing Business 2018*, The World Bank Group)
- Canada ranks 10th in the world in overall economic competitiveness. (*IMD World Competitiveness Rankings 2018*, IMD World Competitiveness Center)
- Canada ranks 14th in the world in the global competitiveness index. (*Global Competitiveness Report 2017-2018*, World Economic Forum)

CHAPTER 02

Types of Business Organizations

Corporations

GENERAL

A corporation is the most common form of business organization in Canada. A corporation has a legal personality distinct from its shareholders and management. A corporation's existence is potentially perpetual, since it is not affected by the departure or death of any or all of its shareholders or managers.

As a separate legal entity, a corporation has rights, powers and obligations similar to those of individuals. It can hold property, carry on a business and incur legal and contractual obligations.

Shareholders are the owners of a corporation, but they usually do not manage its business or enter into transactions on its behalf. By statute, they are protected from liability for obligations of the corporation. Generally, the authority to manage the corporation rests with the directors, who are elected by the shareholders. However, if the shareholders prefer to retain direct control of the corporation, they can enter into a unanimous shareholder agreement. Such an agreement can effectively transfer responsibility (and liability) for the management of the corporation from the directors to the shareholders.

A corporation may be either public or private. Shares of public corporations are traded on stock exchanges and other public markets. Public corporations are subject to extensive regulation in order to protect investors (see the Corporate Governance and Financing a Business Operation chapters of this guide). By contrast, the transfer of shares in a private corporation is restricted and usually requires the consent of a majority of the directors or shareholders. Private corporations are not subject to most aspects of securities regulation.

The main advantages of the corporation as a business entity are the limited liability of the shareholders, the possibility of perpetual existence and the flexibility of the corporate form for financing and estate planning purposes. The disadvantages include the costs associated with the incorporation, operation, annual maintenance and dissolution of the corporation. Since a corporation is a separate

As a separate legal entity, a corporation has rights, powers and obligations similar to those of individuals. It can hold property, carry on a business and incur legal and contractual obligations.

taxpayer, shareholders cannot access directly any tax losses it may generate, and it may be more difficult to use as a tax-efficient vehicle than an unincorporated entity like a partnership.

FEDERAL OR PROVINCIAL INCORPORATION

A business corporation can be incorporated either federally, under the *Canada Business Corporations Act* (CBCA), or in any of the provinces. Each of Ontario and Québec has a *Business Corporations Act* (OBCA and QBCA, respectively).

The CBCA, OBCA and QBCA prescribe essentially the same requirements, with some exceptions, the most significant of which are discussed below. Under all of these statutes, incorporations can be effected quickly and at a reasonable cost.

A federal corporation has the right to carry on business under its corporate name in any province of Canada (although it must use a French form of its name in Québec). In contrast, a corporation incorporated under provincial law cannot do so as of right in another province. Hence, an OBCA or QBCA corporation cannot be licensed or registered under its name in another province if a confusingly similar name is already being used there by another corporation. If this is a concern, incorporation under the CBCA may be advantageous, although as a practical matter, a CBCA corporation may need to operate under a different name in any province where its corporate name would be confusing. However, it may be easier to obtain a desired corporate name by incorporating provincially. Under the OBCA and QBCA (unlike the CBCA), proposed corporate names are not subject to pre-clearance for possible confusion with existing names. Incorporators can decide for themselves whether there is any risk of other parties objecting to the names they wish to use.

Both federally and provincially incorporated corporations must satisfy the registration requirements of every province in which they intend to carry on business. In most provinces, corporations must file corporate returns annually to keep their registrations up to date.

Generally, only public corporations, whether federally or provincially incorporated, must file financial statements on the public record. The directors and officers of all corporations must be disclosed on the public record, but not the shareholders (except in Québec, where the three largest voting shareholders must be disclosed). In Québec, if all of the powers of the directors have been withdrawn pursuant to a unanimous shareholders' agreement, the names and domiciles of the shareholders or third persons having assumed such powers must be declared on the annual corporate return.

The CBCA and OBCA require at least 25% of the directors to be Canadian residents, unless a corporation has fewer than four directors, in which case it needs to have at least one Canadian resident. The QBCA does not require that any directors be Canadian residents. The CBCA, OBCA and QBCA all require, however, that a public corporation have at least three directors and that a certain number of such directors be independent. Additional corporate governance requirements are imposed by securities regulators on public corporations (see the Corporate Governance chapter of this Guide). The CBCA, OBCA and QBCA also allow directors and shareholders to participate and to vote at meetings by electronic means.

There are a few other important differences between the CBCA and the OBCA on the one hand, and the QBCA, on the other. The QBCA authorizes the creation of shares with or without par value and provides for the issuance of shares that are not fully paid up, whereas the CBCA and OBCA prohibit par value shares and the issuance of shares that are not fully paid up. The QBCA has a special regime for sole shareholder corporations, and the sole shareholder may choose not to establish a board of directors and not to comply with some requirements of the QBCA relating to bylaws and meetings of shareholders and directors. The QBCA also allows certificates issued by the Registrar to have, in addition to the date, the time of the issuance of the certificates, which may be useful for some transactions.

The corporate statutes of most other provinces in Canada are generally similar to the CBCA, the OBCA and the QBCA. However, there are differences in detail that may provide additional flexibility to certain investors. For example, British Columbia permits a corporation to hold its own shares, whether directly or through a subsidiary (which is restricted under the CBCA, OBCA and QBCA).

OFFICERS AND DIRECTORS

The daily operations of a corporation are normally carried out by its officers. Officers can be non-residents of Canada provided that they have complied with Canada's immigration laws (see the Temporary Entry and Permanent Residence chapter of this guide).

Directors and officers must act honestly and in good faith with a view to the best interests of the corporation. They must also exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Directors and officers may incur personal liability if they cause the corporation to contravene applicable laws. Directors also may be liable under statutes such as Ontario's *Employment Standards Act, 2000*, Québec's *Act respecting labour standards* and the federal *Income Tax Act* for employees' unpaid wages and amounts that should have been remitted to taxation authorities, if the corporation becomes bankrupt.

A corporation may indemnify its directors and officers for personal liability they may incur when acting in such capacities, or it may purchase insurance for their benefit to cover such liability. However, indemnification will generally cover only those acts that were performed by the directors and officers in good faith. The CBCA, OBCA and QBCA permit broader insurance coverage to be maintained, even in respect of acts contrary to directors' and officers' fiduciary duties, although such insurance may not in practice be obtainable at reasonable cost.

SUBSIDIARY OR BRANCH?

A foreign corporation may carry on business in Canada either through a branch or by setting up a new corporation as a Canadian subsidiary. Tax considerations will be important in making this choice, but the non-tax considerations discussed below may also be relevant.

Most provinces in Canada do not provide for hybrid forms of corporate entity with certain partnership-like characteristics. In particular, no Canadian jurisdiction provides for limited liability companies (LLCs). However, Nova Scotia, Alberta and British Columbia permit the formation of unlimited liability companies (ULCs), the shareholders of which do not have limited liability, but which are otherwise similar to ordinary corporations. Although a ULC is treated as

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a corporation for Canadian tax purposes, it is eligible for flow-through treatment for U.S. tax purposes. Therefore, ULCs are sometimes used in cross-border transactions. However, as a result of the amended Canada-U.S. tax treaty, it may require careful planning for U.S. residents to obtain beneficial tax treatment through the use of a ULC (see the Tax Considerations chapter of this guide).

There are important differences between Nova Scotia, Alberta and British Columbia ULCs. In particular, the shareholders of an Alberta ULC are liable for any liability, act or default of the ULC, whereas in Nova Scotia and British Columbia, the shareholders of a ULC have no direct liability to creditors, and their liability arises only when the ULC is wound up and there are insufficient assets to satisfy its obligations.

Subsidiary

If the incorporation of a subsidiary is chosen, the cost of incorporating the corporation and the ongoing expenses of maintaining it must be taken into account. If it is incorporated under the OBCA or CBCA, it must be considered whether appropriate individuals who are resident Canadians are available to serve as directors. Certain corporate records must generally be maintained in Canada. Since the subsidiary is a separate legal entity from its parent, the parent will not generally be liable for obligations incurred by the subsidiary (unless the subsidiary is a ULC).

Branch

An unincorporated branch may be chosen as an alternative to a subsidiary. The foreign corporation must register in all provinces in which it wishes to carry on business. The corporation cannot register if the name of the foreign corporation is the same as or similar to one already in use in that province. In addition, in Québec the foreign corporation must register a French name. Business names used by a branch should also be registered and should not be the same as or similar to names used in the province. A foreign corporation that establishes a branch in Ontario must obtain a licence under the *Extra-Provincial Corporations Act* (or, in the case of an LLC, register its name under the *Business Names Act*), although this is generally a routine matter.

In Canada, a partnership is not regarded as a separate legal entity from its partners.

Partnerships

Partnership is the relationship between persons carrying on business in common with a view to profit. Partners may be individuals, corporations or other partnerships. In Canada, a partnership is not regarded as a separate legal entity from its partners.

There are two principal types of partnership. In a general partnership, all of the partners can participate in management of the business, but are exposed to unlimited liability for partnership obligations. In a limited partnership, limited partners' liability is limited to their investment in the partnership, but they must remain passive investors and not participate in control of the partnership business. Ontario and Québec also permit professionals to practise through a special type of general partnership known as a limited liability partnership, which provides individual partners with a degree of protection against unlimited liability for the negligent acts of other partners.

In Ontario, the governing statutes are the *Partnerships Act* and the *Limited Partnerships Act*, which define the rights and obligations of the partners between themselves and in relation to third parties. Partnership law also includes non-statutory common law and equitable principles.

In Québec, partnerships are governed by the *Civil Code of Québec* and the *Act respecting the legal publicity of enterprises*, which similarly sets out the rights and obligations of partners between themselves and toward third persons, as well as conditions for the creation, operation and dissolution of a partnership.

The provisions of these statutes that address the rights and obligations of partners between themselves can generally be altered by agreement between the partners. Because the relationships between the partners can be determined by agreement, great flexibility is possible in providing for such matters as capital contributions or other financing of the partnership, participation in profits and management structure.

Income and losses of a partnership, although computed at the partnership level, are taxed in the hands of the partners. This tax treatment is the primary reason for using a partnership rather than a corporation, since each partner may offset its eligible share of the partnership's business tax losses against income from other sources.

GENERAL PARTNERSHIPS

The main characteristic of a general partnership is the unlimited liability of each partner for the liabilities and obligations incurred by the partnership to third parties. Each partner may bind the others unless there are restrictions in the partnership agreement of which third parties have notice. However, a partner is generally not liable for obligations incurred before it became or after it ceased to be a partner.

The main disadvantages of a general partnership are the unlimited liability of the partners and the ability of each partner to incur partnership obligations that will bind the other partners.

In Ontario, all the partners of a general partnership must register the name of the partnership under the *Business Names Act* unless the business is carried on under the names of the partners. In Québec, a general partnership must file a declaration of registration under the *Act respecting the legal publicity of enterprises*. This declaration must include a French name for the purpose of carrying on business in Québec. In both Ontario and Québec, these registrations require that the partnership business and the names and addresses of the partners be disclosed. In Québec, the general partnership must file an annual declaration every year to maintain its registration in good standing.

LIMITED PARTNERSHIPS

A limited partnership combines the advantages of limited liability and the ability to flow tax losses through to passive investors (subject to certain restrictions under tax legislation). This form of business structure is often used for private equity funds, public financings and real estate syndications. A limited partnership is made up of one or more general partners, each of whom has the same rights

A limited partnership combines the advantages of limited liability and the ability to flow tax losses through to passive investors (subject to certain restrictions under tax legislation).

and obligations as a partner in a general partnership, and one or more limited partners, whose powers and liabilities are limited.

The general partner or partners manage the partnership. A limited partner may not take part in the management of the partnership without jeopardizing the partner's limited liability.

The primary advantage of a limited partnership over a general partnership is the limited liability of the limited partners. This enables passive investors to receive tax benefits without risking their personal assets beyond their investment in the partnership.

To establish a limited partnership in Ontario, a declaration signed by the general partners must be filed under the *Limited Partnerships Act*. The declaration must be renewed every five years, and when the partnership wishes to cease operations, a declaration of dissolution must be filed. The names and capital contributions of the limited partners do not have to be disclosed on the public record, although this information must be disclosed on request.

In Québec, a limited partnership must file a declaration of registration under the *Act respecting the legal publicity of enterprises*. This declaration must include, among other information, the name and domicile of each of the general partners and the names and domiciles of the three limited partners who provided the largest contributions. Every year, the limited partnership will have to file an annual declaration to maintain its registration in good standing.

UNDECLARED PARTNERSHIPS

In Ontario, although a limited partnership can only be formed by the filing of a declaration under the *Limited Partnerships Act*, a general partnership may exist without any registration or filing on the public record. (If it uses a firm name or business name other than the name of the partners, that name must be registered under the *Business Names Act*, but the failure to do so would not affect the existence of the partnership.) If the relationship satisfies the legal criteria for a general partnership, its members will be liable as general partners for obligations relating to the partnership business and will be bound by any such obligations incurred by any of the partners, even to third parties who are not aware of the existence or identity of the other partners. This reflects the common law principle that an undisclosed principal will be liable in the same manner as a disclosed principal for obligations incurred by its agent.

In Québec, a general or limited partnership that does not file a declaration under the *Act respecting the legal publicity of enterprises* is an undeclared partnership. An undeclared partnership may arise from a written or oral agreement or from acts indicating an intent to form an undeclared partnership. In the absence of an agreement, the relations of partners to each other in an undeclared partnership are treated by the provisions of the *Civil Code of Québec* in the same manner as those of general partners.

If a partner of a Québec undeclared partnership contracts in the partner's own name with a third party who is unaware of the existence of the undeclared partnership, only that partner incurs liability to the third party (unlike a general partner, who can bind the other partners). If, however, a third party is aware that a partner of an undeclared partnership is acting in a partnership capacity in dealing with the third party, the other partners of the undeclared partnership will also be liable to the third party.

Joint Ventures

A joint venture is an agreement entered into by two or more parties to pool capital and skills for the purpose of carrying out a specific undertaking. It may or may not involve co-ownership of the project assets by the venturers. Because it is essentially a contractual relationship not specifically regulated by statute, the venturers are free to agree on whatever terms they choose. Since a joint venture is not a recognized entity for tax purposes, income and losses for tax purposes are computed separately by each joint venturer rather than at the joint venture level.

A joint venture may be difficult to distinguish from a partnership, and the parties' characterization of their relationship may not be conclusive. The most important legal distinction is that sharing of profits is essential to a partnership, whereas joint venturers generally contribute to expenses and divide revenues of the project, but do not calculate profit at the joint venture level. Equal participation in management of the business is characteristic of a general partnership, but less usual in a joint venture, where one party often operates the project, or management is contracted out.

Joint venturers who do not want their joint venture to be treated as a partnership should enter into a written agreement setting out their respective rights and obligations in detail and exercise care in dealing with third parties. In Québec, joint venturers should also file the proper declaration under the *Act respecting the legal publicity of enterprises* to avoid being characterized as a general partnership, in which case each partner would be fully liable for partnership obligations and subject to tax as a partner, rather than as a joint venturer.

Trusts

Although it has always been possible to use a trust as a form of business organization, only comparatively recently has the income trust become a common form of public offering in Canada. The primary reason for employing a trust rather than a corporate structure is to realize greater tax efficiencies for investors than would be possible by distributing corporate earnings to shareholders by way of dividends. In most cases, the trust is not itself the operating business entity. However, tax changes have reduced the tax advantages of a trust structure and some income trusts have been converted to corporations (see the Tax Considerations chapter of this guide).

The primary reason for employing a trust rather than a corporate structure is to realize greater tax efficiencies for investors than would be possible by distributing corporate earnings to shareholders by way of dividends.

In Ontario, a trust is primarily governed by the provisions of the declaration establishing the trust and the non-statutory principles of equity, although trusts are also subject in certain respects to statutes such as the *Trustee Act*. In Québec, trusts are governed by the *Civil Code of Québec* and the *Act respecting the legal publicity of enterprises*. A commercial trust such as a business trust, investment trust or real estate investment trust must now register with the Québec Registraire des entreprises unless the trustee of the trust is already registered.

A trust is not a separate legal entity. In law, its assets are held by the trustees, who are also liable for obligations incurred in carrying on its activities (although the trustees are entitled to be indemnified out of the trust assets for such liabilities). Unlike shareholders of a corporation, investors in a trust have not had the benefit of statutory limited liability. There has therefore been some concern that in certain circumstances it might be possible for investors to be exposed to liabilities arising from the operations of the trust. Ontario has passed legislation clarifying that investors in a publicly traded trust (that is formed under Ontario law and that files its public disclosure documents under Ontario securities laws) will not incur such liabilities as beneficiaries of the trust.

Sole Proprietorships

A business owned by one person is called a sole proprietorship. This is the simplest form of business organization. The individual is responsible for all the obligations of the business. Accordingly, his or her personal assets are at risk if these obligations are not met.

There is no legislation dealing specifically with sole proprietorships; however, a sole proprietor may need to comply with federal, provincial and municipal regulations affecting trade and commerce, licensing and registration. For example, in Ontario, a sole proprietor who carries on business or identifies his or her business to the public under a name other than his or her own name must register the name under the *Business Names Act*. In Québec, every person who uses a name or designation other than his or her own complete name must register a declaration under the *Act respecting the legal publicity of enterprises.*

A sole proprietorship may be suitable for a small enterprise because it avoids many of the costs of setting up and running a corporation and the complex regulatory scheme that governs corporations. Non-capital startup losses of the business are generally deductible against the sole proprietor's income from other sources. The disadvantages of a sole proprietorship are the unlimited liability of the owner and that the business can be transferred only by selling the assets.

Contractual Arrangements

FRANCHISING

A franchise is an agreement whereby one party, the franchisor, gives another, the franchisee, the right to make use of a trademark or trade name within a certain territory.

Franchising involves an ongoing relationship between the parties. The franchisor generally retains some degree of control over the manner in which the franchisee carries on its business, but neither party is the agent of the other. In Québec, franchises are governed only by the general law of contracts.

Ontario has legislation regulating franchises, which defines "franchise" broadly and may apply to some distribution agreements that might not generally be thought of as franchises. As well as imposing disclosure obligations on franchisors, the Ontario legislation imposes a statutory duty of fair dealing in the performance and enforcement of a franchise agreement and precludes a franchise agreement from contracting out of the application of the legislation, or providing for disputes to be litigated or arbitrated in another jurisdiction. Some other Canadian provinces have similar legislation.

LICENSING

Licensing is a contractual relationship between two parties whereby a licensor grants a licensee the right to use a copyright, industrial design, patent, trademark, trade name or know-how. The relationship is governed primarily by the general law of contracts, although the federal statutory regime regulating the relevant form of intellectual property may have an impact to some degree.

Conclusion

In deciding on the most appropriate form of business organization, the specific needs of the enterprise must be assessed. Factors that require particular consideration include the complexity of the organization, the nature of the business, transferability of interests, participation in management, extent of liability, financing aspects and tax implications (both in Canada and in the home jurisdiction of a non-resident investor).

In deciding on the most appropriate form of business organization, the specific needs of the enterprise must be assessed.

CHAPTER 03

Corporate Governance

In recent years, many of the changes in governance standards and best practices in Canada have resulted from pressure from institutional investors and investor advocacy groups, as well as evolving governance trends that have developed globally.

Corporate governance standards for public companies in Canada are set out in corporate statutes and in securities laws and regulations. In recent years, many of the changes in governance standards and best practices in Canada have resulted from pressure from institutional investors and investor advocacy groups, as well as evolving governance trends that have developed globally. Most boards of Canadian public companies in today's climate are facing a multitude of governance issues requiring ongoing oversight and placing greater demands on directors' time and attention. At the same time, some influential institutional investors are demanding that public companies and their boards devote more attention to advancing their organizations' (and their stakeholders') longer-term interests, including with a renewed focus on long-term strategy. The challenge is how to manage these competing demands and establish priorities. The answer will be different for each issuer depending on a multitude of factors.

Financial Statements and Audit Committees

Canadian law requires public companies to provide investors with annual audited financial statements and quarterly financial statements (which may, but need not, be audited). Financial statements must be accompanied by a management discussion and analysis and supported by certificates signed by the CEO and the CFO. For the most part, all these requirements mirror U.S. requirements.

Canadian law requires public companies to have independent audit committees that meet standards that are very similar to the corresponding U.S. requirements. Internal controls over financial reporting are an important part of public company reporting in Canada, but Canadian securities regulators have not adopted the most onerous requirements of SOX 404. In particular, no management report or audit opinion is required. Instead, the CEO/CFO certification has been enhanced to provide comfort about internal controls over financial reporting and disclosure controls and procedures.

Other Annual Disclosure Requirements

In addition to financial statements and management discussion and analysis, public companies (other than venture issuers) must publicly file an annual information form, which provides extensive disclosure about the company and its business. Earlier this year, the Canadian Securities Administrators announced that as part of a broader policy project aimed at reducing regulatory burdens for non-investment fund reporting issuers, they are reviewing certain continuous disclosure requirements with the dual objectives of reducing the disclosure burden on issuers and enhancing the utility and ease of understanding of disclosure for investors.

Investors in Canadian public companies are entitled to vote at shareholder meetings in person or by proxy. In order to allow investors to form reasoned decisions about the way in which they will cast their votes, management must send investors an information circular that contains detailed disclosure about the matters that will come before the meeting, including specific disclosure about director and executive compensation. Some public companies use a more streamlined process – known as "notice and access" – for providing shareholders with notice concerning annual shareholder meeting materials and facilitating web-based access to those materials; this process can in some cases significantly reduce the costs associated with mailing complete packages of meeting materials to shareholders.

Most investors hold their interests indirectly, through the book-based system. Securities regulation and industry practice seek to put all investors in the same position regarding the receipt of the information circular and their ability to direct the way their shares will be voted. Efforts in this regard have, among other things, resulted in the issuance of non-binding protocols delineating the roles and responsibilities of the key entities involved in the voting reconciliation process in an effort to make the proxy voting system more accurate, reliable and accountable.

"Comply-or-Explain" Governance Model

Many areas of governance that are regulated in other jurisdictions fall within Canada's "comply-or-explain" regime under National Instrument 58-101 (NI58-101). For example, the compositions and charters of the compensation committee and of the nominating and governance committee are not mandated, but rather are the subject of best practice guidelines and disclosure requirements. The Ontario Securities Commission (OSC) and most other Canadian securities regulators have enhanced the comply-or-explain regime in the past few years to promote increased gender diversity among the leadership of public companies. TSX-listed issuers and other non-venture reporting issuers are now required to disclose annually, among other things, the number and percentage of women represented on boards and in executive officer positions; whether the issuer has adopted a written policy on the representation of women on the board (and if not, why not); and whether any targets have been adopted regarding female representation on the board or in executive positions (and, again, if not, why not). Canada's federal government has also approved amendments to the federal corporate statute that will require annual diversity disclosure, including (but not limited to) gender, by all federally incorporated public companies. Despite efforts to improve diversity among Canada's public companies, as in many other jurisdictions around the world, progress has been slow, and regulators and investors remain focused on the need for reporting issuers to make meaningful improvements in the representation of women and other under-represented groups among their leadership. Securities regulators continue to evaluate Canada's comply-or-explain regime and whether increased disclosure is warranted.

National Policy 58-201 (NP58-201) sets out 18 best practices drawn from existing Canadian standards and U.S. regulatory standards. Issuers are not required to comply with the standards set out in NP58-201, but are required to disclose information about their governance practices as set out in the associated disclosure rule, NI58-101. Canadian securities regulators are also considering whether to supplement the comply-or-explain disclosure regime with additional governance guidelines in NP58-201.

Currently, NP58-201 recommends best practices in the following areas:

- **Board Independence.** A majority of the board should be "independent." Generally, independence means the absence of any direct or indirect material relationship between the director and the issuer – that is, a relationship that could, in the view of the issuer's board, reasonably interfere with a member's independent judgment. Certain relationships are deemed to be material for this purpose. In late 2017, regulators commenced a consultation process seeking input from stakeholders on alternative approaches to assessing independence (e.g., a principles-based approach), the results of which are still pending. NP58-201 recommends regular *in camera* meetings for the independent directors and the separation of the positions of chair (which should be held by an independent director) and CEO. If these positions are not separated, an independent lead director should be appointed with appropriate responsibilities.
- **Role of the Board.** The board should have a written mandate that includes specified responsibilities. These responsibilities relate to organizational integrity, strategic planning, risk identification and management, succession planning, communications, internal controls, management information systems and corporate governance.
- **Position Descriptions.** The board should develop clear position descriptions for the chair of the board and the chair of each board committee. The board, together with the CEO, should develop a clear position description for the CEO.
- **Role of the Board in the Issuer's Integrity.** The board should play an oversight role with respect to the ethical framework of the organization. The board should satisfy itself as to both the integrity of the CEO and other senior officers and the culture of integrity they create throughout the organization. The board should approve a code of business conduct and ethics (and any amendments to the code). Any material departure from the code by a director or senior officer may need to be publicly disclosed.

National Policy 58-201 sets out 18 best practices drawn from existing Canadian standards and U.S. regulatory standards.

– **Board Effectiveness.** There should be a comprehensive orientation program for new directors and ongoing education for all directors, as well as regular board, committee and director assessments.

– **Nominating Directors.** The board should be responsible for nominating candidates for election by the shareholders. Before doing so, it should consider the competencies and skills the board requires as well as the competencies and skills the board as a whole currently possesses. It should consider the recommendations of a nominating committee composed entirely of independent directors. In making its recommendations, the nominating committee should also consider the competencies and skills required and those currently in place, as well as those that any new nominee would bring to the board. The nominating committee should have a written charter that includes specified provisions.

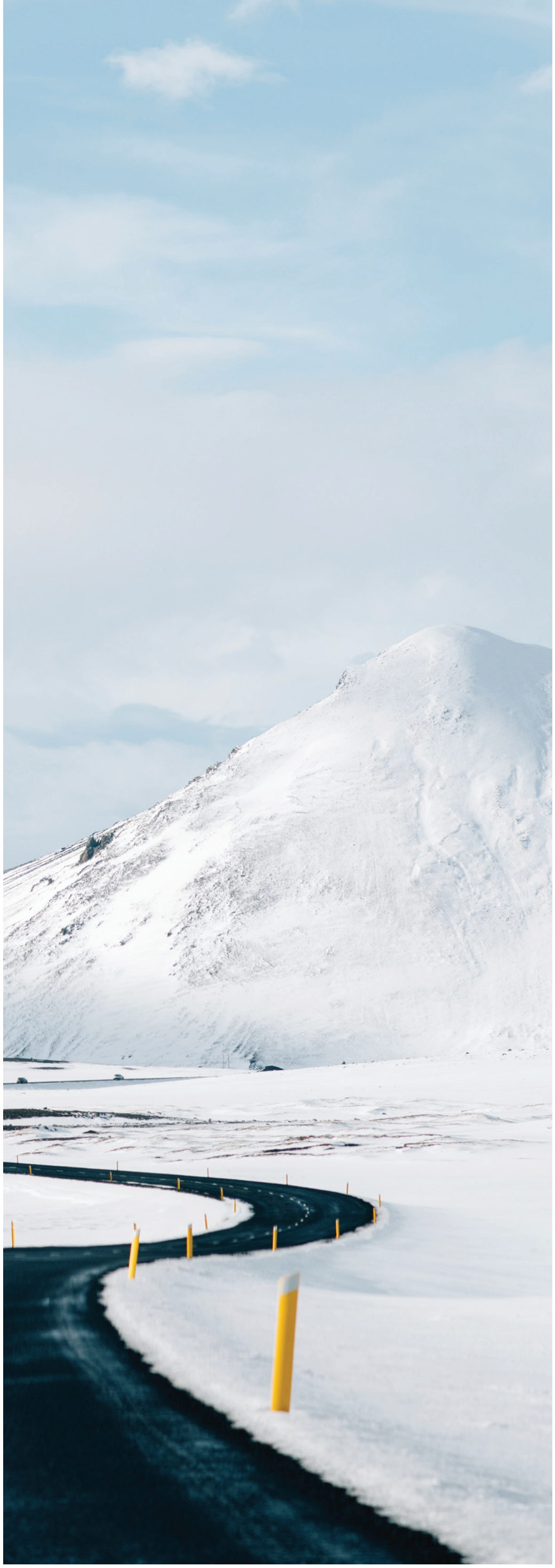
– **Executive Compensation.** The board should establish a compensation committee composed entirely of independent directors with a written charter and specified responsibilities. The compensation committee should be responsible for reviewing executive compensation disclosure before it is publicly disclosed and for making recommendations to the board with respect to CEO compensation (based on established corporate goals and objectives), non-CEO compensation, incentive-based compensation plans and equity-based compensation plans.

Many of the most significant changes in Canadian corporate governance standards have come about as a result of investor pressure.

Recent Trends and Developments

SHAREHOLDER ENGAGEMENT

Many of the most significant changes in Canadian corporate governance standards have come about as a result of investor pressure, as well as increased scrutiny of issuers' practices by shareholder advisory firms such as Institutional Shareholder Services (ISS) and Glass Lewis & Co., and by corporate governance watchdogs such as the Canadian Coalition for Good Governance (CCGG). For example, as a result of stringent pay-for-performance metrics established by ISS and Glass Lewis, many reporting issuers' executive compensation practices continue to face scrutiny and evolve as they strive to eliminate misalignments between executive remuneration and company performance that sometimes result in negative voting recommendations and voting outcomes on "say-on-pay" resolutions and director elections. In addition, relative to five years ago, more public companies across a broader range of industries are facing shareholder proposals on policy- and governance-related topics, including gender diversity, climate change and executive compensation; such proposals are enjoying increasingly higher levels of support.



Over the past few years, shareholder engagement has been focused on by Canadian public companies. Engagement can come in many forms and in varying degrees of aggressiveness. Establishing mechanisms to facilitate direct engagement between an issuer's significant investors and non-executive members of its board is now widely considered to be a key component of good corporate governance. A good shareholder engagement framework can help a company build relationships with its shareholders, gain insight into their views and concerns on a multitude of environmental, social and governance issues, and serve as a powerful defence against activism and shareholder dissatisfaction. By engaging with shareholders, a board can proactively address shareholders' concerns that might otherwise manifest themselves as very public shareholder proposals or proxy contests.

PROXY ACCESS AND BOARD COMPOSITION

One key aspect of shareholder engagement that has recently received significant attention in Canada is proxy access – a mechanism by which significant shareholders gain direct input into the director nomination process by having their nominees included in management's proxy materials. CCGG advocates that Canadian companies voluntarily adopt proxy access as a means of enhancing shareholder engagement and improving board composition. Following the first two Canadian proxy access bylaw proposals made during the 2017 proxy season, which saw mixed success, two major Canadian banks voluntarily adopted proxy access policies. Although the adoption of proxy access in Canada is certainly an important development and is being followed by other major Canadian financial institutions, we do not expect an explosion of proxy access proposals in the coming year or two. Canada's existing shareholder proposal and meeting requisition mechanisms, combined with corporate law and stock exchange rules that are different from those in the United States, provide a robust regime that many view as sufficient for fostering shareholder engagement and democracy without the need for proxy access. It remains to be seen, however, whether Ontario's legislature will implement a form of proxy access as a statutory right under corporate law. In any case, we expect many investors will continue to scrutinize, and may demand greater input into, issuers' director nomination and selection processes through some means or another.

The separation of the positions of CEO and chair is also very common in Canada and advocated by different stakeholders. Director term limits and mandatory retirement policies, now also the subject of Canada's comply-or-explain regime, continue to attract the attention of proxy advisory firms and shareholder advocacy groups that focus on maximizing board accountability. It is also common for public companies to have in place skills or competency matrices and robust assessment programs as part of their ongoing review of board composition and effectiveness, as well as nominating and succession planning policies.

MAJORITY VOTING

Canadian public companies, other than issuers that are majority controlled, are required by the TSX rules to adopt majority voting, which allows investors to vote annually for individual directors rather than for a slate and provides for a mechanism whereby directors must tender their resignation if a majority of votes are withheld from them. A board is required to accept such resignations, other than in "exceptional circumstances" (which must be publicly disclosed). TSX guidance on the issue suggests that issuers proposing to retain a director who fails to receive 50% plus one shareholder votes in his or her favour must meet a high bar, requiring truly exceptional non-recurring reasons. Canada's federal government recently adopted amendments to the federal corporate statute that will implement "true majority voting" for all federally incorporated public companies. The amended statute requires each director to receive annually a majority of "for" votes cast by shareholders in order to be validly elected; a director who fails to receive majority support may remain in office only until a successor is appointed or elected, up to a maximum of 90 days after the meeting. Ontario's provincial government is also considering amendments to its corporate statute that would implement true majority voting, with very limited discretion left to boards to fill vacancies resulting from directors failing to receive majority support.

SAY-ON-PAY

Say-on-pay votes are not currently mandatory in Canada. However, annual advisory say-on-pay votes on executive compensation have become the norm in Canada and were put to the shareholders of approximately 80% of S&P/TSX 60 Index issuers in 2017, compared with just over 50% in 2011. Most Canadian issuers that have adopted say-on-pay practices are putting forward advisory, non-binding resolutions substantially in the form recommended by CCGG. Although say-on-pay votes typically enjoy relatively strong shareholder support, each year some Canadian public companies suffer a failed say-on-pay vote – typically those that received negative vote recommendations by ISS and Glass Lewis due to pay-for-performance misalignments. Ontario's provincial government is also considering amendments to its corporate statute that would permit shareholders to adopt executive compensation policies that would be binding on a board of directors.

SHAREHOLDER ACTIVISM

Shareholder activism also continues in Canada – although the number of resulting formal proxy contests has declined dramatically since its record high in 2015. The decline in proxy contests belies a robust level of activism in its quieter form, with shareholders and boards engaging privately to effect change and reconcile their competing views on corporate strategy and governance. Boards are becoming more receptive to engaging with both significant shareholders and activist investors. Activists are increasingly achieving their objectives without the need for a public threat of a contest. Some boards and management teams are even finding it fruitful to bring activists into the tent (with appropriate confidentiality agreements in place) so that shareholders can play a consultative role regarding the board as it develops its strategy, evaluates its governance structure or negotiates a transaction. Recent cases involving a private placement by an issuer in the face of a proxy contest, on the one hand, and a takeover bid, on the other hand, also provide important insights for boards and management considering such tactics in the face of contested situations.

VOTE BUYING

Soliciting dealer arrangements have historically been used in merger and acquisition transactions. In these arrangements registered investment dealers are paid a fee for each security successfully solicited to be voted on a matter or tendered to a takeover bid. These arrangements received significant attention when Agrium Inc. employed them to help elect its slate of director nominees in defence of a proxy contest launched by JANA Partners LLC in 2013 – a tactic dubbed “vote buying.” Institutional shareholders, corporate governance watchdogs and the media heavily criticized the tactic. Following a reprise of vote buying in a 2017 proxy contest, Canadian securities regulators are now examining it (and soliciting dealer arrangements more broadly), with a view to assessing whether additional guidance or rules regulating soliciting dealer arrangements would be appropriate.

CLIMATE CHANGE AND OTHER ENVIRONMENTAL, SOCIAL AND GOVERNANCE CONSIDERATIONS

Climate change risks and related disclosure have come into focus over the last two years. Earlier this year, Canadian securities regulators reported on their 2017 review of issuers’ disclosure of risks and financial impacts associated with climate change and the governance processes related to them. Substantially all investors and stakeholders that were consulted by the regulators expressed dissatisfaction with the state of climate change–related disclosure. In contrast, a substantial number of issuers noted little or no demand on the part of investors and other stakeholders for climate change–related information. Issuers may very well have a different perspective today. In late 2017, for example, 30 Canadian and international financial institutions and pension funds, representing approximately C$1.2 trillion in assets under management, issued a joint declaration calling on issuers to commit to enhanced disclosure of their exposure to climate change risks and the measures they are taking to manage them. Issuers appear to have responded: fast-forward to 2018, when Glass Lewis noted in its 2018 proxy season preview report a marked improvement in climate change–related disclosure over the few months preceding its report.

More generally, investors are increasingly concerned with environmental, social and governance factors and their impact on shareholder returns and sustainable growth. For example, in his 2018 annual letter to CEOs, BlackRock, Inc.'s chair and CEO, Larry Fink, stated that to prosper over time and drive sustainable long-term growth, every company must, among other things, show how it makes a positive contribution to society, to the benefit of all stakeholders, including shareholders, employees, customers and the communities in which companies operate.

Conclusion: Directors in the Hot Seat

In addition to the specific issues mentioned above, corporate governance generally continues to be a hot topic in Canada and abroad, with significant implications for the leadership of Canadian issuers. Standards continue to evolve, requiring ongoing oversight and attention by boards and senior management, and making it more important than ever that they stay abreast of the issues. For example, due partly to a high-profile plan of arrangement transaction that occurred during 2016–17, in 2017 certain Canadian securities regulators issued important guidance on the role of boards and special committees and their processes and disclosure obligations in the context of material conflict of interest transactions regulated under Multilateral Instrument 61-101. Similarly, a wave of Canadian and U.S. IPOs in the past few years using various forms of dual-class share structures has also cast scrutiny on the potential governance challenges these structures create, with some critics questioning their appropriateness and calling for a "one-vote-per-share" principle consistent with some other jurisdictions.

Perhaps most challenging for boards will be balancing new and evolving corporate governance practices and trends against existing demands and established priorities that compete for the attention of directors. Nevertheless, public companies' leaders should expect a sustained focus by investors and governance watchdogs on initiatives to improve shareholder input into their strategies and environmental, social and governance practices. These include topics such as climate change, risk-management (including relating to sustainability, cybersecurity risks, corruption risk and risks associated with new and emerging technologies), diversity, board-shareholder engagement (including proxy access and shareholder proposals), executive performance and compensation, long-term strategy, and board composition and effectiveness.

For more information about these and other issues relating to corporate governance, please refer to Davies' annual *Governance Insights* reports available on the firm website at dwpv.com.

CHAPTER 04

Financing a Business Operation

Corporations may raise capital in several ways, the most common of which are equity and debt financings.

Debt financing may be provided to the corporation by the shareholders, in addition to capital provided by purchasing shares; by third parties such as banks and other financial institutions; or by offering debt securities in the capital markets. Canadian chartered banks, Canadian subsidiaries or branches of foreign banks and other financial institutions, such as merchant banks and life insurance companies, are all active in providing financing to private and public corporations in Canada. Third-party lenders may require that the corporation's shareholders maintain a certain level of equity investment. Lenders may also require personal guarantees from the shareholders of small private corporations.

Two principal forms of debt financing are available from third-party lenders: operating financing and term financing. Operating financing, as the name suggests, usually finances the ongoing operations of the business; term financing is usually made available for capital investment or acquisitions. Both operating and term financing generally bear interest at a fluctuating rate linked to market rates of interest. Term financing may require scheduled repayments over a defined period of time.

Two principal forms of debt financing are available from third-party lenders: operating financing and term financing. Operating financing, as the name suggests, usually finances the ongoing operations of the business; term financing is usually made available for capital investment or acquisitions.

Secured Debt Financing

Lenders providing debt financing, whether on an operating basis or on a term loan basis, may require security for their loans. The security will often consist of a charge covering all assets of the borrower, including inventory, accounts receivable, capital assets, such as machinery and equipment and, in some instances, real estate. The exact nature of the security taken in each instance will depend upon the financial situation and bargaining power of the borrower and the nature of the assets available to secure the debt.

Property is categorized in two ways in Canadian law: real or immovable property (land, buildings and property that is permanently attached to land) and personal or movable property (generally anything not attached to land, including vehicles, equipment, shares, inventory, accounts receivable and other intangibles).

Security may be taken in real or immovable property through a mortgage or charge or, in Québec, through a hypothec. In each case, the secured party must register its security against the property in question in order to protect its security interest and ensure its priority as against third parties.

Where security is taken on personal or movable property, a lender may have to effect registrations in a number of jurisdictions across (or even outside) Canada in order to protect its security interest, since personal property security is primarily (although not exclusively) under provincial jurisdiction.

Ontario's *Personal Property Security Act* is modelled on Article 9 of the U.S. *Uniform Commercial Code*. All other Canadian common law provinces have similar, but not identical, legislation. With some exceptions, the Act applies to every transaction that in substance creates a security interest, including a lease that secures payment or performance of an obligation, and any lease of goods with a term of more than one year. To perfect its security interest, a secured party must either take control of the property secured or register a financing statement at a searchable computerized registry, depending on the type of collateral. Further registrations are required in certain circumstances, such as a debtor name change or a transfer of collateral, and to effect a renewal.

The *Civil Code of Québec* generally provides for a single form of consensual security: the hypothec. A hypothec is a charge on movable (personal) or immovable (real) property that is granted to guarantee the performance of any present or future obligation and subsists only so long as such obligation continues to exist. The security created by a hypothec is set up against third parties by the registration of a notice in registries established for that purpose or by the secured party taking delivery or control of the secured property. Further publications are required in certain circumstances, such as a debtor name change. Québec has rules relating to the timing of registration and to the execution and form of security that can differ from those applicable in the other Canadian provinces.

The federal government has authority to legislate over personal property security in limited areas such as shipping, railways and certain security taken by Canadian banks. Although the federal intellectual property statutory schemes do not deal comprehensively with the taking of security interests, security agreements can generally be filed against intellectual property with the Canadian Intellectual Property Office. If a debtor's intellectual property is of significant value, a lender will generally register security against it both provincially and federally.

Securities Regulation

In Canada, securities regulation is within provincial jurisdiction, and each province and territory has securities regulatory legislation that is, broadly speaking, comparable to that of the United States. The Supreme Court of Canada confirmed in 2011 that the day-to-day regulation of securities is under provincial jurisdiction, and struck down the Canadian federal government's proposed federal securities legislation as unconstitutional. However, the federal government and the provinces of Ontario, British Columbia, Saskatchewan, New Brunswick and Prince Edward Island and Yukon Territory have agreed to establish a cooperative capital markets regulatory system and have invited all other provinces and territories to participate.

The securities laws, regulations and rules and the policies of the securities commissions across Canada are generally similar in most respects. The prospectus requirements, the exemptions from these requirements and continuous disclosure obligations of reporting issuers (that is, public companies) are substantially harmonized across Canadian jurisdictions and further harmonization initiatives are ongoing. However, the lack of complete consistency in securities regulation across the Canadian jurisdictions can complicate securities offerings that are made in more than one jurisdiction, particularly where discretionary exemptive relief is required or novel issues are encountered.

A "security" is broadly defined in Ontario securities legislation as, among other things, any document evidencing title to or an interest in the capital, assets, profits or property of a person or company. A number of different types of agreements and instruments involving monetary consideration are specifically included in the definition of "security," including notes, stocks, bonds, debentures, certificates of interest, transferable shares and options, or any option, subscription or other interest in or to a security. Depending on the circumstances, both equity and debt financing instruments may come within the definition of security and may therefore be subject to applicable provincial securities legislation. In addition, the Ontario securities regulator takes the position that cash-settled derivatives that permit an investor to obtain economic exposure to an underlying asset without acquiring ownership of the underlying asset are securities subject to the application of Ontario securities legislation.

A "security" is broadly defined in Ontario securities legislation as, among other things, any document evidencing title to or an interest in the capital, assets, profits or property of a person or company.

Generally, in each Canadian jurisdiction, a distribution of securities must be qualified by a prospectus that is cleared by the relevant provincial or territorial securities regulatory authority, unless an exemption from this requirement is available. A distribution of securities includes a trade by an issuer in previously unissued securities and a trade in securities from a person who is a "control person" in respect of the issuer. A person is presumed to be a "control person" in respect of an issuer if that person holds more than 20% of the voting rights attached to the securities of the issuer. In addition, certain trades in securities that were previously acquired under an exemption from the prospectus requirements are deemed to be distributions, but securities of a reporting issuer that were acquired under such an exemption are generally freely tradable after a four-month hold period.

The most useful exemptions from the prospectus requirements for a foreign entity financing a business in Canada are the following:

– The *accredited investor exemption* permits certain qualified investors, including institutional investors and persons or companies that meet income or asset tests, to acquire securities on a prospectus-exempt basis.

– The *substantial purchase exemption* permits a person (other than an individual) to acquire securities on a prospectus-exempt basis whereby each purchaser invests cash in an amount of $150,000 or more.

These two prospectus exemptions do not require purchasers to be provided with a disclosure document. However, in Canadian provinces other than British Columbia, Québec and, in respect of the accredited investor exemption, Alberta (where a disclosure document is "voluntarily" provided to purchasers), a purchaser will have a right of action against the issuer or selling securityholder for rescission or damages if the disclosure document contains a misrepresentation. There may also be a right of action against the directors of the issuer or selling securityholder or the dealer, if any, through which the sale was made. If a disclosure document is provided to a purchaser in connection with a trade under these two prospectus exemptions, a copy of the disclosure document generally must be filed with, and fees paid to, the securities regulator.

A distribution of securities includes a trade by an issuer in previously unissued securities and a trade in securities from a person who is a "control person" in respect of the issuer.

Canadian securities legislation requires continuous disclosure of any material changes in the affairs of reporting issuers and also includes provisions relating to insider trading and takeover bids.

Several key steps have been taken to grant foreign issuers easier access to the Canadian financial markets. In 1991, a cooperative effort between Canadian provincial securities regulators and the U.S. Securities and Exchange Commission (SEC) resulted in a system known as the multijurisdictional disclosure system, or MJDS. Under the northbound MJDS, securities may be offered by a U.S. issuer in Canada primarily in accordance with SEC rules. Rights offerings, takeover and issuer bids, business combinations, offerings of debt and preferred shares that have received an approved rating, as well as offerings of equity and other securities by certain large issuers, are included in the MJDS.

Qualified Canadian issuers can similarly access U.S. capital markets via the southbound MJDS rules. Under the southbound MJDS, securities may be offered by a Canadian issuer in the United States using a prospectus prepared in accordance with Canadian securities rules with certain additional disclosure. A Canadian "foreign private issuer" (other than an "investment company" under U.S. legislation) may use the southbound MJDS if it has been subject to the continuous disclosure requirements of any provincial securities regulator for 12 calendar months and the aggregate market value of the equity shares of the issuer is at least US$75 million.

The primary benefit for a Canadian issuer of using the southbound MJDS is that the review is conducted by Canadian securities regulators, not the SEC (though the SEC reserves the right to review when it has reason to believe that there is a problem with the filing or the offering). In addition, the applicable regulatory review periods are those prescribed by Canadian securities laws, which tend to be considerably shorter than those under U.S. securities laws.

Stock Exchange Listing

The principal stock exchanges in Canada are the Toronto Stock Exchange (TSX) and the TSX Venture Exchange (TSXV). The TSX lists securities of larger, more established companies, whereas the TSXV serves the venture capital market. While each exchange offers alternative methods for listing, the most common type of new listing is in connection with an initial public offering for which a prospectus has been filed with Canadian securities regulators.

A company seeking to list on either exchange must submit a listing application together with a number of supporting documents. The company must provide data to demonstrate that it is able to meet the financial, public float and other listing requirements of the exchange. Once listed, a company must continue to comply with the exchange's ongoing requirements. These include obtaining the approval of the exchange prior to effecting certain share issuances or other changes in the company's capital structure (which may also require shareholder approval). The exchanges also impose corporate governance and disclosure standards that are in addition to those mandated by applicable corporate and securities laws.

CHAPTER 05

Mergers & Acquisitions

The governing principle behind takeover bid laws in Canada is that shareholders should be treated equally and, therefore, subject to certain exceptions, all shareholders must be offered the same consideration or choice of consideration.

Canada has a well-established corporate and securities law framework for the acquisition of Canadian public companies. Acquisitions of public companies in Canada usually take the form of a takeover bid, which is an offer to purchase shares made by the acquirer directly to shareholders of the target company. Alternatively, an acquisition can take the form of a plan of arrangement or an amalgamation, which are statutory procedures subject to approval by the shareholders of the target company at a shareholders' meeting. Acquisitions in Canada can occur on a negotiated (or "friendly") basis with the support of the target company or on an unsolicited (or "hostile") basis without the support of the target company (in which case a takeover bid would generally be the only practical structure).

Takeover Bid

A takeover bid is an offer to purchase shares of a public company that is made by the acquirer to the shareholders and is subject to the deposit of a requisite number of shares by shareholders accepting the offer. Takeover bids are specifically regulated by Canadian securities legislation. Although each province and territory in Canada has its own securities commission or similar regulatory authority and its own legislation, a national instrument has been adopted to harmonize the rules regarding takeover bids in all Canadian jurisdictions.

CONSIDERATION

An acquirer of a Canadian public company by way of a takeover bid can pay with cash, securities or a combination of cash and securities. The governing principle behind takeover bid laws in Canada is that shareholders should be treated equally and, therefore, subject to certain exceptions, all shareholders must be offered the same consideration or choice of consideration.

Like the United Kingdom and unlike the United States, Canada has a "fully financed" rule with respect to takeover bids. This rule means that an offeror commencing a takeover bid must have adequate financing arrangements in place to ensure the payment of the cash purchase price to the shareholders at the expiry of the bid. This does not mean that the offeror must have the cash on hand when the takeover bid is commenced, but rather, if it does not have the cash on hand, it must have an adequate commitment from a lender to provide the financing. Unlike the U.K. rules, the Canadian takeover bid rules do not require that a third party (e.g., a financial adviser) confirm that financing is fully available to the offeror.

If the acquirer is offering securities as consideration, it must take into account a number of factors. The takeover bid circular would need to include prospectus-level disclosure regarding the acquirer, including in certain cases pro forma financial statements giving effect to the acquisition. The acquirer may also become subject to ongoing public disclosure requirements in Canada. A takeover bid circular offering security consideration is not subject to approval from the Canadian securities regulators. However, if the issuance of the securities is also subject to U.S. securities laws, a plan of arrangement may be a preferred structure in order to take advantage of an exemption from the U.S. registration requirements that is available for Canadian arrangements. Although a tax deferral for shareholders of the target company is not available when target shares are exchanged for securities of a foreign entity, an "exchangeable share" structure can be utilized to provide such tax deferral.

PROCESS

A takeover bid can be commenced in one of two ways: by mailing a takeover bid circular and offer to the shareholders; or, in the case of an unsolicited, or hostile, bid, by placing an advertisement in a newspaper. A takeover bid is required to be open for acceptance for at least 105 days in Canada, but may be open for longer and may be extended by the offeror. In a negotiated or friendly bid, the period during which shares may be deposited under a takeover bid may be shortened to a minimum of 35 days. In any event, the target company must prepare and send the shareholders – no later than 15 days after the date of the bid – a directors' circular recommending to shareholders whether they should accept or reject the bid or stating that the board of directors is unable to make a recommendation.

After the expiry of the initial deposit period, if all the conditions to completion of the bid have been met or waived, the offeror must extend the period during which shares may be deposited under the bid for at least 10 days. After the expiry of the takeover bid, the offeror "takes up" (accepts the tenders of shares and announces that it is completing its bid) and pays for the shares tendered to the bid.

Under Canadian securities laws, an offeror may not take up shares deposited under a takeover bid if 50% or less of the outstanding shares (excluding the shares held by the offeror and any person acting jointly or in concert with the offeror) have been deposited under the bid. If less than 100% of the outstanding shares have been tendered to the bid (which is usually the case), the acquirer may acquire the remaining shares in one of two ways. If 90% or more of the outstanding shares have been tendered, corporate law in Canada generally allows the offeror to "force out" the remaining shareholders at the same price paid under the takeover bid by sending a notice to the non-tendering shareholders. Such shareholders then only have the right to receive such consideration or to exercise a dissent right to apply to a court to determine the "fair value" for their shares. If less than 90% but more than 66 2⁄3% of the outstanding shares have been tendered, the offeror may proceed to a second-step amalgamation or arrangement transaction with the target company whereby the remaining shareholders are squeezed out for the same consideration as in the takeover bid (subject to a dissent right). An amalgamation or arrangement generally requires 66 2⁄3% shareholder approval. Given that the shares acquired by the offeror under the bid can be counted toward the required 66 2/3% approval, this would ensure that the vote on the amalgamation or arrangement would be favourable. Since a second-step transaction requires the holding of a shareholders' meeting, it adds another period of approximately 35 to 45 days following the expiry of the takeover bid to complete the acquisition of all the shares.

Under Canadian securities laws, a takeover bid made by an insider of the target company, including a person that holds shares carrying more than 10% of the voting rights attached to all the outstanding shares of the target company, is subject to an obligation to obtain an independent formal valuation of the target shares, subject to certain exemptions.

Arrangement or Amalgamation

A plan of arrangement is a flexible statutory procedure that can include steps such as the acquisition of shares and other securities of the target company by the acquirer. A plan of arrangement is very common in negotiated M&A deals in Canada due to the flexibility of the structure. An amalgamation is a statutory combination or "merger" of two or more corporate entities. In an acquisition of a Canadian public company by way of amalgamation, a special purpose company formed by the acquirer amalgamates with the target company, and the shareholders of the target receive the acquisition consideration. Arrangements and amalgamations require approval by the shareholders of the target company (typically 66 2/3%). In addition, an arrangement requires court approval.

CONSIDERATION

An acquirer of a Canadian company by way of plan of arrangement or amalgamation can pay with cash, securities or a combination of cash and securities. Unlike the rules that govern takeover bids, there is no specific prohibition on offering different consideration or providing different treatment to different shareholders. However, if related parties of the target company are offered different consideration or if they receive a "collateral benefit," it may be necessary to obtain an independent formal valuation of the target shares, as well as approval by a majority of the votes cast by minority shareholders at the shareholders' meeting. A typical example of different treatment would be an acquisition by a private equity buyer whereby management is required to reinvest a portion of the proceeds or to take a portion of the proceeds as an equity interest in the acquired business.

If securities are to be offered as consideration, the issues discussed above in the context of takeover bids would also be relevant.

Arrangements and amalgamations require approval by the shareholders of the target company (typically 66 2/3%). In addition, an arrangement requires court approval.

An arrangement or amalgamation can be completed in one step and, from a practical perspective, lowers the threshold of acceptance for the transaction as compared to a takeover bid.

PROCESS

To implement a plan of arrangement, a target company applies to the court for a procedural order to set the level of shareholder approval required for the transaction (which is generally 66 2⁄3% of the votes cast at the shareholders' meeting) and the procedures for the shareholders' meeting to approve the transaction. The target company then mails an information circular to its shareholders and holds a meeting to approve the transaction (generally approximately 30 days following such mailing). The target then returns to the court for a ruling on the fairness of the transaction. For an amalgamation, there is a similar shareholder meeting process, but there is no need to obtain any court orders or approvals. Following shareholder and, in the case of an arrangement, court approval, the parties would close the transaction.

Transactions by way of plan of arrangement or amalgamation can generally only be undertaken on a friendly basis ("friendly" being a relative term, because an activist shareholder could acquire board positions or otherwise exert pressure and force a transaction that the board of the target company was not originally willing to consider).

A transaction by way of plan of arrangement provides the parties with an enhanced level of flexibility, because stock options or other convertible securities can be dealt with and tax planning steps implemented in the arrangement steps. An arrangement or amalgamation can be completed in one step and, from a practical perspective, lowers the threshold of acceptance for the transaction as compared to a takeover bid (in scenarios where an acquirer is seeking to acquire 100% of a target company, a takeover bid is typically subject to the tender of at least 66 2⁄3% of all outstanding shares, whereas an arrangement or amalgamation is subject to the approval of 66 2⁄3% of the votes cast by shareholders represented at the shareholders' meeting – which representation will most likely be less than 100%). However, the element of court approval for an arrangement and the court hearing on the fairness of the transaction provide a forum for shareholders (and other stakeholders) to seek to prevent the transaction if they are opposed to it. Due to the flexibility provided by arrangement structures, acquisitions of Canadian public companies by way of amalgamation have not been as common as acquisitions by way of plan of arrangement.

Negotiated Acquisition

Negotiated, or friendly, acquisitions in Canada are typically sequenced so that the acquirer provides a non-binding indication of interest to the target company and, in certain cases, the target company may provide the acquirer with the right to negotiate exclusively with the target company. Before due diligence access is provided, the target company will request that the acquirer execute a confidentiality agreement with, in many cases, a standstill provision restricting the acquirer from proceeding with an unsolicited acquisition. Typically, the acquirer will complete its due diligence investigations before a definitive acquisition agreement is signed because it is rare for a definitive agreement to contain a due diligence condition.

In assessing a change of control transaction, the directors of the target company have a fiduciary duty to act in the best interests of the company. Generally, the board of directors is required to seek the best value reasonably available in the circumstances, but the board does not need to conduct an auction or "market check" in every change of control transaction.

The definitive acquisition agreement will provide for, among other things, the technical steps to implement the transaction and the support of the target company's board of directors for the acquisition. The definitive agreement would generally contain provisions preventing the target company from soliciting, or responding to, alternative acquisition proposals from third parties. However, it would be customary for there to be a "fiduciary out" permitting the target company's board of directors to respond to a proposal that is superior to the agreed transaction and to terminate the definitive agreement in order to accept the superior proposal, subject to the target company paying a break-up fee to the acquirer (typically in the range of 2% to 4% of the transaction value). In certain circumstances, there may be a "go shop" provision allowing the target company to actively seek alternative proposals for a limited period of time after entering into the definitive acquisition agreement. It is also typical for the acquirer to have the right to match any superior proposal in order to preserve its transaction. The acquirer may also enter into lock-up agreements with major and management shareholders of the target company in order to obtain their commitment to support the transaction. In appropriate circumstances, other forms of "deal protection" may be available, such as the granting of an option to the acquirer to purchase an asset of the target company or the issuance of shares of the target company to the acquirer concurrent with the execution of the definitive agreement.

The definitive acquisition agreement will provide for, among other things, the technical steps to implement the transaction and the support of the target company's board of directors for the acquisition.

Prior to approving the entering into of the definitive acquisition agreement, the target company's board of directors would typically receive an opinion from its financial advisers that the consideration offered in the transaction is fair to the shareholders of the company from a financial point of view. Upon entering into the definitive agreement, the target company would issue a news release announcing the transaction.

The general approach taken to disclosure of an acquisition transaction is that disclosure must be made when the parties have agreed on the price and structure of the transaction. Practically speaking, this generally coincides with the time that the parties enter into the definitive acquisition agreement. There have been examples of target companies making earlier disclosure, but this has not become the norm. However, the Toronto Stock Exchange may require the target company to disclose the existence of merger negotiations if market activity indicates that trading is being unduly influenced by rumours.

Unsolicited Acquisition

Unsolicited, or hostile, takeover bids for Canadian public companies are not unusual. Unsolicited bids are made to bypass the board of directors of the target company and take the offer directly to shareholders. A takeover bid is generally the only practical transaction structure available for an unsolicited acquisition. Unlike in the case of a negotiated acquisition, the acquirer in an unsolicited takeover bid does not have access to confidential due diligence information and does not receive the cooperation of the target company in seeking regulatory approvals for the acquisition. However, in many cases the target company may later agree to a negotiated transaction – for example, if the offer price is increased.

Less commonly, a target company may seek to enhance shareholder value through alternative means such as a recapitalization, spinoff or strategic alliance.

Until recently, Canadian unsolicited bids were considerably easier and took far less time than unsolicited transactions in the United States because there were fewer structural and other takeover defences available in Canada than in the United States. Changes made in 2016 to the takeover regime in Canada have made it less easy to successfully complete a hostile takeover bid, mostly due to the increase in the period for which the bid must remain open from 35 days to 105 days. However, Canadian public companies, in contrast to U.S. ones, remain unlikely to simply "just say no" in the face of an unsolicited offer. In light of the inability of Canadian target companies to utilize structural defences for an extended period of time, the success of an unsolicited bid will depend primarily on whether the target company is able to find a superior alternative transaction or to otherwise convince the shareholders to reject the bid. The most typical response of a Canadian company subject to an unsolicited takeover bid is to conduct an auction process or market check to seek superior alternatives. Less commonly, a target company may seek to enhance shareholder value through alternative means such as a recapitalization, spinoff or strategic alliance. Any defensive tactic that denies or materially limits the ability of shareholders to respond to a bid will likely be scrutinized by securities regulators in Canada.

A shareholder rights plan or "poison pill" has traditionally been the primary defensive mechanism available to target companies in Canada. A rights plan may be pre-existing or it may be implemented as a tactical plan in the face of or in response to an unsolicited bid. It has become common practice for an unsolicited bidder faced with a rights plan to request that Canadian securities regulators nullify the rights plan in order to provide shareholders with the opportunity to consider the bid. The regulators have generally nullified rights plans in the range of 45 to 70 days from the start of the bid when these plans have outlived their legitimate purpose of permitting the target company to develop alternatives to the unsolicited bid. Therefore, in Canada (unlike in the United States) shareholder rights plans have not been used to completely shield target companies from bids. Now that the minimum bid period has been extended to 105 days, giving target companies more time than under the former regime to evaluate alternatives and attempt to pursue other transactions, and that bids must be extended for a minimum of 10 days thereafter, it is unlikely that plans will be allowed to be used to further postpone the time when shares can be taken up by the offeror. However, pre-existing rights plans may still be used to prevent "creeping" bids whereby the offeror buys large blocks of shares of the target company through limited private acquisitions that are exempt from the takeover bid requirements.

More recently, Canadian courts have heard challenges of private placements being attempted in response to a hostile takeover bid. One of the key takeaways of the court decisions is that in order for a private placement to succeed in a context of an unsolicited bid, it must not merely be a defensive tactic and must have a legitimate financing purpose.

For additional information, visit Davies' website at dwpv.com to view our publication *Canadian Mergers and Acquisitions — A Guide for Foreign Investment Banks and Bidders*.

CHAPTER 06

Foreign Investment

Any non-Canadian who proposes to establish a new business or acquire an existing business in Canada should be aware of the provisions of the federal *Investment Canada Act* (ICA). The purpose of the ICA is to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada. The Investment Review Division (IRD), which is part of Innovation, Science and Economic Development Canada, is responsible for administering the ICA and for promoting and reviewing significant non-cultural investments in Canada by non-Canadians. Investments in cultural businesses are reviewed under the ICA by the Department of Canadian Heritage.

The purpose of the ICA is to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada.

Application of the *Investment Canada Act*

In general, any acquisition by a non-Canadian of control of a business carried on in Canada will be either notifiable or reviewable under the ICA. Whether such an acquisition is notifiable or reviewable will depend on the value of the assets of the Canadian business being acquired. The ICA applies even if the business is not currently controlled by Canadians. It also applies where a Canadian business is acquired indirectly through the acquisition of a foreign corporation with a Canadian subsidiary.

Notification, when required, may be made either prior to closing or within 30 days of closing and involves the filing of only very basic information concerning the investor and the acquired business. Notification does not represent an impediment to an acquisition.

However, if an acquisition is subject to review under the ICA, it may not be completed unless the Minister of Innovation, Science and Economic Development or, in the case of an acquisition of a "cultural business," the Minister of Canadian Heritage is satisfied that the acquisition is likely to be of "net benefit to Canada."

Investments to establish new Canadian businesses are always subject to notification. In certain limited circumstances, an investment to establish a new cultural business may also be subject to review.

In addition to the general requirements for notification or review, the ICA also contains broad provisions allowing the federal government to review any acquisition on national security grounds.

What Is a Canadian Business?

The term "Canadian business" is defined in the ICA to mean a business carried on in Canada that has (i) a place of business in Canada; (ii) an individual or individuals in Canada who are employed or self-employed in connection with the business; and (iii) assets in Canada used in carrying on the business. The term "business" is, in turn, defined to include any undertaking or enterprise capable of generating revenue and carried on in anticipation of profit.

Who Is a Non-Canadian?

A "non-Canadian" is an individual, government, government agency or entity that is not a "Canadian." An individual is a "Canadian" for the purposes of the ICA if he or she is a Canadian citizen or a permanent resident of Canada who has been ordinarily resident in Canada for not more than one year after first becoming eligible to apply for Canadian citizenship. (Permanent residents may apply for Canadian citizenship after three years in Canada.)

The rules for determining whether a corporation is a Canadian under the ICA are complex and essentially require a determination whether the individuals who are the ultimate controlling shareholders of the corporation are "Canadians." When shares in a corporation are owned by a partnership, joint venture or certain trusts, the ICA deems such shares to be owned by the partners, joint venture members or beneficiaries. This "look through" principle does not apply to corporations.

Determining whether shareholders are Canadian may be practically impossible in the case of a widely held corporate acquirer, in which case the determination may be based on the citizenship or permanent resident status of the members of the board of directors of the acquirer. In this case, a corporation would be "Canadian" only if it is not controlled in fact through ownership of its voting shares and at least two-thirds of the members of its board of directors are Canadians.

There are also special rules for determining whether partnerships and trusts are "Canadian."

Acquisition of Control

The ICA contains detailed provisions defining the concept of an "acquisition of control." In summary, these provisions provide that control can be acquired only through the acquisition of (i) voting shares of a corporation; (ii) "voting interests" of a non-corporate entity (which for partnerships and trusts means an ownership interest in the assets of the entity that entitles the owner to receive a share of the profits and to share in the assets on dissolution); or (iii) all or substantially all of the assets of a Canadian business. The acquisition of shares of a non-Canadian company with a Canadian division, but no Canadian subsidiaries, is not an acquisition of control of a Canadian business within the meaning of the ICA.

For the purposes of determining whether an investor has acquired control of a corporation, the following general rules apply:

– Acquisition of a majority of voting shares is deemed to be acquisition of control.

– Acquisition of one-third or more, but less than a majority, of voting shares is presumed to be acquisition of control unless it can be shown that the acquired shares do not give control in fact to the investor.

– Acquisition of less than one-third of voting shares is deemed not to be acquisition of control.

Similarly, for the purposes of determining whether an investor has acquired control of a non-corporate entity, the following general presumptions apply:

– Acquisition of a majority of voting interests is deemed to be acquisition of control.

– Acquisition of less than a majority of voting interests is deemed not to be acquisition of control.

Thresholds for Review

FACTORS

Acquisitions are subject to review under the ICA if they exceed certain prescribed financial thresholds. If the relevant thresholds are not exceeded, the only requirement by the foreign investor is to submit a relatively straightforward notification within 30 days following closing. (However, even when the net benefit review thresholds are not exceeded, an ICA review may take place on national security grounds. See National Security Review, below.) Investments to establish a new Canadian business (other than a cultural business) are not subject to net benefit review – the only requirement is to submit a notification.

The thresholds for net benefit review vary depending upon several considerations, including the following:

– Is the foreign investor or the Canadian business being acquired ultimately controlled by trade agreement investors?

– Is the foreign investor or the Canadian business being acquired ultimately controlled by World Trade Organization (WTO) investors?

– Is the acquisition of control direct or indirect?

– Is the foreign investor a state-owned enterprise (an SOE)?

– Is the Canadian business a cultural business?

Trade Agreement Investors

Under the ICA, generally an individual will be a trade agreement investor if he or she is a “national” of a country (other than Canada) that is a “trade agreement country” – that is, a country that has a trade agreement with Canada. Currently, the list of trade agreement countries includes Chile, Colombia, Honduras, Mexico, Panama, Peru, South Korea, the United States and the European Union and its member states. (The list of trade agreement countries may change as the Canadian government enters or exits trade agreements in the future.) Further, a corporation or other entity will be a trade agreement investor if it is ultimately controlled by one or more trade agreement investors. A widely held public company will generally be a trade agreement investor for the purposes of the ICA (i) if a majority of the voting shares of the public company are owned by trade agreement investors; or (ii) if no person or voting group controls the company, at least two-thirds of the members of the company’s board of directors are any combination of trade agreement investors and Canadians.

WTO Investors

In general, an individual will be a WTO investor if he or she is a "national" of a country (other than Canada) that is a member of the WTO or has a right of permanent residence in a WTO member country. Similar to the definition of a trade agreement investor, a corporation or other entity will be a WTO investor if it, in turn, is ultimately controlled by one or more WTO investors. A widely held public company will generally be a WTO investor for the purposes of the ICA (i) if a majority of the voting shares of the public company are owned by WTO investors; or (ii) if no person or voting group controls the company, at least two-thirds of the members of the company's board of directors are any combination of WTO investors and Canadians.

Indirect Acquisition

Generally speaking, an "indirect acquisition" for the purposes of the ICA occurs if an investor is acquiring control of a corporation that is incorporated outside Canada and controls an entity in Canada carrying on a Canadian business.

State-Owned Enterprise

An SOE is broadly defined to include a foreign government or government agency, or an entity that is controlled or influenced, directly or indirectly, by a foreign government or government agency. The ICA does not define the term "influenced," but it is clear that it would include something less than legal control. In addition, the ICA gives the Minister the discretion to deem an entity to be non-Canadian if the Minister is satisfied that the entity is controlled in fact by one or more SOEs. Moreover, the Minister has discretion to determine that an investment by a state-owned enterprise constitutes an acquisition of control in fact even if it is below the otherwise applicable thresholds.

Cultural Business

The acquisition of a Canadian business that is a cultural business is subject to lower review thresholds under the ICA because of the perceived sensitivity of the cultural sector. A "cultural business" includes a business that carries on any of the following activities: (i) publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine-readable form, other than the sole activity of printing or typesetting of books, magazines, periodicals or newspapers; (ii) production, distribution, sale or exhibition of film or video recordings; (iii) production, distribution, sale or exhibition of audio or video music recordings; (iv) publication, distribution or sale of music in print or machine-readable form; or (v) any radio communication in which the transmissions are intended for direct reception by the general public and any radio, television and cable television broadcasting undertakings as well as any satellite programming and broadcast network services.

Note in this regard that there is no *de minimis* exception to the determination whether a business is a cultural business. A business will be considered a cultural business even if its cultural activities represent only a small part of its overall operations. Moreover, the Responsible Minister may decide to review the acquisition of control of a Canadian cultural business even if the acquisition does not trigger any of the relevant thresholds.

APPLICABLE REVIEW THRESHOLDS

Summarized briefly, an acquisition of a Canadian business that exceeds the thresholds stated below will be subject to review under the ICA.

1. The Canadian business is controlled by a trade agreement investor or is being acquired by a trade agreement investor:

i. Direct acquisitions will be reviewable only when the value of the entity carrying on the Canadian business and all other acquired entities in Canada (not limited to their assets in Canada) is equal to or greater than C$1.5 billion in enterprise value of assets unless the investor is an SOE or the Canadian business is a cultural business (see below).

ii. For these purposes, in the case of an acquisition of control of a Canadian business that is publicly traded, the enterprise value of the assets of the Canadian business is the market capitalization of the entity plus the entity's total liabilities (excluding operating liabilities) and minus the assumed cash and cash equivalents. Market capitalization is determined on the basis of the average daily closing price of each class of security outstanding multiplied by the average number of that security outstanding, calculated over a prescribed period.

   In the case of an acquisition of control of a Canadian business that is not publicly traded or in the case of an asset acquisition, the enterprise value of the assets of the Canadian business is the acquisition value plus total liabilities assumed (excluding operating liabilities) of the business acquired and minus the assumed cash and cash equivalents.

   Starting on January 1, 2021, and for subsequent years, the $1-billion threshold will be adjusted annually on the basis of GDP growth.

2. When the Canadian business is controlled by a WTO investor or is being acquired by a WTO investor that is not a trade agreement investor, direct acquisitions will be reviewable only when the value of the entity carrying on the Canadian business and all other acquired entities in Canada (not limited to their assets in Canada) is equal to or greater than C$1 billion in enterprise value of assets unless the investor is an SOE or the Canadian business is a cultural business (see below).

3. When the WTO investor is an SOE, the threshold for direct acquisitions is currently C$398 million in *book* value of assets (this threshold is adjusted on an annual basis).

4. "Indirect" acquisitions by or from a WTO investor (including an acquisition by an SOE) will not be reviewable but will be subject to notification only unless the acquisition involves a "cultural" business and the relevant threshold is exceeded (see below):

   i. A direct acquisition will be reviewable if the *book* value of the relevant assets involved exceeds C$5 million.

   ii. An indirect acquisition will be reviewable if the *book* value of the relevant assets involved exceeds C$50 million.

5. Finally, neither the investor nor the vendor is a trade agreement investor or a WTO investor:

   i. A direct acquisition will be reviewable if the *book* value of the relevant assets involved exceeds C$5 million.

   ii. An indirect acquisition will be reviewable if the *book* value of the relevant assets involved exceeds C$50 million.

The Review Criterion: Net Benefit to Canada

If an acquisition is subject to review, the Minister must be satisfied that the proposed acquisition is likely to be of "net benefit to Canada." The ICA requires the Minister to take into account certain factors, including (i) the effect of the acquisition on the level and nature of economic activity in Canada (including employment in Canada); (ii) the degree and significance of participation by Canadians in the Canadian business in particular and in the relevant industry in general; (iii) the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada; (iv) the effect of the investment on competition in the relevant industry or industries in Canada; (v) the compatibility of the investment with Canadian industrial, economic and cultural policies, taking into account the policy objectives of affected provinces; and (vi) the effect of the investment on Canada's ability to compete in world markets. The IRD and Canadian Heritage have released specific policies with respect to the application of these criteria to various sectors, including the book publishing, film and uranium industries in Canada.

When the acquirer is a foreign SOE, ICA guidelines state that the net benefit to Canada review will focus particularly on whether the acquirer adheres to Canadian standards of corporate governance and whether the Canadian business will continue to operate on a commercial basis. In addition, investments by foreign SOEs to acquire control of a Canadian oil sands business will be found to be of net benefit on an exceptional basis only.

If an acquisition is subject to review, the Minister must be satisfied that the proposed acquisition is likely to be of "net benefit to Canada."

In order to establish net benefit under these criteria, the Minister usually requires undertakings from the acquirer. Typical undertakings relate to maintaining certain employment levels in Canada, guaranteeing participation of Canadians as directors and in management, processing resource products in Canada, making capital expenditures or investing in research and development in Canada and transferring technology to Canada. However, NAFTA imposes certain restrictions on the types of undertakings that the Minister may require from NAFTA investors. The concept of a “NAFTA investor” is similar to the definition of a “WTO investor,” except that it refers to individuals who are “nationals” of the United States or Mexico.

In order to establish net benefit under these criteria, the Minister usually requires undertakings from the acquirer.

Consultations

When IRD or Canadian Heritage receives an application for review, it will consult with all the provinces in which the Canadian business has assets or employees, as well as federal government departments with relevant expertise. This allows the affected provinces and departments to review the proposed investment and inform IRD and/or Canadian Heritage if they have any concerns or objections. Finally, the Competition Bureau is charged with providing advice regarding the effect of the investment on competition in the relevant industry or industries in Canada.

Timing of Review Procedure

The ICA sets out certain time limits for the review procedure. Within 45 days after a completed application has been received, the Minister must either indicate whether he or she is satisfied that the investment is likely to be of net benefit to Canada or extend the review period for a further 30 days, following which the Minister must indicate whether he or she is satisfied that the investment is likely to be of net benefit to Canada. (However, if the Minister requires more time, the investor may be requested to consent to an extension of the review period.) If the Minister has advised the applicant that he or she is not satisfied that the investment is likely to be of net benefit to Canada, the applicant has the right to make representations and submit undertakings within 30 days of the date of the notice of the Minister’s decision (or any longer period that may be negotiated).

Prohibitions and Remedies

Non-Canadians who implement a reviewable investment in contravention of the ICA may be ordered to divest themselves of control of the acquired Canadian business. Generally, the ICA prohibits the implementation of an investment until the completion of the Minister’s review, but this prohibition does not apply in some circumstances, including an acquisition of control of a corporation incorporated outside Canada or where the Minister is satisfied that the delay in implementing the acquisition would result in undue hardship. However, if closing before completion of the review is permitted, subsequent divestiture could be required if the Minister is not ultimately satisfied that the transaction is likely to be of net benefit to Canada. If a NAFTA investor has acquired a cultural business that is required to be disposed of under the ICA, the federal government may acquire all or part of the cultural business.

National Security Review

Irrespective of whether an investment is subject to net benefit review, it may also be reviewed to determine if it "could be injurious to national security."

Under this process, the federal Cabinet may, on the recommendation of the Minister, order a national security review. If Cabinet orders a review, the Minister is required to send a notice to the investor that the investment will be reviewed, and the proposed transaction cannot be completed while the review is pending. If the transaction has already been completed, a review can still be ordered (and remedies, including divestiture of the Canadian business, can still be required) following implementation of the transaction.

The expression "national security" is not defined in the ICA, and there are no monetary thresholds that must be exceeded to trigger a national security review. Moreover, the general net benefit review threshold requirement that there be an acquisition of control of a Canadian business has been relaxed so that a national security review could occur when there has been an acquisition "in whole or in part" of an entity carrying on all or any part of its operations in Canada if the entity has (i) a place of operations in Canada; (ii) an individual or individuals in Canada who are employed or self-employed in connection with the entity's operations; or (iii) assets in Canada used in carrying on the entity's operations.

The national security review is carried out by the Minister in consultation with the Minister of Public Safety and Emergency Preparedness. The Minister has until 45 days following the filing of a notification or an application for review, or until 45 days following implementation of a transaction not subject to notification or review, to issue a notice to a non-Canadian that its proposed investment may be subject to a national security review (alternatively, a national security review can be initiated within the same time period without a notice first being sent). The entire review process can take up to 200 days, or more if extended.

If the Minister is satisfied following the review that the investment would be injurious to national security, the federal Cabinet is authorized to take any measures that it considers advisable to protect national security, including imposing conditions on the investment or the outright prohibition of a proposed investment (or divestiture in the case of a completed investment).

For additional information, visit Davies' website to view our publication *Investment Canada Act: Guide for Foreign Investors in Canada*.

Irrespective of whether an investment is subject to net benefit review, it may also be reviewed to determine if it "could be injurious to national security."

The national security review is carried out by the Minister in consultation with the Minister of Public Safety and Emergency Preparedness.

CHAPTER 07

Competition Law

Canada's competition laws are contained in a single federal statute called the *Competition Act*. In contrast to jurisdictions such as the United States, Canada does not have provincial competition laws, although several provinces have fair business practice laws directed primarily toward consumer protection.

Like many other countries, Canada has a complex set of competition laws. These laws, among other things, (i) prohibit cartel behaviour; (ii) prohibit abuses of a dominant position; (iii) regulate mergers and acquisitions; and (iv) otherwise govern the conduct of businesses in their relationships with competitors, customers and suppliers. Canada's competition laws are contained in a single federal statute called the *Competition Act* (CA). In contrast to jurisdictions such as the United States, Canada does not have provincial competition laws, although several provinces have fair business practice laws directed primarily toward consumer protection. With the exception of activities that are specifically exempted or actively regulated, all business activities in Canada are subject to the CA.

Administration and Enforcement of the *Competition Act*

The CA is administered by the Competition Bureau (Bureau), which is part of Innovation, Science and Economic Development Canada. The head of the Bureau is the Commissioner of Competition (Commissioner), who has the statutory responsibility for administering and enforcing the CA. Bureau staff routinely investigate complaints from the public concerning competition matters. The CA also permits, and in some cases requires, the Commissioner to commence a formal inquiry. Once an inquiry has been commenced, the Commissioner has a broad range of formal enforcement powers and may obtain authority from a court to (i) enter and search premises and seize records; (ii) require the production of records or the provision of written information; or (iii) require a person to appear and be examined under oath or affirmation. The Commissioner has increasingly resorted to the use of such powers over the past several years.

Civil matters under the CA (non-reviewable practices) are generally adjudicated by the Competition Tribunal (Tribunal), which is a specialized administrative body composed of judges of the Federal Court (Trial Division) and lay members. Criminal offences under the CA are prosecuted in the regular criminal courts.

Criminal Offences Under the *Competition Act*

CONSPIRACY

The CA contains a number of criminal offences, the most significant of which is the conspiracy offence. This offence prohibits agreements between competitors (or potential competitors) to fix or increase prices; to allocate sales, customers, territories or markets; and to fix or lessen production or supply of a product. Proof that the agreement would be likely to lessen competition is not required. Liability may be avoided, however, if the agreement is "ancillary" to a broader agreement that does not contravene the conspiracy offence and is reasonably necessary to give effect to the objective of that broader agreement.

As discussed below, the CA also contains civil provisions dealing with other agreements between competitors that prevent or lessen competition substantially. The Bureau has issued Competitor Collaboration Guidelines, which describe the Bureau's approach to determining whether to assess an agreement or collaboration between competitors under the criminal conspiracy provisions or the civil agreements provisions (or other provisions of the CA). These Guidelines indicate that the Bureau intends to apply the criminal provisions only to so-called naked restraints on competition falling into the categories enumerated above, which are described as "restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture." All other types of restraints that could be anti-competitive in nature are potentially subject to review under the civil agreements provisions discussed below.

BID RIGGING

Bid-rigging is the other principal criminal offence under the CA. The bid rigging offence applies to any agreement whereby a person (i) agrees not to submit a bid or tender in response to a call for bids or tenders; (ii) agrees to withdraw a bid or tender submitted in response to a call for bids or tenders; or (iii) submits a bid or tender that is arrived at by an agreement with another person, and that agreement is not disclosed to the person calling for the bid or tender before the time when such bid or tender is submitted or withdrawn. As with the criminal conspiracy offence, there is no requirement to show that the bid rigging had any effect on competition.

OTHER CRIMINAL OFFENCES

Other criminal offences under the CA include telemarketing, double ticketing, pyramid selling, conspiracy relating to professional sport and certain agreements among federal financial institutions. Misleading advertising can also be an offence if the misleading representation was made knowingly or recklessly.

This offence prohibits agreements between competitors (or potential competitors) to fix or increase prices; to allocate sales, customers, territories or markets; and to fix or lessen production or supply of a product.

Penalties

Commission of a criminal offence under the CA can result in significant fines and, in some cases, imprisonment. For example, conspiracy is punishable by up to 14 years' imprisonment, a fine of up to $25 million, or both. The trend in Canada is toward more frequent prosecutions of individuals and larger fines for conspiracy and bid-rigging offences.

Commission of a criminal offence under the CA can result in significant fines and, in some cases, imprisonment.

Unlike U.S. law, there is no limitation period relating to indictable criminal offences under the CA, such as conspiracy and bid rigging.

Immunity from Prosecution

The Commissioner has an immunity policy, which may allow an applicant who is "first in" to report a criminal offence (such as conspiracy or bid rigging) to receive a recommendation of immunity from prosecution in exchange for cooperation in the prosecution of others, provided that the applicant meets the other criteria set out in the immunity policy. Subsequent applicants may seek another form of lenient treatment, such as a reduction in sentence, but will not normally be eligible for a recommendation of immunity unless the first-in party ultimately does not qualify.

Non-Criminal Reviewable Matters Under the *Competition Act*

The CA also contains civil prohibitions ("reviewable practices") that are generally adjudicated by the Tribunal upon application by the Commissioner (or in some cases by private parties, with leave). Generally speaking, relief is available only upon a finding that the practice in question has had an anti-competitive effect in the relevant market, and is limited to an order enjoining the continuation of such conduct. One important exception in this regard is the civil prohibition against "abuse of dominance," which carries with it the potential imposition of an "administrative monetary penalty," as discussed in the section immediately following below.

ABUSE OF DOMINANT POSITION

The Tribunal may, on application by the Commissioner, make an order requiring, among other things, that a person pay an administrative monetary penalty of up to $10 million (and up to $15 million for each subsequent order) or cease certain conduct or dispose of assets or shares if it finds that

a) one or more persons substantially or completely control a class or species of business throughout Canada or any part of Canada;

b) such person or persons have engaged, or are engaging, in a practice of anti-competitive acts; and

c) the practice has had, is having or will likely have the effect of preventing or lessening competition substantially.

A company may be considered to "control a class or species of business" if it has sufficient market power to set prices above competitive levels in a market for a considerable period of time. If a company has a very large market share, it will very likely have market power, but considerations such as the number of competitors and their respective market shares, excess capacity in the market and ease of entry will also be taken into account. Further, it is not necessary for a person to compete in a market itself in order for it to control that market. As a result, the abuse of dominance provisions could potentially apply, for example, to a large customer or supplier that might be considered to possess market power in an upstream or downstream market.

There is little definitive guidance on when a company will be found to have the degree of market power required to trigger the potential application of these provisions. However, when a company's market share is above 40%–45%, or the aggregate market share of a small group of companies that arguably might be "jointly dominant" exceeds this threshold, there is a danger that the abuse provisions could apply.

The CA contains a non-exhaustive definition of "anti-competitive acts." Generally speaking, the prohibition applies to any type of conduct that, if carried out by a person having market power, has a predatory, exclusionary or disciplinary effect on a participant in the relevant market.

PRICE MAINTENANCE

The Tribunal may make an order prohibiting a person from engaging in price maintenance or requiring a person found to be engaging in price maintenance to accept another person as a customer on usual trade terms. Price maintenance occurs where (a) a person either (i) by agreement, threat, promise or any like means has influenced upward, or discouraged the reduction of, the price at which its customer or another reseller of its product sells or offers to sell the product or (ii) has refused to supply a product to or has otherwise discriminated against another person because of the low pricing policy of that other person; and (b) such conduct has had, is having or is likely to have an adverse effect on competition.

AGREEMENTS THAT SUBSTANTIALLY PREVENT OR LESSEN COMPETITION

The Tribunal may, on application by the Commissioner, make an order prohibiting any person from doing anything under an agreement or arrangement between competitors if the Tribunal finds that the agreement or arrangement (whether existing or proposed) has, or is likely to have, the effect of preventing or lessening competition substantially. While this civil provision was only introduced in 2010 and has to date been the subject of little enforcement action, it is expected that the Commissioner will use this provision to deal with anti-competitive agreements among competitors where the criminal offence (discussed above) does not apply.

OTHER NON-CRIMINAL REVIEWABLE MATTERS

Other non-criminal reviewable matters under the CA include types of vertical restraints – that is, exclusive dealing, tied selling, market restriction and refusal to deal. These prohibitions apply where the practice in question has a negative impact on competition (such as a "substantial lessening of competition" or an "adverse effect on competition"). Misleading advertising can also be dealt with as a civil matter, where the requisite criminal level of culpability ("knowingly or recklessly") is not present.

Private Rights of Action

The CA allows a private party to sue for and recover "an amount equal to the loss or damage proved to have been suffered" as a result of a defendant engaging in conduct contrary to the criminal provisions of the CA or failing to comply with an order made pursuant to the CA.

In addition, the CA provides private parties with a limited right of access to the Tribunal under the refusal to deal, price maintenance, exclusive dealing, tied selling and market restriction provisions. Leave must be obtained from the Tribunal in order to bring such an application and damages are not available as relief.

Acquiring a Business in Canada

The CA also establishes a comprehensive framework for reviewing and controlling mergers and acquisitions in Canada. In addition, transactions that exceed certain financial thresholds and, in the case of share acquisitions, that exceed an additional voting interest threshold may be subject to pre-merger notification requirements and corresponding waiting periods. The CA applies to all mergers in Canada, while the *Investment Canada Act* targets the acquisition by non-Canadians of existing Canadian businesses and the establishment of new Canadian businesses by non-Canadians (see the Foreign Investment chapter of this Guide).

The CA applies to all mergers in Canada, while the *Investment Canada Act* targets the acquisition by non-Canadians of existing Canadian businesses and the establishment of new Canadian businesses by non-Canadians.

SUBSTANTIVE MERGER REVIEW

Any merger (defined to mean the acquisition or establishment, direct or indirect, of control over or a significant interest in all or part of a business of a competitor, supplier, customer or other person) may be challenged under the CA by the Commissioner before the Tribunal. The Commissioner may bring an application before the Tribunal in respect of a proposed merger or in respect of a completed merger provided that the application is made within one year of closing. The Tribunal may issue an order with respect to all or any part of a proposed merger and may dissolve a completed merger or order divestiture of assets or shares. Under certain circumstances, the Tribunal may also make any other order to which the Commissioner and the parties to the merger consent. The Tribunal also has the power to grant injunctive relief.

Before making any order, the Tribunal must determine that the merger prevents or lessens, or is likely to prevent or lessen, competition substantially in the relevant market. In making this determination, the Tribunal generally applies economic and legal analyses similar to those employed by U.S. courts in antitrust matters. Among the factors that the Tribunal may consider are the strength of remaining competition, whether the merger results in the removal of a vigorous competitor, whether the acquired business has failed or is likely to fail, the extent and availability of acceptable substitutes, barriers to entry, the ability of customers or suppliers to exert countervailing power, and innovation in the market. In addition, the CA includes an efficiencies defence that provides that the Tribunal will not issue a remedial order if it finds that the merger is likely to result in gains in efficiency that will be greater than and offset the anti-competitive effects.

Before making any order, the Tribunal must determine that the merger prevents or lessens, or is likely to prevent or lessen, competition substantially in the relevant market.

PRE-MERGER NOTIFICATION

In addition to the substantive review procedure that may apply under the CA, advance notification may be required for certain large mergers. Subject to certain exceptions, if a proposed acquisition of assets or shares, an amalgamation or other combination to establish an operating business in Canada exceeds certain prescribed thresholds and includes a Canadian operating business, the parties to the merger are required to notify the Commissioner in advance.

Parties to a notifiable merger transaction in Canada cannot complete the merger before the expiry of the statutory waiting period. This waiting period is similar to that in the U.S. merger review process under the *Hart-Scott-Rodino Antitrust Improvements Act*. The waiting period in Canada expires 30 days after the pre-merger notification filing unless, prior to the end of that 30-day period, the Commissioner issues a “supplementary information request” to the merging parties for production of documents and/or responses to questions. If such a request is issued, a new waiting period is triggered and expires 30 days after compliance with the request. The Commissioner may terminate or waive the waiting period (including the initial 30-day waiting period) at any time by issuing an advance ruling certificate or no-action letter indicating that the Commissioner does not intend to challenge the merger.

In the context of an unsolicited takeover bid, where a bidder files a pre-merger notification under the CA, the Commissioner is required to notify the target company immediately, whereupon the target company is required to file a pre-merger notification within 10 days. The timing of the target's response does not, however, affect the running of the waiting period.

In general, two size thresholds must be met for the mandatory pre-merger notification rules to apply.

First, the parties to the merger, together with their affiliates, must have total assets in Canada or total annual gross revenues from sales in, from or into Canada with a value that exceeds $400 million. This is known as the "size of parties" test or threshold.

Second, the transaction itself must be of a minimum size. This is known as the "size of transaction" test or threshold. For acquisitions of assets or the formation of an unincorporated business combination, the aggregate value of the Canadian assets acquired or contributed, or the annual gross revenues from sales in or from Canada from such assets, must exceed $92 million (this is the threshold for 2018; it is reviewed annually). Share acquisitions are subject to mandatory pre-merger notification when the aggregate value of the Canadian assets or annual gross revenues from sales in or from Canada of the corporation whose shares are acquired and all other corporations controlled by that corporation would exceed $92 million. In addition, the acquisition must result in the acquirer holding a minimum percentage of voting shares for the mandatory pre-merger notification rules to apply. In the case of public corporations, this threshold is more than 20% (or 50% if more than 20% of the voting shares are already owned); in the case of private corporations, this threshold is more than 35% (or 50% if more than 35% of the voting shares are already owned).

Both the "size of parties" threshold and the "size of transaction" threshold must be exceeded for a transaction to be subject to pre-merger notification under the CA. It is important to note, however, that the Bureau may review (and possibly challenge) a transaction even if it is not subject to formal pre-merger notification.

CHAPTER 08

Tax Considerations

This chapter provides a summary of certain considerations arising from Canadian income tax, sales taxes and other taxes that may be relevant to persons considering doing business in Canada.

Income Tax

LEGISLATION

Income tax is imposed in Canada by the federal government and by the provincial and territorial governments.

The federal government levies income tax under the *Income Tax Act* (the Tax Act). It covers federal income tax for individuals and other taxpayers, including corporations and trusts, whether resident in Canada or non-resident. A partnership is generally a flow-through entity for Canadian tax purposes and not itself a taxable entity (unless deemed to be a "specified investment flow-through" partnership, as further discussed below). The Tax Act is administered by the Canada Revenue Agency (CRA).

Each provincial and territorial government levies income tax computed on a similar basis as federal income tax, at different rates.

For the remainder of this chapter, except where indicated otherwise, descriptions of taxation provisions refer only to the Tax Act.

JURISDICTION TO TAX

The primary basis for taxation is the residence of the taxpayer. Canada does not impose tax on the basis of citizenship.

Canadian residents are generally subject to income tax in Canada on their worldwide income, regardless of source, but are generally entitled to tax credits or deductions for foreign taxes paid.

Non-residents of Canada are subject to taxation on Canadian source income, subject to relief by way of rate reduction or, to a limited extent, elimination of Canadian tax, under a tax treaty.

The federal government levies income tax under the *Income Tax Act*. It covers federal income tax for individuals and other taxpayers, including corporations and trusts, whether resident in Canada or non-resident.

The following are the principal sources of non-residents' income that are subject to tax in Canada:

- income from a business carried on in Canada;
- income from an office or employment performed in Canada;
- gains realized on the disposition of "taxable Canadian property"; and
- certain types of passive income such as dividends paid by a Canadian corporation or rent from Canadian real estate.

TAXABLE CANADIAN PROPERTY

Taxable Canadian property generally refers to the following:

- real or immovable property situated in Canada;
- assets used in a business carried on in Canada;
- a share of a private corporation, an interest in a trust or an interest in a partnership of whose value more than 50% was derived from any combination of real or immovable property situated in Canada, Canadian resource property, timber resource property, or interests, options or rights in such property at any time in the 60-month period prior to the disposition of such shares or other interests (otherwise than through the ownership of shares or interests that are not themselves taxable Canadian property); and
- units of a mutual fund trust and listed shares of a corporation, where at any time during the 60-month period preceding the disposition, a 25% ownership threshold is exceeded and at that time more than 50% of the value of the units or shares was derived from any combination of real or immovable property situated in Canada, Canadian resource property, timber resource property, or interests, options or rights in such property.

DETERMINATION OF CANADIAN RESIDENCE

The term "resident in Canada" is not defined in the Tax Act. A person's residence is determined by common law criteria, subject to the specific deeming rules in the Tax Act that deem certain persons to be either resident or not resident in Canada.

A corporation incorporated in Canada after April 26, 1965 (or, in certain limited situations, before this date) is deemed to be resident in Canada.

There is no statutory rule that deems a corporation incorporated outside Canada to be resident in Canada. Under the common law test of residence, a corporation will be considered to be resident in Canada if its central management and control is located in Canada. Central management and control is generally considered to refer to the superior or directing decision-making in respect of a corporation that is normally exercised by its board of directors. As a result, the place where the board of directors exercises its decision-making powers will generally be the place in which the central management and control of the corporation is located.

In the case of an individual, the courts have generally held that residence is determined on the basis of the degree to which an individual "settles into or maintains" his or her ordinary mode of living at the

A corporation will be considered to be resident in Canada if its central management and control is located in Canada.

place in question. In addition, an individual will be regarded as establishing Canadian residency if he or she is ordinarily resident in Canada. The determination whether an individual is ordinarily resident in Canada depends on whether Canada is the place where the individual, in the settled routine of his or her life, regularly, normally or customarily lives. In addition, the Tax Act deems an individual who “sojourns” in Canada for 183 or more days during a year to be resident in Canada throughout that year.

In general, a trust will be resident in Canada for income tax purposes if one or more Canadian residents exercise the central management and control of the trust. A careful examination of the facts is necessary to determine where the central management and control of a trust is exercised. In addition, some non-resident trusts will be deemed to be resident in Canada in certain circumstances.

A taxpayer who is considered under Canadian domestic law to be resident in Canada and at the same time resident in another country may be deemed by an applicable tax treaty to be resident in only one country for tax purposes.

TAX TREATIES

Canada has an extensive network of treaties, with 93 treaties currently in force. The appendix to this chapter contains a complete list of the Canadian tax treaties in force as of June 3, 2018.

For many years the federal government has voiced its intention to curb “treaty-shopping” structures whereby a person not entitled to the benefits of a particular treaty invests in Canada through an entity resident in the relevant country to gain Canadian tax benefits under the treaty. Canada has been an active member of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project.

Canada (together with 77 other countries, but not the United States) signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) in 2017. The MLI is not a stand-alone tax treaty but modifies existing bilateral treaties involving countries that have signed the MLI. The MLI requires participating countries to agree to BEPS minimum standards with respect to treaty shopping and dispute resolution. Canada has listed 75 of its 93 tax treaties as Covered Tax Agreements, which will be affected by the MLI if Canada and the relevant Covered Tax Agreement partner ratify the MLI under their respective domestic laws.

The Canadian ratification process was initiated on May 28, 2018, when the MLI was tabled as a notice of ways and means motion in the House of Commons. The MLI is expected to come into force in 2019.

Upon signature of the MLI, Canada had indicated that it would adopt the OECD’s agreed minimum standard on treaty abuse and dispute resolution, and the mandatory binding arbitration provisions. Canada also initially entered reservations rendering the optional MLI provisions inapplicable to its Covered Tax Agreements. On May 28, 2018, however, Canada announced its intention to remove certain reservations and adopt four optional MLI provisions:

- a 365-day holding period ensuring that lower treaty-based rates of withholding tax on dividends will be made available only to companies holding shares for over 365 days, as opposed to those engaging in short-term share acquisitions (Article 8);

- a 365-day lookback testing period for the purposes of determining whether capital gains on a sale of shares (or similar rights in an entity) that do not derive a certain percentage of their value from real or immovable property are exempted from tax (Article 9);

- a provision on methods of resolving dual-resident entity cases (Article 4); and
- a provision intended to allow treaty partners to move from a tax exemption system to a foreign tax credit system as their method of providing relief for double taxation (Article 5).

With respect to the OECD's agreed minimum standard, Canada will adopt the principal purpose test (PPT) into each tax treaty listed as a Covered Tax Agreement. The PPT is a general anti-abuse rule that considers whether one of the principal purposes of an arrangement or transaction is to obtain treaty benefits in a way that is not in accordance with the object and purpose of the relevant treaty provisions. The federal government has announced its intention, where appropriate, to negotiate detailed "limitation of benefit" provisions into its treaties on a bilateral basis either in addition to or to replace the PPT.

Once the MLI is ratified by Canada, it will no longer be possible for Canada to add further reservations limiting the application of the MLI to its Covered Tax Agreements. However, Canada notes that it may remove certain reservations in order to render previously inapplicable provisions of the MLI applicable. Thus even after ratification, additional MLI provisions may enter into force and affect certain Covered Tax Agreements.

TAX REPORTING

Annual Tax Returns

Canadian resident taxpayers are generally required to file an annual income tax return. Partnerships that carry on business in Canada or that are "Canadian partnerships" (i.e., partnerships whose members are all Canadian residents) are generally required to file an annual information return.

Any non-resident of Canada who, in a taxation year, has a taxable capital gain or disposes of taxable Canadian property is generally required to file a Canadian tax return in respect of that year, unless no tax is payable by the non-resident for the taxation year or a prior taxation year and either the taxpayer has received a section 116 certificate in respect of each disposition of taxable Canadian property during the year (as discussed below) or such dispositions were exempt from the section 116 certificate requirements.

A non-resident corporation is required to file a Canadian tax return for any taxation year in which it carries on business in Canada directly or through a partnership. A non-resident individual carrying on business in Canada directly or through a partnership is also required to file a Canadian income tax return, but only in respect of a taxation year in which Canadian tax is owing by the non-resident on such business income.

The filing obligation generally applies regardless of whether the non-resident is entitled to relief from Canadian taxation under an applicable tax treaty.

Section 116 Certificates

There is a reporting and tax collection mechanism that applies to dispositions of most kinds of taxable Canadian property by non-residents. A non-resident vendor must notify the CRA in writing of such a disposition, providing particulars of the transaction, and is entitled to obtain a certificate (commonly referred to as a "section 116 certificate") from the CRA, upon satisfying the CRA that no Canadian tax is owing (e.g., because there is no gain or because any gain is exempt under an applicable tax treaty), or by paying 25% of the gain to the CRA on account of the ultimate tax liability or by posting acceptable security.

In addition, any person, whether a resident or non-resident of Canada, acquiring taxable Canadian property from a non-resident is required to withhold and remit to the CRA 25% of the purchase price or, where the non-resident vendor provides a section 116 certificate, 25% of the amount, if any, by which the purchase price exceeds the limit indicated in the section 116 certificate. The rate is increased to 50% for certain types of property, including depreciable property (e.g., machinery and equipment, and buildings). If the property is "taxable Québec property," an additional withholding applies, at a rate of 12.875% (30% where the 50% federal rate applies), and a separate certificate (equivalent to a section 116 certificate) must be obtained from the Québec tax authority. Failure to obtain a satisfactory section 116 certificate from the non-resident vendor or, alternatively, to make the required withholding and remittance, will make the purchaser liable for the amounts that should have been withheld and remitted.

These requirements do not apply to certain excluded property, such as listed shares, units of a mutual fund trust, debt securities and any "treaty-exempt property" (as defined in the Tax Act). A purchaser is also exempt from the withholding obligation under section 116 in respect of the acquisition of taxable Canadian property (other than certain specified taxable Canadian property, such as depreciable property) from a non-resident person where (i) the purchaser concludes after reasonable inquiry that the non-resident person is, under a tax treaty between Canada and a particular country, resident in the particular country; (ii) any gain from the disposition of the property would be exempt from Canadian income tax by virtue of such treaty; and (iii) the purchaser provides the CRA with notice of the acquisition within a specified period.

Income also includes one-half of the capital gain (referred to as the taxable capital gain) realized on a disposition of capital property, subject to reduction by allowable capital losses.

GENERAL RULES

Determination of Income

In very general terms, income for purposes of the Tax Act means income from business or property, income from office or employment and taxable capital gains.

Income from business or property is generally equivalent to the profit from the business or property calculated in accordance with "well-accepted principles of business (or accounting) practice" or "well-accepted principles of commercial trading," adjusted as required by specific rules in the Tax Act.

Income also includes one-half of the capital gain (referred to as the taxable capital gain) realized on a disposition of capital property, subject to reduction by allowable capital losses. The amount of the capital gain generally equals the proceeds of disposition less the sum of the adjusted cost base of the property under the Tax Act and any costs of disposition. If capital cost allowance (tax depreciation) has been taken in respect of the capital asset, part of the proceeds may be ordinary income (a recapture of the capital cost allowance previously claimed).

Employment income includes wages, bonuses and taxable employment benefits. Remuneration paid to directors constitutes income from employment. Deductions from employment income are very limited.

Employers are required to make regular "source deductions" for income tax and social security contributions from employees' income (including taxable benefits) and remit the amount to the tax authorities on behalf of the employees. Directors of corporations may be personally liable if a corporate employer fails to make or remit source deductions. Employers may also be required to pay provincial payroll taxes. Unless an employer obtains a waiver or is a non-resident entitled to an exemption from such withholding, withholding is required from non-residents' employment income for services performed in Canada, even if such income is exempt from tax under a tax treaty. Employee source deductions are not required on amounts paid by a "qualifying non-resident employer" (QNRER) to certain non-resident employees. A QNRER generally refers to a corporation that is resident in a country with which Canada has a tax treaty and is certified by the CRA.

The remainder of this section summarizes some key rules relevant to the computation of income for Canadian tax purposes and the taxation of common business entities.

Losses

Canadian rules do not permit formal loss consolidation or other relief within a corporate group; however, established techniques have been accepted by the CRA for shifting losses between members of the same corporate group, subject to certain limitations.

Non-capital losses of a taxpayer from business or property can generally be carried back three years or forward 20 years to reduce taxable income of the taxpayer.

Net capital losses may be carried back three years or forward indefinitely, but generally can be applied only against taxable capital gains.

Various anti-avoidance rules may apply to limit the availability of losses, including those that may be utilized after an acquisition of control of a corporation (or certain changes in the beneficiaries of a trust). A person or group of persons will be deemed to have acquired control of a corporation in certain circumstances in which the person or group acquires more than 75% of the fair market value of the corporation's shares but does not acquire legal control of the corporation.

Interest Expense and Other Financing Costs

Reasonable interest expense on funds borrowed or indebtedness incurred for the purpose of earning income from business or property is deductible on an accrual or cash basis (depending upon the method regularly followed by the taxpayer).

Non-interest costs, including commissions and fees, incurred to borrow money or incur debt for an income-earning purpose or to issue treasury shares are generally deductible on a straight-line basis over five years.

Various anti-avoidance rules may apply to limit the availability of losses, including those that may be utilized after an acquisition of control of a corporation.

Québec has legislation that limits the deductibility of financing costs to the amount of income generated by the investment. This rule applies only to individuals subject to tax in Québec.

Income from Shares

Taxable dividends received by a Canadian resident corporation from a "taxable Canadian corporation" are generally fully deductible to the recipient corporation (subject to the anti-avoidance rules in subsection 55(2) of the Tax Act), permitting dividends to pass up through a chain of taxable Canadian corporations without taxation. A taxable Canadian corporation is generally a Canadian resident corporation incorporated in Canada that is not exempt under the Tax Act by reason of special rules applicable in limited circumstances (e.g., Crown corporations, pension corporations). In general terms, subsection 55(2) may apply to deem a dividend received by a Canadian resident corporation from a "taxable Canadian corporation" to be a capital gain in certain circumstances. Subsection 55(2) will generally not apply where the dividend is paid out of "safe income on hand" (generally, the after-tax retained earnings attributable to the share on which the dividend was paid) or where a deemed dividend is paid in the course of certain qualifying reorganizations.

Dividends received by an individual are taxable, subject to the dividend tax credit, which reduces the effective rate of taxation on dividends paid by a taxable Canadian corporation and is intended to compensate (partially) for underlying corporate tax paid by the dividend payer. The dividend tax credit for certain "eligible dividends" more fully compensates individual shareholders for the underlying corporate tax paid.

Dividends received by a Canadian resident corporation from a non-resident corporation are included in income, subject to certain deductions permitted under the Canadian foreign affiliate rules and subject to the foreign tax credit rules. The foreign affiliate rules are complex, but, in general terms, provide that earnings from an active business carried on by a foreign affiliate in a jurisdiction with which Canada has a tax treaty, or in a non-treaty jurisdiction that has agreed to exchange tax information with Canada, may be repatriated to Canada free of *Canadian* tax. Canada currently has 23 tax information exchange agreements in force, with several others either signed but not yet in force or in the course of being negotiated.

Conversely, under the foreign affiliate rules, Canadian residents are required to include their share of the "foreign accrual property income" (passive income or income deemed to be passive) of a controlled foreign affiliate whether or not distributed to the Canadian resident.

Canadian residents are also required to include, in certain circumstances, an amount of deemed income in respect of an interest in any "offshore investment fund property."

A shareholder of a Canadian private corporation, whether resident in Canada or non-resident, is generally entitled to the return of share capital free of Canadian tax (including Canadian withholding tax). This is an important planning point for non-residents acquiring shares of a Canadian private corporation, especially since capital may be returned without first distributing earnings and profits by way of dividend.

Depreciation

Taxpayers are permitted deductions ("capital cost allowance") at prescribed rates in respect of depreciable property used in a business, including machinery and equipment, buildings and intangible property. Land is not eligible for tax depreciation. Capital cost allowance is generally computed by reference to the aggregate undepreciated capital cost of various asset classes and not the undepreciated capital cost of each individual asset.

Resource Expenditures

Canadian resource expenditures (other than expenditures related to the acquisition of tangible property, which would generally be treated as depreciable property) are classified as either Canadian oil and gas property expense (COGPE), Canadian development expense (CDE) or Canadian exploration expense (CEE). Expenditures related to the acquisition of Canadian oil and gas properties or rights (including oil sands properties) are generally classified as COGPE. Expenditures related to the acquisition of Canadian mining properties or rights are generally classified as CDE. Expenditures in respect of the exploration and development of Canadian resource properties are generally classified as either CDE or CEE.

Once classified as COGPE, CDE or CEE, the expenditures are added to the corresponding cumulative accounts. Subject to certain restrictions, a taxpayer may deduct in a taxation year 10% of its cumulative COGPE, 30% of its cumulative CDE and 100% of its cumulative CEE.

Some provinces, such as Québec, offer similar or additional incentives.

Capital Tax

The federal government imposes a capital tax on financial institutions at a rate of 1.25% of their "taxable capital employed in Canada" in excess of $1 billion.

Corporate Reorganizations

The Tax Act permits many corporate reorganizations to be effected on a "rollover" or tax-deferred basis to shareholders. Some reorganizations, such as share-for-share exchanges, are relatively straightforward from a tax perspective, whereas others, such as tax-deferred spinoffs, have complex statutory and administrative restrictions.

Partnerships

Although partnerships are not taxpayers per se under the Tax Act, a partnership is required to compute its income as though it were a taxpayer resident in Canada. Each member of the partnership includes in income the member's allocable share of the income, gain or loss of the partnership. Special rules apply to limited partners that may, in certain circumstances, restrict their ability to claim losses of a limited partnership allocated to them.

Trusts

Unlike partnerships, trusts resident in Canada are taxable entities under the Tax Act. However, certain trusts, including personal trusts and mutual fund trusts, may be eligible for an offsetting deduction in respect of amounts distributed to beneficiaries. The effect of such rules is to reduce (or eliminate) tax at the trust level. Such distributions are generally taxable in the hands of the beneficiaries.

As previously noted, the Tax Act may deem non-resident trusts to be resident in Canada in certain circumstances.

SPECIFIED INVESTMENT FLOW-THROUGHS

The Tax Act contains rules related to the taxation of certain publicly traded trusts and partnerships referred to as specified investment flow-through entities (SIFTs). Under the SIFT rules, SIFTs and their unitholders are taxed in a manner similar to corporations and their shareholders. Certain real estate investment trusts (REITs) are exempt from SIFT taxation. Certain cross-border income trusts that invest in non-Canadian assets may also be exempt from SIFT taxation.

GENERAL ANTI-AVOIDANCE RULE

The Tax Act contains a broadly worded anti-avoidance rule (GAAR) to prevent "abusive avoidance transactions." The rule supplements specific anti-avoidance rules in the Tax Act. GAAR is not intended to apply to a transaction that is undertaken primarily for bona fide purposes other than to obtain a tax benefit or that does not result in an abusive tax avoidance. If GAAR applies, the CRA may re-determine the tax consequences of a transaction or series of transactions, resulting in tax liability for one or more participants in the transaction(s).

The Tax Act also contains certain provisions that require the reporting of so-called aggressive tax-planning transactions. These transactions include those in which two of the three following hallmarks are present: (i) the fees of the adviser or promoter are based or contingent upon a resulting tax benefit or attributed to the number of participants or those offered an opinion or advice; (ii) the adviser or promoter has "confidential protection" (i.e., participants have an obligation not to disclose the transaction to third parties, including tax authorities); and/or (iii) any person, adviser or promoter receives "contractual protection" (i.e., any direct or indirect form of insurance against the tax risk of the transaction). Penalties for non-disclosure can be significant.

Québec has adopted similar rules, but Québec taxpayers have the option of disclosing a transaction that would otherwise not be subject to the aggressive tax reporting rules. If it is unclear whether GAAR applies, such a preventive disclosure can have the benefits of shortening the reassessment period within which Québec can challenge the transaction under GAAR and precluding Québec from assessing a penalty in respect of GAAR.

SPECIAL RULES FOR NON-RESIDENTS

Withholding Tax

A person resident (or deemed resident) of Canada who makes a payment to a non-resident in respect of most types of passive income (including dividends, rent and royalties) is generally required to withhold tax equal to 25% of the gross amount of the payment.

Interest that is "participating debt interest" and interest paid or credited by a Canadian resident to a non-arm's-length non-resident person is also subject to withholding tax. Conversely, interest that is neither "participating debt interest" nor subject to the "thin capitalization rules" is generally exempt from withholding tax when paid to an arm's-length non-resident person. The Canada-U.S. tax treaty generally eliminates withholding tax for payments of interest to non-arm's-length U.S. persons who are entitled to the benefits of such treaty. The Tax Act contains a number of anti-avoidance rules applicable to "back-to-back" arrangements intended to reduce withholding tax on certain interest or royalty payments by interposing an intermediary between the Canadian payor and a non-resident who would be subject to withholding tax at a higher rate if the non-resident had received the payment directly.

The Canada-U.S. tax treaty generally eliminates withholding tax for payments of interest to non-arm's-length U.S. persons.

The 25% withholding rate may be reduced under an applicable tax treaty. For dividends, the typical treaty rate is 15%, except where the shareholder is a corporation that beneficially owns 10% or more of the voting shares of the dividend payer, in which case the rate is generally reduced to 5%. The typical treaty rate on royalties is 10% and may be reduced to 0% on certain royalties.

If any member of a partnership is a non-resident, the partnership is itself deemed to be a non-resident under the Tax Act. Consequently, a payment by a Canadian resident to a partnership with any non-resident members is subject to full withholding tax. However, in practice, the CRA may permit the payer to look through the partnership and withhold on the basis of the residence and treaty status of the members of the partnership.

Although withholding tax is imposed on the non-resident recipient, the resident payer is required to deduct the tax and remit it to the CRA on behalf of the non-resident, failing which the resident payer becomes liable for the tax. The CRA expects – although this is not required by law – Canadian payers to obtain Forms NR301, NR302 and/or NR303 (depending on the legal status of the non-resident payees) from non-residents in respect of which withholding tax rates are reduced by an applicable tax treaty.

A non-resident carrying on business through a Canadian branch may be deemed to be a resident of Canada for purposes of the withholding tax rules. The effect of these rules is to make certain payments made by the non-resident to another non-resident subject to Canadian withholding tax.

A 15% "backup" withholding obligation is also imposed on payments made to non-residents in respect of services performed in Canada. This backup withheld amount may be refunded or credited to the non-resident when it files a Canadian tax return. A similar 9% backup withholding obligation applies to payments made to a non-resident for services performed in Québec.

Canadian Branch Versus Canadian Subsidiary

In general, from a Canadian income tax perspective, there is little difference between carrying on business through a Canadian branch of a non-resident entity and carrying on business through a wholly owned Canadian subsidiary. However, most branch assets are typically "taxable Canadian property" whereas shares of a Canadian subsidiary may not be (depending on the subsidiary's assets). Consequently, the sale of a subsidiary is much less likely to be subject to the section 116 certificate requirements discussed above than the sale of a branch. As discussed below, the thin capitalization rules also apply to a non-resident carrying on business in Canada through a Canadian branch. A non-resident branch performing services in Canada is also subject to the backup withholding discussed above.

A Canadian incorporated subsidiary of a non-resident corporation is a Canadian resident for Canadian income tax purposes and is therefore subject to tax in Canada on its worldwide income. Certain types of payments (including dividends, rent and royalties) made by a subsidiary to its non-resident parent are subject to withholding tax, as discussed above.

Similarly, Canadian tax will apply to the profits attributable to an unincorporated branch of a non-resident carrying on business in Canada. The allocation of items of income and expense between head office and the Canadian branch may be unclear and can result in ambiguity in the computation of branch income for purposes of the Tax Act. In addition, the Tax Act imposes a branch profits tax of 25% on the profits of a Canadian branch of a non-resident corporation not reinvested in Canada, subject to an applicable tax treaty. The branch profits tax is intended to parallel the dividend withholding tax.

Hybrid Entities

The corporate laws of Nova Scotia, Alberta and British Columbia permit the establishment of unlimited liability companies (ULCs). These entities are treated like regular Canadian resident corporations for Canadian tax purposes, but in the United States are eligible to be treated as flow-through entities for U.S. tax purposes. This dual or "hybrid" tax characterization can be a useful planning feature. However, as a result of specific provisions in the Canada-U.S. tax treaty, the use of a ULC by a U.S. resident must be carefully considered and may require additional steps or intermediate entities in order to be beneficial.

The Canada-U.S. tax treaty generally treats U.S. limited liability companies as look-through entities for the purposes of applying the provisions of such treaty.

The use of a ULC by a U.S. resident must be carefully considered and may require additional steps or intermediate entities in order to be beneficial.

Capitalization of a Canadian Corporation

A Canadian corporation may be capitalized with equity or with a combination of debt and equity.

As noted above, share capital of a Canadian private corporation can generally be returned to shareholders free of Canadian tax, including Canadian withholding tax applicable to non-resident shareholders.

A distribution to a shareholder in excess of such share capital will be deemed to be a dividend for purposes of the Tax Act. Deemed dividends to non-resident shareholders are subject to withholding tax in the same manner and at the same rate (including any reduced treaty rate) as regular dividends.

Repayment of principal loaned to a Canadian corporation by a non-resident shareholder is not subject to withholding tax, but, where applicable, tax must be withheld in respect of interest paid or credited on the loan.

Subject to the thin capitalization rule discussed below and the general limitations on interest expense and losses described above, a Canadian subsidiary may deduct interest paid or credited by it to a non-resident in computing its income.

Thin Capitalization and Interest Imputation

The thin capitalization rule is intended to prevent a Canadian-resident corporation or trust, as well as a non-resident corporation or trust that carries on business in Canada or earns rental income that is subject to tax on a net basis, or a partnership of which such a corporation or trust is a partner, from excessively reducing its taxable Canadian profits, and hence its liability for Canadian tax, by maximizing its interest expense to related non-resident creditors.

In very general terms, the Canadian business is denied an interest deduction to the extent that its "relevant debt" exceeds 1.5 times its "relevant equity." In certain circumstances, interest subject to the thin capitalization rules may be treated as a deemed dividend or trust distribution subject to withholding tax. These rules may also apply to loans made to a Canadian business by an arm's-length intermediary under back-to-back lending arrangements such as a back-to-back loan or guarantee given by a related non-resident person.

Conversely, where a Canadian resident corporation has made a loan to a non-resident, and such loan does not bear a reasonable rate of interest and has been or remains outstanding for more than a year, interest income calculated at a prescribed rate on the principal amount outstanding is imputed by the Tax Act to the Canadian lender. The amount of imputed interest is reduced by any amount of interest received by the Canadian resident corporation.

Moreover, if the loan is made to a non-resident shareholder of the Canadian resident corporation or a person connected with a shareholder (other than a foreign affiliate of the corporation) and is not repaid within one year of the end of the taxation year during which it was made, the principal amount of the loan may be deemed to be a dividend for Canadian withholding tax purposes.

Foreign Affiliate Dumping Rules

The Tax Act contains rules targeting so-called foreign affiliate dumping transactions. Although there are many variations, foreign affiliate dumping generally involves a non-Canadian parent transferring shares of a non-Canadian subsidiary to a wholly owned Canadian corporation for intercompany debt and shares of the Canadian corporation. The issuance of shares by the Canadian corporation is generally to comply with the debt-to-equity thin capitalization limit. The interest on the intercompany debt is deductible by the Canadian corporation, but the income from the foreign subsidiary is generally exempt from Canadian taxation under Canada's foreign affiliate system. This allows the Canadian corporation to use the interest expense on the intercompany debt to shelter income from its existing Canadian operations.

The debt-dumping provisions generally apply where a Canadian corporation is controlled by a non-resident parent; the Canadian corporation makes an investment in a foreign corporation that is, immediately after the investment, a "foreign affiliate" of the Canadian corporation; and the investment is not excluded from the application of the foreign affiliate dumping rules under statutory exceptions. Examples of such statutory exceptions are strategic acquisitions of a business that is more closely connected to the business of the Canadian corporation than to the business of any non-resident member of the multinational group; and corporate reorganizations. For these purposes, the term "investment" is defined broadly. Accordingly, due care must be exercised in any situation involving foreign affiliates of a Canadian corporation controlled by a non-resident parent.

The Tax Act contains rules targeting so-called foreign affiliate dumping transactions.

Where the rules apply, the consequences are as follows:

- The Canadian corporation is deemed to have paid, at the time it acquires the investment in the foreign subsidiary, a dividend to the foreign parent for withholding tax purposes in an amount equal to the fair market value of any non-share consideration paid by the Canadian corporation for such acquisition (the deemed dividend can be eliminated and replaced with a reduction of paid-up capital in certain circumstances).

- No amount will be added to the Canadian corporation's tax paid-up capital in respect of any shares issued by the Canadian corporation in consideration for the acquisition of the investment in the foreign subsidiary. This will prohibit any addition in the equity component of the debt-to-equity thin capitalization ratio and will impede the ability to extract assets from Canada on a tax-efficient basis in the future.

- No amount will be reflected in the contributed surplus of the Canadian corporation as a result of the acquisition of the investment in the foreign subsidiary for the purposes of (i) the debt-to-equity thin capitalization ratio; and (ii) the rules allowing for a conversion of contributed surplus to tax paid-up capital without triggering a deemed dividend.

TRANSFER PRICING RULES

Canada, like many other countries, employs transfer pricing rules to protect its tax base. The rules are designed to ensure that the income of Canadian taxpayers (and their corresponding Canadian tax liability) is not artificially reduced through non-arm's-length transactions with related non-residents.

In recent years, the CRA has become more aggressive in its auditing of transfer pricing records.

The transfer pricing rules apply to Canadian residents and to non-residents carrying on business in Canada; therefore, these rules are potentially relevant to both Canadian subsidiaries (and parent companies) and Canadian branches. The pricing of goods and the quantum of management fees, guarantee fees and royalties are common matters for transfer pricing scrutiny.

Where a Canadian taxpayer or a partnership participates in one or more transactions with a non-arm's-length non-resident and either (i) the terms of the transactions differ from those that would have been made by arm's-length persons or (ii) the transactions cannot reasonably be considered bona fide transactions entered into for non-tax purposes and would not have been entered into by arm's-length persons, then the CRA can make adjustments under the transfer pricing rules in the Tax Act, including imputing income or denying deductions.

In addition, penalties can be levied. Where a taxpayer's transfer pricing adjustments for a year exceed the lesser of $5 million and the taxpayer's gross revenue for the year computed in accordance with the Tax Act, a penalty equal to 10% of the total transfer pricing adjustments applies unless reasonable efforts were made to apply arm's-length terms. For these purposes, a taxpayer will be deemed not to have made reasonable efforts to apply arm's-length terms unless the taxpayer makes or obtains complete records of the transactions establishing the appropriateness of the transactions from a transfer pricing perspective no later than the taxpayer's tax return due date (or in the case of a partnership, its annual information return due date). This rule is often referred to as the contemporaneous documentation requirement.

The CRA has special audit powers in transfer pricing matters and can require that a taxpayer produce contemporaneous documentation within 90 days of the CRA making a formal request. In recent years, the CRA has become more aggressive in its auditing of transfer pricing records.

A Canadian corporation will be deemed to have paid a dividend to a non-arm's-length non-resident (other than a controlled foreign affiliate), even where such non-resident is not a shareholder of the Canadian corporation, where an excessive transfer price has been paid, thereby decreasing the Canadian corporation's assets and increasing the non-resident's assets. However, a non-resident is allowed to repatriate the amount of the transfer pricing adjustment to avoid the withholding tax on the deemed dividend.

TAX INCENTIVES AND SPECIAL REGIMES

The federal government and many provincial governments provide tax incentives for certain business activities in the form of tax credits, reduced tax rates and accelerated write-offs of qualifying expenditures. In addition, special tax regimes may apply to certain undertakings, notably, as discussed above, the exploration and development of resource properties. The applicable rules and eligibility criteria are complex and beyond the scope of this summary; however, some of the more common tax incentives available federally and in Ontario and Québec are noted below. In addition, the Tax Act provides reduced tax rates and certain other benefits to corporations that meet the definition of "Canadian-controlled private corporation" (CCPC), essentially a private Canadian corporation that is not controlled directly or indirectly in any way by one or more public corporations or non-residents or any combination of them.

Scientific Research and Experimental Development Incentives

The Tax Act contains generous incentives for "scientific research and experimental development" (SR&ED).

SR&ED means systematic investigation or research carried out in a field of science or technology that is basic or applied research or experimental development, including work with respect to engineering, design, operations research, mathematical analysis and testing. Some activities are explicitly excluded from SR&ED, including marketing, quality control, social science research, mineral or oil and gas exploration or production, commercial production and routine data collection.

SR&ED expenses incurred on income account generally include all expenses directly related to research and development, such as salaries, cost of materials consumed in SR&ED and overhead expenses directly related to SR&ED. A portion of payments to Canadian resident corporations or other entities, such as universities, for SR&ED conducted in Canada on behalf of the payer can also generally be included in SR&ED expenditures. Certain SR&ED expenditures made outside Canada – namely, salaries and wages of Canadian-resident employees carrying on SR&ED outside Canada, in support of SR&ED carried on in Canada by the taxpayer – may also qualify.

Broadly speaking, SR&ED incentives take the form of immediate deductions for qualifying current expenditures and a 15% investment tax credit that may be applied to reduce income tax owing. Investment tax credits may be carried over and applied in other taxation years subject to limits in the Tax Act. More generous SR&ED incentives are available to qualifying CCPCs – namely, a 35% fully refundable tax credit for the first $3 million of current SR&ED expenditures.

Provinces may also provide incentives for SR&ED carried on within their jurisdictions.

Québec provides for fully refundable income tax credits of up to 30% with respect to salaries paid to employees working on SR&ED projects undertaken in Québec. Other Québec incentives include a 28% tax credit for eligible expenditures for research carried out by a university or public research centre and a tax holiday (i.e., full or partial exemption from Québec income tax on employment income) for foreign researchers for up to five years.

Film Tax Credits

The federal government and many provincial governments, including Ontario and Québec, offer an array of incentives for film and video production in Canada. Incentives may also be available for films and videos produced outside Canada where the production corporation incurs eligible labour expenditures in Canada or the relevant province.

Sales and Other Taxes

GOODS AND SERVICES TAX

General Rules

Canada imposes a 5% goods and services tax (GST) on the consumption or use in Canada of most tangible or intangible property and the supply of services. A parallel system of input tax credits (ITCs) is designed to ensure that intermediate users of goods and services receive a credit for the GST they pay, so that only the final consumer or end-user in the chain of supply effectively bears the GST. GST is imposed under Part IX of the *Excise Tax Act* (ETA) and is administered by the CRA (except in Québec).

A person, whether resident in Canada or non-resident, who in the course of commercial activities makes a supply (defined in the ETA as a "taxable supply") of property or a service in Canada is generally required to register for the GST unless the person's aggregate annual worldwide taxable supplies do not exceed $30,000 (taxable supplies of related parties must be considered for these purposes). Therefore, any non-resident that makes a taxable supply in Canada and has worldwide non-exempt sales of more than $30,000 (including non-Canadian sales) will generally be required to register for the GST. For the purposes of the ETA, "person" is defined broadly to include an individual, a corporation, a trust and a partnership.

Exempt Supplies

The supply of certain types of property and services, defined in the ETA as an "exempt supply," is expressly exempted from the GST. The following are the most common types of exempt supplies:

- supplies of financial services (such as loans or securities transactions, including the sale or issuance of shares, and some related services);
- supplies (including sales and leases) of used residential real estate;
- certain supplies made by Canadian charities or other non-profit entities; and
- supplies of most medical and dental services.

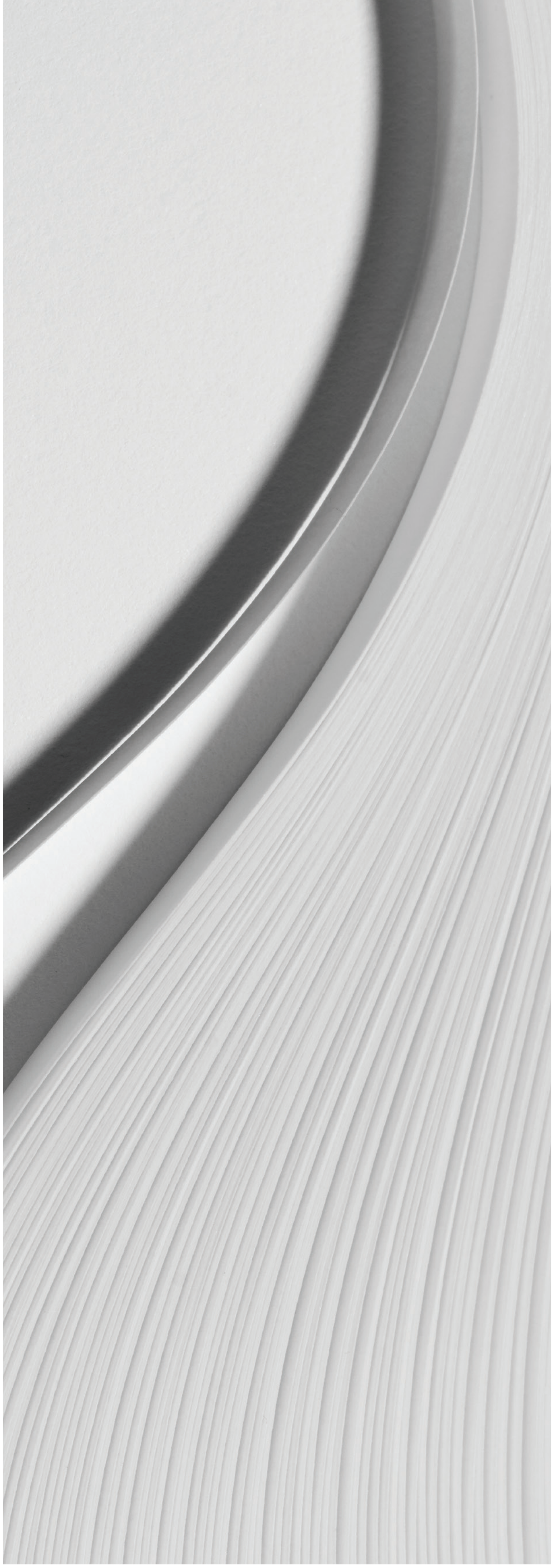
Zero-Rated Supplies

The supply of certain types of property or services, defined in the ETA as a "zero-rated supply," is treated as a taxable supply, but with the rate of tax being 0% (i.e., no GST is charged). The following are the principal categories of zero-rated supplies:

- supplies of most forms of property or services for export;
- supplies of prescription drugs and basic groceries;
- supplies of certain agricultural products; and
- supplies of most forms of financial services to a non-resident.

Input Tax Credits

In general terms, a registrant engaged exclusively in making taxable supplies (including zero-rated supplies) is entitled to claim ITCs equal to all GST that the registrant has paid in connection with property or services acquired for consumption, use or supply in its commercial activities. Conversely, a supplier that is engaged exclusively in making exempt supplies is not entitled to claim ITCs. A registrant that makes both exempt and taxable supplies must allocate its GST expense reasonably between the two activities, and is generally permitted to claim ITCs only for the GST expense allocated to the making of taxable supplies.



Collection and Reporting

Although the GST is payable by the recipient, a supplier that is (or is required to be) a registrant for GST purposes is liable, in most cases, to collect and remit the GST payable by the recipient to the federal government on a periodic basis. The supplier may net its ITCs against the GST collected and thus remit only the balance (if any) to the federal government. If the supplier's ITCs exceed the GST collected in any reporting period, the federal government will refund the excess to the supplier.

GST and ITCs are calculated, reported and paid or refunded on a regular periodic basis. The reporting period of a registrant may be monthly, quarterly or annually, depending upon the registrant's revenues and whether the registrant elects to report on a more frequent basis than is otherwise required.

Other Commodity Taxes

Businesses involved in bringing goods into Canada or manufacturing and selling goods in Canada may also be affected, either directly or indirectly, by certain other taxes and duties imposed in Canada. Most products imported into Canada are subject to two types of commodity taxes in addition to the GST – namely, customs duties and provincial sales tax. Products such as alcohol and tobacco are subject to additional excise duties.

PROVINCIAL SALES TAX

Every province except Alberta imposes a retail sales tax, which is commonly referred to as provincial sales tax (PST), or charges a harmonized sales tax (HST) that is imposed on the same basis as, and includes, the GST described above or, in Québec, Québec sales tax (QST), discussed below. Currently, British Columbia, Manitoba and Saskatchewan impose PST at 7%, 8% and 6%, respectively. HST is charged at a rate of 13% in Ontario and 15% in New Brunswick, Newfoundland and Labrador, Nova Scotia and Prince Edward Island. A vendor in the business of selling taxable goods or providing taxable services in any one or more of these provinces is generally required to obtain a vendor's permit from each relevant provincial government and to collect and remit sales tax on taxable sales within that province.

The Québec QST is a goods and services tax system, which closely parallels the concepts and provisions of the GST (including the requirement to register and collect tax). The Québec tax authority is responsible for the collection and administration of both GST and QST in Québec. QST applies at the rate of 9.975% for a combined rate with GST of 14.975%.

Other Taxes: Property Taxes and Fees

LAND TRANSFER TAXES

Many provinces impose tax on the transfer of real property (including with respect to certain leasehold interests). Ontario transferees of real property are generally liable for land transfer tax at a rate of up to 2.5% of the consideration paid. Québec also levies a land transfer tax at a similar rate. Certain deferrals and exemptions may be available in respect of land transfer tax, particularly in the context of qualifying intercorporate transfers among affiliated corporations. Certain transfers of real property may also be subject to GST (and QST or HST depending on the relevant provincial jurisdiction).

The City of Montréal levies land transfer taxes at slightly higher rates than the rest of Québec.

The City of Toronto also imposes tax on the transfer of real property located in Toronto at a rate of up to 2.5%, which is in addition to the Ontario land transfer tax described above.

Ontario and British Columbia also impose an additional 15% land transfer tax on non-residents acquiring residential properties in the Greater Golden Horseshoe Area (i.e., the Greater Toronto Area and surrounding regions) and the Metro Vancouver region.

MUNICIPAL PROPERTY TAXES

Real property owners may also be subject to municipal property taxes and levies, generally based upon the assessed value of the property. The tax rates vary from one jurisdiction to another.

Appendix: Canada's In-Force Tax Treaties

(current to June 3, 2018)

Algeria
Argentina
Armenia
Australia
Austria
Azerbaijan
Bangladesh
Barbados
Belgium
Brazil
Bulgaria
Cameroon
Chile
China (PRC)*
Colombia
Croatia
Cyprus
Czech Republic
Denmark
Dominican Republic
Ecuador
Egypt
Estonia
Finland
France
Gabon
Germany
Greece
Guyana
Hong Kong
Hungary
Iceland
India
Indonesia
Ireland
Israel
Italy
Ivory Coast
Jamaica
Japan
Jordan
Kazakhstan
Kenya
Korea
Kuwait
Kyrgyzstan
Latvia
Lithuania
Luxembourg
Malaysia
Malta
Mexico
Moldova
Mongolia
Morocco
Netherlands
New Zealand
Nigeria
Norway
Oman
Pakistan
Papua New Guinea
Peru
Philippines
Poland
Portugal
Romania
Russia
Senegal
Serbia
Singapore
Slovak Republic
Slovenia
South Africa
Spain
Sri Lanka
Sweden
Switzerland
Taiwan
Tanzania
Thailand
Trinidad & Tobago
Tunisia
Turkey
Ukraine
United Arab Emirates
United Kingdom
United States
Uzbekistan
Venezuela
Vietnam
Zambia
Zimbabwe

* Excluding Hong Kong and Taiwan, with which Canada has separate treaties, and Macau.

CHAPTER 09

Intellectual Property, Industrial Design, E-Commerce and Privacy

Canadian legal principles regulating intellectual property are generally similar to those in most other industrialized countries and World Trade Organization members. There are some notable exceptions, however, that can affect the protection of intellectual property rights in Canada.

Canadian legal principles regulating intellectual property are generally similar to those in most other industrialized countries and World Trade Organization (WTO) members. There are some notable exceptions, however, that can affect the protection of intellectual property rights in Canada. Most matters relating to intellectual property in Canada, including the registration of IP rights, are administered by the Canadian Intellectual Property Office (CIPO).

The Canadian government has introduced new legislative amendments to the *Patent Act*, the *Trade-marks Act* and the *Industrial Design Act* to comply with international treaty requirements. Some of these legislative amendments have already come into force, but others are to be implemented at a later date.

These proposed amendments are consistent with other legislative changes made over the years by the Canadian government regarding enforcement of copyright and trademark rights, as well as anti-counterfeiting legislation, border measures, new civil causes of action and new criminal offences designed to better protect intellectual property rights in Canada.

Patents

Canadian patents are governed by the federal *Patent Act*, which is generally consistent with patent legislation in other countries that, like Canada, are signatories to the Paris Convention for the Protection of Industrial Property and the Patent Cooperation Treaty. Canada is also a signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and is in the process of ratifying the *Patent Law Treaty*.

To be the subject matter of a Canadian patent, an invention must be novel and useful, and must not be obvious to a person skilled in the particular art or subject matter of the invention. The invention may be any new and useful product, process, machine, composition of matter or any improvement thereof. In specific cases, computer-implemented inventions can be patentable in Canada if they provide functional and useful results and are not merely the calculation of an algorithm. Applications for patents of medicines entail their own special regime that includes a number of specific reporting and pricing requirements.

Unlike U.S. patents, Canadian patents do not include designs, which are separately protected under the *Canadian Industrial Design Act* (discussed below).

To be novel, an invention and the related claims of the patent must not have been previously disclosed or published in Canada or anywhere else in the world. Therefore, any public disclosure of an invention more than 12 months before the filing date of a Canadian patent application could be a bar to patentability.

To be useful, an invention must be workable and of industrial value. For example, a scientific principle or abstract theorem cannot be the subject matter of a patent.

Lastly, an invention must not be obvious to someone skilled in the relevant art or subject matter, taking into consideration the state of knowledge and prior art existing in that area at the time of the invention, without the benefit of hindsight.

Patents are normally granted to an original inventor or to his or her legal representatives or assignees. Companies that employ inventors or are actively involved in research and development should therefore clarify the ownership of any potential or future inventions in written agreements with those individuals or employees likely to participate in the creative process. In addition, a patent is granted on the basis of the first to file, unlike the first-to-invent rule applied in some other jurisdictions. Because of the importance of the filing date of an application, an applicant should make every effort to file at least the minimum permitted information as early as possible.

Once a patent is granted and subject to the payment of annual fees, it remains valid for a non-renewable term of 20 years from the date the application is filed in Canada. The patentee enjoys exclusive rights to make, construct or use the invention that is the subject matter of the patent and to enjoin others from doing so. These exclusive rights may be assigned or licensed by the patentee. Any such assignment or licence should be in writing and recorded with CIPO.

A patentee can bring a civil action for infringement of its patent rights. Available remedies may include an injunction, damages or an accounting for profits resulting from the infringement. In some cases, the court may also grant punitive damages.

There is no requirement in Canada that a product be marked as patented, although it may be prudent to do so in order to give notice to third parties of the existence of a patent. However, it is a criminal offence to mark an article as "patented" if it has not been patented in Canada.

Once a patent is granted and subject to the payment of annual fees, it remains valid for a non-renewable term of 20 years from the date the application is filed in Canada.

Trademarks

Canada is a signatory to the Paris Convention and TRIPS. It is also in the process of adopting the Nice Agreement, which relates to the classification of goods and services, and implementing the Madrid Protocol, which relates to the international filing of trademark applications.

Canadian trademarks are governed by the federal *Trade-marks Act*. Amendments to the *Trade-marks Act* and regulations are expected to come into force in 2019, greatly modifying the existing practice. This new legislation will increase the filing and renewal fees to reflect the number of classes of goods and services covered in the application or registration.

In addition, as in many European countries, applicants will be able to secure trademark registration in Canada without the need to claim or show use of the mark in Canada. This constitutes a significant departure from previous legislation. However, if a mark is not commercially used in Canada for a period of three consecutive years following registration and such non-use cannot be excused, the registration may still be cancelled at the request of any third party.

Unlike many other countries, Canada recognizes trademark rights arising from the commercial use of a mark alone, without registration. An unregistered mark may therefore prevent subsequent use or registration by another person of a confusingly similar mark if the prior user can prove that its mark is distinctive and has acquired goodwill through use in the same trading area in Canada. However, unregistered trademark rights can be limited in scope and, at times, more difficult to enforce. Registration of a trademark in Canada is therefore always advisable.

To be registered, a trademark must be distinctive of the unique and single source of the products or services for which it is used. Registration may therefore be refused if a mark is the name or surname of an individual, is deceptive or merely descriptive, or if it can be confused with another trademark or trade name that was previously used or registered in Canada. Trademarks that are not initially distinctive may become registrable through extended use in Canada, so as to have acquired recognition and distinctiveness in Canada.

Generally, once a trademark application has been examined and no successful opposition filed, the mark will be registered for a term of 15 years (to be reduced to 10 years under the new proposed legislation) and may be renewed for an indefinite period of time. Once a Canadian trademark is registered, the owner has the exclusive right to use the mark throughout Canada.

Trademarks may be assigned or licensed to third parties. A written licence agreement is generally advisable. To maintain the distinctiveness of a licensed trademark, the trademark owner must exercise direct or indirect control over the quality of products manufactured and sold or services offered by its licensee. If the licence is made public, for example by written notice, there is a presumption that the licensee's use of the trademark is lawful and within the control of the owner.

Unlike many other countries, Canada recognizes trademark rights arising from the commercial use of a mark alone, without registration.

The owner of a trademark may bring a civil action for infringement of its trademark rights, acts of passing-off or unfair competition, and can seek remedies such as an injunction, damages or an accounting of profits resulting from the infringement, punitive damages or any other order deemed appropriate by the court.

Although there are no requirements regarding the markings of products or services protected under a registered trademark in Canada, symbols such as TM or ® are often used to give notice to third parties of the existence of trademark rights. However, the ® symbol should not be used unless the mark is registered in Canada.

Copyright

Canadian copyrights are governed by the federal *Copyright Act*. Canada is a signatory to the Berne Convention for the Protection of Literary and Artistic Works, TRIPS and other World Intellectual Property Organization treaties and conventions related to copyrights.

Copyright arises automatically in Canada upon the creation and fixation on a tangible support of any original literary, dramatic, musical or artistic work, including computer software, compilations and sound recordings. Copyright can be granted if the author of the work is a citizen or subject of, or ordinarily resident in, a country that is a party to the Berne Convention or is a member of the WTO.

Registration of copyright is not mandatory to confirm the existence of a copyright, but does serve as prima facie evidence of copyright ownership and strengthens the remedies available to a party whose copyright is infringed. The *Copyright Act* also provides a system for the registration of copyright interests and assignments or licensing of copyrights. Assignments or licences must be in writing and recorded to be enforceable against third parties.

Generally, copyright exists in Canada for the life of the author plus 50 years following the end of the year of his or her death.

In most cases, the author of the work is the initial owner of the copyright. The most prominent exception to this rule is that copyright in works created in the course of employment initially belongs to the employer unless there is an agreement to the contrary. In the case of an independent contractor or consultant, it is necessary to stipulate ownership of the copyright in a written agreement.

The existence of a copyright gives the copyright holder an exclusive right to use, publish, produce, reproduce, translate, broadcast or adapt the copyright works; to perform or cause them to be performed in public; and to give the right to others to exercise any of those rights and commercially exploit the work covered by the copyright. Generally, copyright exists in Canada for the life of the author plus 50 years following the end of the year of his or her death. Different criteria are applied to determine the duration of copyright in certain types of works, such as photographs, sound recordings, posthumous works and jointly authored works.

In addition to the rights mentioned above, the *Copyright Act* gives authors certain moral rights. These include the right of an author or creator to claim authorship of the work and the right of integrity of the work – that is, the right to restrain any distortion or modification of the work that prejudices the integrity or reputation of the creator. Moral rights exist for the same term as copyright in the work. They belong to the author alone and may not be assigned, although they may be waived in whole or in part. The assignment of copyright in a work does not by itself constitute a waiver of any moral right.

The *Copyright Act* also establishes a regulatory framework for the collective administration of performing rights, including a compulsory licensing scheme to collect royalties for distribution of a work to the public by telecommunications media.

Infringement of copyrights can give rise to criminal sanctions, fines and civil actions for relief, including an injunction, damages (including statutory damages), an accounting of profits resulting from the infringement, and punitive damages.

Marking of copyright material is not essential in Canada, but is advisable as it may provide additional protection and rights to its owner in litigation.

Domain Names

The Canadian Internet Registration Authority (CIRA) is responsible for the ".ca" system, which is governed by Canadian law.

In order to be eligible to register a ".ca" domain name, "persons," including both private individuals and companies, need first to meet certain Canadian presence requirements. These include holding Canadian citizenship or permanent resident status in the case of individuals, and being incorporated under the laws of Canada or any of Canada's provinces or territories, in the case of companies. This is done to ensure that the ".ca" domain names remain a public resource for Canadians' social and economic development. A person that does not meet these Canadian presence requirements, but that nonetheless owns a registered trademark under Canada's *Trade-marks Act*, may also register for a ".ca" domain name provided that the domain name consists of or includes the exact word component of that registered trademark.

Registration is on a first-come, first-served system, which no longer requires evidence of entitlement to a proposed domain name. However, the registrant of a domain name must ensure that the domain name does not violate any third party's intellectual property rights, does not defame any person and does not contravene any applicable laws. Canadian companies and Canadian individuals are free to register as many domain names as they wish.

Registration of a ".ca" domain name does not give the registrant any additional rights beyond the mere right to use the name as a domain name, other than common law trademark rights that may exist or be created through commercial use of the domain name.

CIRA has a dispute resolution policy that regulates domain name conflicts; it also has the power to transfer or cancel domain name registrations.

Industrial Design

Canadian industrial designs are governed by the federal *Industrial Design Act* and are also protected under the Paris Convention and TRIPS. Canada is in the process of implementing the Hague Agreement.

"Industrial design" generally refers to any original features of shape, configuration, pattern or ornament, and any combination of those features that, in a finished article, appeal to and are judged solely by the eye and that have a fixed appearance and are visible at the time of purchase or during normal use (excluding any utilitarian features).

Registration is mandatory for the protection of industrial designs, but no registration can be obtained if the industrial design application is filed more than 12 months after making the design public or offering it for commercial use. This includes distributing samples of an article bearing the design, selling or exhibiting such articles for sale, publishing the design in advertising or other printed material of any sort, or public use of articles bearing the design.

Subject to payment of the maintenance fee, registration grants an exclusive right to make, sell, rent, license or import for trade or business the design applied to any article for which it is registered, for a period of 10 years. In certain cases, designs may also be eligible for protection under trademark or copyright legislation. An industrial design registration protects not only the specific design registered, but also any design not differing from it.

Industrial designs may be assigned or licensed. However, such assignment or licence must be in writing and be recorded with CIPO.

The owner of a registered industrial design may bring a civil action for infringement of the design and may obtain remedies such as an injunction, damages, an accounting for profits resulting from the infringement or punitive damages.

Though marking an article embodying a registered design with notice of the registration is not required, it may be helpful in a court proceeding for infringement, especially to counter a defence that the infringer was not aware, and had no reasonable grounds to suspect, that the design was registered. The article or its label or packaging can be marked with a capital D in a circle, together with the name, or an abbreviation of the name, of the design's registered owner.

Other Forms of Protection

Certain other specialized intellectual property rights are provided for in other federal statutes, including the *Plant Breeders' Rights Act* and the *Integrated Circuit Topography Act*.

E-Commerce

Canada has undertaken initiatives to create a legal and regulatory infrastructure that fosters the growth of e-business and Internet activity, including increasing Canada's e-government capabilities, enacting federal and provincial legislation concerning privacy protection and electronic transactions, and pursuing a wide range of regulatory policy initiatives.

All Canadian provinces and one territory have passed legislation enabling electronic commerce in order to normalize the legal rules applicable to documentary communication, irrespective of the medium used. These statutes typically address issues related to electronic document equivalency and reliability, digital signatures and electronic record creation, maintenance and retention. In addition, the federal government has enacted the *Personal Information Protection and Electronic Documents Act* (PIPEDA), which, among other things, deals with electronic documents and governs the rules applicable to the use of "electronic alternatives...where federal laws contemplate the use of paper to record or communicate information or transactions." PIPEDA also deals with data protection and privacy, as is discussed further below.

As long as the general legal principles of contract formation are adhered to, laws in Canada concerning the creation of contractual obligations are generally media-neutral. However, legal issues may arise with regard to whether enforceable contracts can be formed through such online contracting methods as "click-wrap" or "browse-wrap" agreements. Businesses should consult their legal advisers before putting in place such online contracting methods so as to ensure that they comply with the requirements of an enforceable contract under Canadian contract law and with consumer protection legislation.

Laws regarding consumer protection and the sale of goods in several provinces have specific provisions dealing with consumer Internet sales transactions. They specify required disclosure on sales transactions and in some cases provide for a statutory "cooling-off" period during which a consumer can cancel an online purchase. An area of increasing litigation in e-commerce involves the governing law of, and jurisdiction over, online consumer terms and conditions, including mandatory arbitration provisions. In recent cases, the courts have found that local consumer protection legislation can override online terms and conditions.

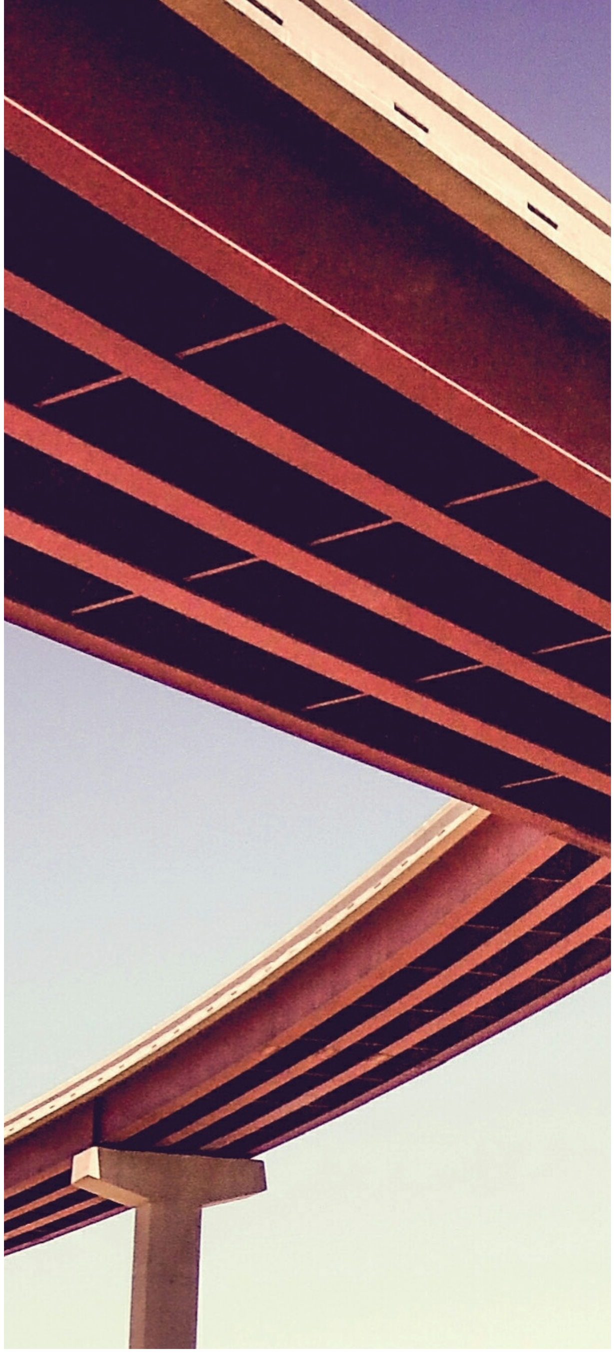
Advertising on the Internet is subject to the provisions of the *Competition Act*, which imposes a dual criminal and civil adjudicative regime (see the Competition Law chapter of this Guide). In addition, other statutes, such as the *Food and Drugs Act*, provincial consumer protection legislation and, in Québec, the *Charter of the French Language*, provide specific restrictions on the content and style of advertisements relating to certain classes or types of products. For example, under the *Charter of the French Language*, advertisements for products available in Québec that are posted on the website of a company having an address or a physical establishment in Québec must be available in French. However, advertisements for products such as cultural or educational material (e.g., books, CDs) may be exclusively in a language other than French, provided that the products themselves are in that other language.

Canada's anti-spam law (known as CASL) is designed to be one of the strictest anti-spam laws in the world, in order to protect consumers and businesses from dangerous forms of spam. Spam, which is the word used to refer to unsolicited commercial email, has been estimated as constituting as much as 86% of all email worldwide. A drain on both business and personal productivity, spam is considered a threat to consumer confidence in the e-commerce marketplace. CASL is not limited to counteracting spam; it also regulates activities that are perceived to discourage the misuse of electronic means of carrying out commercial activities, such as downloading malicious computer programs and the harvesting of email addresses. CASL contains provisions that prohibit the sending of commercial electronic messages (including email, text messages, instant messages and other electronic messages sent with a commercial purpose) without the prior consent of the intended recipient. It also prohibits the unauthorized installation of computer programs on another's computer system, the altering of transmission data in an electronic message and other activities that could have an impact on electronic commerce.

Legal issues may arise with regard to whether enforceable contracts can be formed through such online contracting methods as "click-wrap" or "browse-wrap" agreements.

CASL is aimed at punishing senders of electronic messages and perpetrators of activities originating in Canada or affecting Canadian residents that involve identity theft, phishing, pharming, spyware and other forms of fraud or misleading consumers. CASL requires express opt-in consent (in contrast to PIPEDA, discussed below, under which opt-out consent and implied consent can be permissible in some circumstances). CASL provides for administrative monetary penalties to be imposed on offenders: up to $10 million for corporations and $1 million for individuals. CASL also provides for a private right of action that will permit consumers and businesses to commence enforcement proceedings and recover damages of up to $1 million per day. Although the private right of action was scheduled to come into force on July 1, 2017, implementation has been suspended by the government pending a review of the legislation by a parliamentary committee.

CASL and the regulations made under it contain detailed requirements and rules on matters such as the form of electronic messages, exemptions from the consent requirement and inclusion of a mandatory unsubscribe mechanism in such messages. Businesses should consult with counsel to understand the highly complex provisions of CASL and its impact on their operations in Canada.



Data Protection and Privacy

PIPEDA applies to the collection, use and/or disclosure of personal information in the course of any private sector commercial activity within Canada. "Personal information" means information about an identifiable individual. "Commercial activity" means "any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists."

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Businesses are required to establish an administrative structure to ensure that 10 “privacy principles” are implemented: (1) accountability; (2) identification of the purpose for which the information is gathered; (3) consent; (4) limitations on collection; (5) limitations on use, disclosure and retention; (6) accuracy; (7) ensuring appropriate safeguards are in place; (8) openness; (9) individual access; and (10) challenging compliance. These principles are based on the international OECD *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*.

Under PIPEDA, private sector businesses are required to implement privacy policies in respect of the collection, use and disclosure of personal information and to make those policies available to their customers. In addition, PIPEDA requires a business to make the personal information collected about an individual available to that individual upon request.

PIPEDA applies in all provinces of Canada other than those provinces that have enacted privacy legislation that the federal government has determined to be substantially similar to the privacy provisions of PIPEDA. Québec, Alberta and British Columbia (but not Ontario) have all enacted such legislation. The provincial legislation enacted in those provinces applies to the collection, use and disclosure of personal information by private sector businesses in those provinces that are not federal works. PIPEDA continues to apply to entities in those three provinces that are federal works (such as banks, railways and telephone companies). PIPEDA does not apply to organizations with respect to the collection of employee information unless the organizations are federal works. Employee information is protected under the equivalent provincial privacy legislation in Québec, Alberta and British Columbia. Organizations located in Yukon, Nunavut and the Northwest Territories are considered to be federal works, undertakings and businesses for the purposes of PIPEDA. Notwithstanding that a province has substantially equivalent legislation, PIPEDA applies in that province if the data cross a border. Most provinces also have specific legislation governing the privacy of personal health information.

In 2015 PIPEDA was amended in several important ways, including clarifying what is business contact information and what is personal contact information. The PIPEDA amendments create a new “business contact information” definition that includes a person’s business email address. This definition is coupled with a new statutory provision, which states that Part 1 of PIPEDA does not apply to business contact information if this information is collected, used or disclosed “solely for the purpose of communicating or facilitating communication with the individual in relation to their employment, business or profession.”

PIPEDA requires informed consent to collect, use or disclose an individual’s personal information. Prior to the amendments coming into force, the validity of the consent was interpreted in the light of the “reasonable expectations” of the individual from whom it was sought. The amendments clarify this provision by providing that consent will be valid only if it is reasonable to expect that the individuals providing it understand “the nature, purpose and consequences of the collection, use or disclosure of personal information” to which they are consenting.

The 2015 amendments also introduced an exception for use and disclosure of personal information without the knowledge or consent of the individual for the purpose of a prospective business transaction. Generally, the exception would permit the use and disclosure of personal information without consent when (i) the information is necessary for the parties to decide whether to proceed with the transaction and, if they decide to do so, the information is necessary to complete the transaction; and (ii) the parties have entered into a confidentiality agreement that requires the recipient to (a) use and disclose personal information only for purposes related to the transaction; (b) use appropriate security safeguards to protect personal information; and (c) return or destroy personal information if the transaction is not concluded. The business transaction exception also imposes further requirements once the transaction is completed, including restrictions on use and disclosure, and an obligation to notify persons whose information has been transferred as part of a business transaction. This amendment addressed a significant gap in PIPEDA that made due diligence and the completion of business transactions difficult.

The 2015 amendments to PIPEDA also provided for a data-breach notification protocol. Organizations are required to record and report to the federal Privacy Commissioner any breaches of security safeguards in relation to personal information under their control if it is reasonable to conclude that the breach creates a real risk of significant harm. “Significant harm” is defined 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 damage to or loss of property. Organizations are to consider various factors (such as the sensitivity of the personal information involved and the probability of misuse of the information) in making their own determination about whether to notify affected individuals. The amendments also impose a positive obligation on organizations to notify other organizations or government institutions that may be able to reduce the risk of harm emanating from the breach. The regulations set out the requirements for the content of the notice of breach. And organizations that knowingly contravene the new sections of PIPEDA regarding data-breach notification or obstruct the Commissioner in the investigation of a complaint or in conducting an audit will be liable for fines of up to $100,000. Organizations are required to maintain a record of all breaches, whether or not the breach met the threshold for reporting. The PIPEDA amendments dealing with breach-reporting, notification and record-keeping will come into force concurrently with the related regulations, which are scheduled to come into force on November 1, 2018.

This amendment addressed a significant gap in PIPEDA that made due diligence and the completion of business transactions difficult.

CHAPTER 10

Real Estate

Canada occupies an immense geographical area of 9.985 million square kilometres, or 3.855 million square miles. With a growing population and extensive land available for commercial, industrial, residential and recreational development and resource extraction, Canada attracts substantial foreign investment in property.

In general, each province has jurisdiction over the ownership, use and development of real property within its boundaries, with a few exceptions that are under federal jurisdiction, such as lands reserved for Canada's Indigenous peoples, national parks, military reserves and harbours. Provincial real property law has evolved from English common law principles, except in Québec, where real property is governed by the *Civil Code of Québec*.

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Land Titles

Most provinces in Canada record land ownership under computerized land titles (under which title to real property is certified by a government official) or are converting from a registry system (under which title is not certified) to the land titles. Two provinces – Prince Edward Island and Newfoundland and Labrador – still use a registry system. The Québec system allows both paper and electronic registration, but does not provide for certification of title by the land registrar.

Ontario has 54 land registry offices, which register, store and manage land records such as transfers, charges and plans of surveys. It was the first jurisdiction in the world to provide electronic registration of land-related documents, and electronic registration is mandatory in all regions in Ontario.

Electronic land registration in Ontario replaces the need to register paper documents at a land registry office. Specialized software is used to register documents electronically. The parties' legal representatives are authorized to electronically sign, complete and register the documents, and affix signatures electronically.

Most of the other provinces still require paper registration of documents.

Land Ownership Structures

Most land in Canada is held in "fee simple" or its equivalent in Québec (absolute ownership for an indefinite duration) rather than on a leasehold basis (tenure when one party has the right to occupy a property for a fixed duration). Many areas are still owned by the Crown. Most resource extraction is carried on pursuant to leases or other limited-term rights granted by the provincial or federal governments.

USE OF NOMINEES

For a variety of reasons, beneficial owners of real property may wish to use a separate entity – usually a single purpose corporation – to hold registered title to the property as a bare trustee or nominee (called a mandatary in Québec). For example, the beneficial owner may not be a legal entity capable of holding title in its own name or may be a joint venture between multiple parties. Other advantages of using a separate entity are the abilities to keep the identity of the beneficial owner confidential and to transfer beneficial ownership without having to register such transfer on title. The nominee corporation will usually be named as the purchaser or vendor, mortgagor or mortgagee, or lessor or lessee in all agreements pertaining to the property.

In general, a declaration of trust or nominee agreement will be entered into to document the relationship between the bare trustee or nominee (or mandatary) and the beneficial owner. A bare trust or mandate exists where the only function of the nominee is to hold property for the beneficiary and to deal with the property only in accordance with directions from the beneficiary.

REAL ESTATE INVESTMENT TRUSTS (REITS)

A REIT is a special form of business trust established to invest 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 REIT are usually issued units, which represent an undivided beneficial interest in the REIT assets and a corresponding share of the income and losses of the REIT.

The REIT structure has grown in popularity because REITs provide a number of advantages to both real estate companies and REIT unitholders. These include favourable tax treatment and improved tax efficiency on distributions to unitholders (see the Tax Considerations chapter of this Guide), 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.

The REIT structure has grown in popularity because REITs provide a number of advantages to both real estate companies and REIT unitholders.

JOINT VENTURE STRUCTURES

Commercial and industrial real estate properties may also be held through a joint venture structure. A joint venture is not a specific type of legal entity, but describes various relationships between two or more parties through which they can jointly own, develop and manage property. There are several alternative joint ownership legal structures, the most common being joint venture corporations, partnerships and co-ownerships or co-tenancies (these are described in the Types of Business Organizations chapter of this Guide).

A joint venture nominee corporation owns the assets of the venture. The parties hold shares in the corporation and usually enter into a shareholders' agreement to govern their relationship. Joint venture corporations provide many of the same advantages as corporations in general, including limited liability, ease of administration and certainty of legal rights and obligations.

A joint venture may also hold property through either a general or a limited partnership. A partnership, unlike a corporation, is not a separate legal entity and may enable the flow-through of losses to the partners for tax purposes. Another advantage of a partnership structure is its flexibility because the partnership agreement can provide freely for the allocation of profits and losses between the partners and other aspects of their relationship.

Another common structure for real estate joint ventures is a co-ownership or co-tenancy. Each co-tenant or co-owner has an undivided ownership interest in the joint venture property. Co-tenants or co-owners will typically enter into a co-ownership agreement that governs their relationship and the ability of each party to deal with its interest. Unlike a partnership, each co-tenant or co-owner has no right to act as an agent for any other co-tenant or co-owner and is not liable for the debts of other co-tenants or co-owners.

As these types of structures are common in Canada, they do not pose any concern in a financing of a joint venture property.

In general, Canada does not impose significant restrictions on foreign ownership of commercial real property.

Foreign Ownership

In general, Canada does not impose significant restrictions on foreign ownership of commercial real property. Under the federal *Citizenship Act*, a non-resident can acquire, hold and dispose of real property in the same manner as a Canadian citizen or resident. However, provinces may restrict the acquisition of land by foreign individuals or corporations. Recently, the provincial governments of British Columbia and Ontario have imposed taxes on foreign citizens purchasing residential real estate in certain areas of the two provinces.

In Ontario, the *Aliens' Real Property Act* grants non-citizens the same rights as Canadians to hold or dispose of real property. Under the *Extra-Provincial Corporations Act*, a corporation incorporated outside Canada must obtain an extraprovincial licence to acquire, hold or convey real property in Ontario, but such licences are easily obtained.

In Québec, under *An Act respecting the acquisition of farm land by non-residents*, non-residents of Québec cannot acquire farm land unless they receive the authorization of the Commission de protection du territoire agricole du Québec, the authority in charge of preserving agricultural land in Québec. Some other provinces have similar restrictions to preserve agricultural land.

Land-Use Planning

Land-use planning is the responsibility of provincial governments and is supervised at the provincial level, but significant planning functions are typically delegated to municipalities.

In Ontario, the *Planning Act* provides the principal means for the government to control the development and use of land. Land use is controlled through such instruments as the official plan (a long-range general plan for a region or municipality) and zoning bylaws (which regulate, for each parcel of land in the municipality, the uses permitted and other matters such as required parking and the type, size, height and location of buildings and structures). For a purchaser of land, understanding both the official plan and the particular zoning bylaws is crucial. Municipalities require that site plans be approved before the construction of any new development. 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. Municipalities also require the developer to enter into an agreement ensuring construction and ongoing maintenance in accordance with the site plans.

Land-use planning is the responsibility of provincial governments and is supervised at the provincial level, but significant planning functions are typically delegated to municipalities.

Under Ontario's *Planning Act*, any subdivision of land requires the consent of the relevant municipality. This requirement also applies to a mortgage or the grant of certain other interests in land (such as a lease for 21 years or more, inclusive of all renewals), when the mortgage or interest is granted over only part of a parcel of land. If such consent is not obtained, the deed, mortgage or lease will not be legally effective. Although there are a number of exemptions to the requirement for consent, most contracts for the purchase of real property in Ontario are made subject to any required consent. The cost and responsibility for obtaining consent is usually allocated to the vendor. A developer wishing to subdivide land and sell lots may be required to submit a draft plan of subdivision for approval. Normally, the municipality will require the developer to enter into development agreements with it, whereby the developer agrees to provide sewers, roads and other services for the subdivision and to dedicate certain lands for public use and certain other public benefits. All of the common law provinces in Canada have similar land division restrictions.

In Québec, under *An Act respecting land use planning and development*, each regional county municipality adopts a development plan setting out general land-development and land-use policies. The council of each municipality within the regional county municipality has the power to adopt zoning, subdivision and building bylaws, but these bylaws must be consistent with the objectives of the development plan. Municipal councils may impose certain conditions for the approval of subdivisions, such as minimum lot areas, and dimensions and provisions for rights-of-way. Similarly, metropolitan communities in Québec adopt metropolitan land-use and development plans setting out general policies that cities implement in detail.

Title Insurance, Title Opinions and Due Diligence

When an agreement of purchase and sale is signed, the purchaser (through its lawyer) is responsible for conducting due diligence on the property. This will generally include title and zoning searches, certain corporate and litigation searches and off-title searches and inquiries. The lawyer should review all leases, surveys and other agreements associated with the property.

The traditional approach in most commercial real estate transactions in Canada was for purchasers and lenders to receive title opinions from their lawyers in respect of any property that was being acquired or mortgaged. A title opinion would be based on the title search, off-title inquiries and other due diligence investigations conducted by the lawyer. If a defect in title was not addressed in such an opinion and a loss was suffered, the purchaser or lender could sue its lawyer for negligence or breach of contract, in addition to its remedies against the vendor or mortgagor.

In recent years, Canadian lenders and purchasers have increasingly provided title insurance policies in lieu of title opinions. In a typical title insurance policy, the title insurer has a duty to indemnify or reimburse the insured for any actual losses suffered as a result of a defective title, as well as a duty to defend and pay the legal defence costs and expenses in the event of a claim that threatens the insured's title to the property. Nonetheless, title insurance does not cover all losses and is not a replacement for thorough due diligence.

In recent years, Canadian lenders and purchasers have increasingly provided title insurance policies in lieu of title opinions.

Regulation of Real Estate Brokers

Real estate brokers are regulated by each province in Canada. In Ontario, real estate brokers are governed by the *Real Estate and Business Brokers Act, 2002*. The Act is administered by the Real Estate Council of Ontario (RECO). Subject to certain exceptions, such as for Canadian banks and other financial institutions, the Act requires a person who trades in real estate to be registered as a brokerage, broker or salesperson.

A brokerage is defined in the Act as an entity trading in real estate for reward. A broker or salesperson is an individual employed by a brokerage in that capacity. No broker or salesperson can trade in real estate on behalf of, or accept any commission or other remuneration for trading in real estate from, any brokerage other than a brokerage that employs such broker or salesperson. A registered broker or salesperson must be a Canadian resident and may not trade in real estate in Ontario from an office outside Ontario. No action can be brought for commission or other remuneration for services in connection with a trade in real estate unless at the time of rendering the services, the person bringing the action was registered or exempt from registration under the Act.

The Act and regulations made under it set out detailed requirements of registration for brokerages, brokers and salespersons, including compliance with a code of ethics. Brokerages must hold funds belonging to their clients (such as deposits) in separate trust accounts. If a registrant breaches any of the requirements applicable to it, RECO can impose various sanctions under the Act, including fines, freezing assets or placing restrictions on its registration.

In Québec, real estate brokers are subject to similar rules. In addition, under the *Real Estate Brokerage Act* and the *Regulation respecting the issue of broker's and agency licences*, a person applying for a broker's or agency licence must have an establishment in Québec.

The potential application of the Act must be carefully examined by other lenders (both Canadian and foreign) when considering lending on the security of real property in Ontario.

Regulation of Mortgage Brokers and Lenders

Mortgage brokers and lenders in Ontario are regulated by the *Mortgage Brokerages, Lenders and Administrators Act, 2006*. Under this Act, no person can carry on the business of dealing or trading in mortgages in Ontario or carry on business as a mortgage lender in Ontario (which the Act defines as lending money in Ontario on the security of real property) unless the person holds a brokerage licence issued under the Act by the Superintendent of Financial Services, or is exempt under the Act. Canadian financial institutions subject to regulation under other legislation, such as banks, insurance and trust companies and credit unions, do not require licences under the Act, but the potential application of the Act must be carefully examined by other lenders (both Canadian and foreign) when considering lending on the security of real property in Ontario. Many provincial governments are imposing stricter rules in the mortgage broker industry.

In Québec, persons engaging in brokerage transactions relating to loans secured by immovable hypothecs are governed by the *Real Estate Brokerage Act*.

CHAPTER 11

Environmental Law

Although the Supreme Court of Canada has confirmed the operation of the statutory "polluter pay" principle, purchasers of real property must be aware that they may be held liable for pre-existing contamination on and/or migrating from newly acquired property. Tenants should ensure that leases provide protection from such liability.

Legal Framework

In Canada, environmental matters are regulated at the federal, provincial, territorial and local levels. Although provincial and territorial governments generally take the lead in regulating most environmental matters, in recent years federal and municipal governments have become more active in environmental protection. Some harmonization of programs and standards has taken place in Canada, but in various circumstances, the separate requirements at each governmental level apply. In particular, each federal, provincial and territorial government in Canada has its own unique environmental impact assessment regime.

Contaminated Property

The contamination of soil and groundwater is primarily regulated by the provinces and territories. Although the Supreme Court of Canada has confirmed the operation of the statutory "polluter pay" principle, purchasers of real property must be aware that they may be held liable for pre-existing contamination on and/or migrating from newly acquired property. Tenants should ensure that leases provide protection from such liability (e.g., allocation of liabilities, representations and warranties, indemnities), although contractual provisions do not generally provide absolute protection from regulatory liability.

In Ontario, the *Environmental Protection Act* (EPA) provides for administrative orders to be issued against anyone who owns, manages or controls a contaminated property, whether or not that person or entity caused the contamination. When the discharge of a contaminant continues after a sale or occupancy, the new owner or operator may also be viewed as having permitted the discharge to take place even if it did not cause the initial source of contamination. These owners and operators may be subject to remediation liability. Although there is generally no positive statutory obligation in Ontario to clean up historic contamination, remediation and reimbursement obligations may arise, including with respect to off-site impacts.

The EPA provides some limited protection from statutory liability. If appropriate investigations and remedial work are conducted and a record of site condition (RSC) is filed, the owner or operator is protected from regulatory action with respect to contaminants identified in the RSC (except when contamination migrates from the site or the regulator believes there is a danger to health or safety). It is also obligatory to file an RSC when a change to a more sensitive property use is planned.

Québec's *Environment Quality Act* (EQA) also subjects polluters to land characterization and rehabilitation obligations upon the issuance of an order from the Minister responsible for the EQA. Such an order may also, in some circumstances, be made against any person who has or had "custody" of a contaminated site (e.g., owner, tenant, operator or secured creditor taking possession of a site), even if such person did not cause the contamination. Moreover, land rehabilitation can also be required if the discharge of a contaminant is ongoing or if there is off-site migration, under both the EQA and the *Civil Code of Québec*. In addition to land characterization and rehabilitation orders, ceasing to carry on certain regulated industrial and commercial activities and/or carrying on different activities can trigger land characterization and rehabilitation obligations, even for contamination caused by others. Except for the above situations, there is generally no positive statutory obligation in Québec to clean up historic contamination.

In many instances, land rehabilitation in Québec must be undertaken through approved rehabilitation plans and may provide for land use restrictions. Such land use restrictions must be registered against the land and are binding on any subsequent purchaser of the land. Notices of contamination and notices of decontamination may also need to be registered against the land. Furthermore, notices to owners of adjacent lands and to the Minister responsible for the EQA may be required: in particular, when certain types of contaminants are found at the boundaries of a contaminated site in concentrations exceeding the regulatory limits or if there is a serious risk of off-site contamination.

Operational Issues

ENVIRONMENTAL IMPACT ASSESSMENT

Environmental impact assessment (EIA) is a tool used by the federal, provincial and territorial governments to ensure that any significant adverse environmental impacts of a regulated project are considered and mitigated before the project is permitted to proceed. Such EIA processes typically require substantial public and Indigenous consultation obligations (see the discussion of the latter under "Crown's Duty to Consult and Accommodate Indigenous People," below). If the project is under both federal and provincial jurisdictions, the federal government may encourage coordination with the provinces and may substitute the EIA process of another jurisdiction for its own.

The federal government is proposing to replace the *Canadian Environmental Assessment Act, 2012* (CEAA) with a broad "impact assessment" regime that would consider health, social and economic impacts, in addition to the environmental impacts currently assessed. The nature of projects to be subjected to the new regime has yet to be determined, but they will include most large-scale development projects, including infrastructure works, chemical and pharmaceutical manufacturing, oil and gas, mines, pulp and paper, and electricity generation. Federal impact assessments arise only with respect to issues of federal jurisdiction, such as fisheries and migrating birds.

Provincial EIA regimes target similar large-scale projects. Many provincial regimes also require consideration of projects of a smaller scale than those assessed federally. In Canada's North, the federal government no longer has sole responsibility for assessing proposed projects. As a result of comprehensive land claim settlements, self-government agreements and devolution to territorial governments, the federal government now works with Indigenous peoples, resource and environmental regulatory boards and the territorial governments to review and approve impact assessments of proposed projects in the North. The Québec EIA regime was recently (March 2018) modified, resulting notably in increased public disclosure and consultation requirements as well as a revised list of targeted projects. These targeted projects are determined by regulation, although the Québec government may, in some circumstances, subject other projects to this EIA regime if (i) a project raises major environmental issues and public concern warrants it; (ii) a project involves a new technology or new type of activity in Québec whose apprehended impacts on the environment are major; or (iii) a project involves major climate change issues.

Canada's environmental assessment process, particularly in the North, presents a complex challenge for project proponents, and delays for controversial projects are common. Further, environmental groups and other stakeholders may use the courts to challenge EIA approvals. As a result, judicial review of EIAs, even at the early scoping stage, is not uncommon and can cause project delays. The new federal impact assessment regime proposes to address transparency issues and facilitate public and Indigenous consultation but there is little indication that it will reduce the complexity or inherent delays in the current regime.

Canada's environmental assessment process, particularly in the North, presents a complex challenge for project proponents, and delays for controversial projects are common.

ENVIRONMENTAL PERMITTING AND ENFORCEMENT

In addition to any EIA process, there are generally two principal mechanisms for protection of the environment with respect to commercial and industrial operations (including resource extraction): standard operating requirements and a general prohibition against the discharge of contaminants; and a system of permits or certificates to address specific operations. Proposed operations that may impair the environment (air emissions, noise, water intake, wastewater discharges, etc.) may trigger federal, provincial, territorial and municipal permitting requirements. Such permitting requirements may be triggered by the location of a project, the equipment and substances used or the emissions and waste generated. In addition, decommissioning and rehabilitation obligations may be imposed by permit, with costs related to waste and wastewater management facilities often being secured through financial assurances.

Federal, provincial and territorial environmental laws set out enforcement mechanisms allowing for the regulators to ensure compliance with the environmental prohibitions and permits. These include, but are not limited to,

- wide inspection and investigation powers;
- the imposition of fines, administrative monetary penalties and/or damages;
- the power to order the execution of prescribed works; and
- the power to complete prescribed works at the expense of the contravener.

Ontario's EPA, for example, prohibits unlawful discharges of contaminants into the environment and requires any parties that cause or permit such discharges to notify the regulators immediately of an unlawful discharge. Those who cause or permit unlawful discharges may face offence liability, environmental penalties and administrative orders. To avoid such liability, all operational discharges (to air, water or land) must be approved by the provincial Ministry of the Environment. Conditions and requirements (including financial assurances) may apply to such approvals, and any alterations to discharging equipment (including sewage and water works) must also be approved. To provide greater flexibility for business, Ontario, British Columbia and Alberta have generally simplified registration processes for low-risk activities and single-site, multi-media approvals for more complex facilities.

Québec's EQA also prohibits unlawful discharges of contaminants into the environment. As in Ontario, the range of regulated contaminants is very broad. The EQA imposes a duty to report accidental discharges to the Minister responsible for the statute and to clean up discharges of contaminants without delay.

A new permitting regime under the EQA came into force in March 2018, based on environmental risks, including climate change impacts and risks. Under this new permitting regime, projects are ranked according to four levels of risk, each level requiring a different type of management: (i) high-risk projects require the completion of an EIA process and governmental authorization; (ii) moderate-risk projects require ministerial authorization; (iii) low-risk projects require the filing of a declaration of compliance by the proponent; and (iv) negligible-risk projects are exempted from the permitting regime. However, these projects remain subject to the prohibition against the discharge of contaminants and to the EQA's operating requirements. The specific details of Québec's new permitting regime will be determined by regulations, which are scheduled to come into force before the end of 2018.

Provincial, territorial and federal regulators generally have complex and extensive prohibitions to prevent harm or harassment of endangered species or damage to their habitat, as well as to prevent harm to protected areas (e.g., wetlands and watercourses). Where such harm or damage may occur, federal, provincial or territorial permits will be necessary, and mitigation measures and habitat compensation may be required.

Although Canadian municipalities have traditionally regulated noise and discharges to municipal sewers, municipalities have recently become more active in regulating toxics at the local level. For example, many Canadian municipalities have banned the cosmetic use of pesticides and have required public disclosure of certain toxics.

CIVIL LIABILITY

In addition to regulatory enforcement measures, operations that cause environmental damage to adjoining properties or permit the escape of harmful substances may lead to civil liability to injured parties under general legal principles such as (in common law provinces like Ontario) negligence, nuisance or the "strict liability tort" as termed in *Rylands v Fletcher*. In Québec, civil liability can notably be triggered if it is proven that a person failed to abide by the applicable rules of conduct, such as environmental laws, and that this failure has caused damages to a third party. In addition, the *Civil Code of Québec* prohibits companies from causing abnormal inconvenience, with the result that, in some cases, liability can be triggered for impacts to neighbours even when a facility complies with all applicable environmental legislation and permits.

Directors' and Officers' Statutory Liability

Directors and officers of a corporation have statutory obligations under federal and certain provincial environmental laws to take reasonable care to ensure that the corporation complies with such laws. Under the federal *Canadian Environmental Protection Act, 1999*, directors and officers have a statutory duty to take reasonable care to ensure that the corporation complies with all requirements under that Act. In Ontario, there is a more limited statutory duty requiring directors and officers to take all reasonable care to prevent the corporation from (i) causing an unlawful discharge, (ii) contravening administrative orders and (iii) contravening obligations with respect to approvals, notification of unlawful discharges and hazardous waste management.

In Québec, there is no express statutory obligation to take reasonable care to ensure that the corporation complies with the EQA. However, if an entity or its employee or agent commits an offence under the EQA, its directors and officers are presumed to have committed the offence unless they can establish that they exercised due diligence and took all necessary precautions to prevent the offence. In addition, the directors and officers of a corporation that has defaulted on payment owing under the EQA share liability with the corporation unless they can establish that they exercised due diligence to prevent the failure which led to the claim.

Directors and officers may also incur operational liability if they are found to have personally permitted a discharge or deposit (as noted above). In general, officers are more likely than directors to be subject to such liability because their management responsibilities may result in more control over the discharge or deposit (as distinct from the general supervisory role of directors). Recent trends suggest greater enforcement risk to directors and officers, and liability of directors and officers may arise even where the corporation has not been sued or charged.

Directors and officers of a corporation have statutory obligations under federal and certain provincial environmental laws to take reasonable care to ensure that the corporation complies with such laws.

Extractive Sector Transparency Measures

Over the past few years, the federal and provincial governments have enacted various laws and regulations setting out reporting requirements and transparency obligations for the Canadian extractive sector. The *Extractive Sector Transparency Measures Act* (ESTMA), which came into force on June 1, 2015, aims to increase transparency and deter corruption in the extractive sector by requiring, in some circumstances, extractive entities active in Canada to publicly disclose, on an annual basis, specific payments made to all governments (including Indigenous governments) in Canada and abroad. Under ESTMA, reporting entities are allowed, under some conditions, to use reports prepared in another jurisdiction to meet Canada's requirements, including reports submitted to the Québec government.

The Québec government adopted the *Act respecting transparency measures in the mining, oil and gas industries* in 2015, and it came into full effect in 2017. The Act requires mining, oil and gas industry entities active in Québec to declare the monetary payments and payments in kind made by them to different levels of government in connection with their mineral substance or hydrocarbon exploration and development activities. A statement filed in compliance with the requirements of a competent authority whose rules have been designated as acceptable by the Québec government may, under some conditions, be substituted for the statement required by the Act.

Climate Change

Canada has enacted the *Greenhouse Gas Pollution Pricing Act,* which will establish the backstop requirements for provinces and territories that do not have a carbon pricing system that meets federal requirements by January 1, 2019. To avoid the federal backstop, all provinces and territories must have a system for carbon pricing to ensure Canada meets its target under the Paris Agreement to reduce carbon emissions to 30% below 2005 levels by 2030. If a province or territory fails to implement an appropriate carbon pricing system, the federal government will implement a carbon tax of $10 per tonne in 2018, increasing by $10 per tonne each year until the tax reaches $50 per tonne by 2022. For provinces and territories that implement a cap-and-trade system, the framework must include a carbon emissions reduction target equal to or greater than the federal 2030 target, as well as caps that become more stringent annually until at least 2022.

Meanwhile, some Canadian provinces have already implemented either a carbon tax or a cap-and-trade system. British Columbia was the first to implement a carbon tax on the purchase and use of fuels, in 2008. Alberta's carbon tax (referred to as a "levy") regime took effect as of January 1, 2017, and replaced an existing cap-and-trade system. The cap-and-trade program in Québec was implemented in 2013 and is currently being reviewed for the post-2023 period. Québec linked its cap-and-trade program with California's in 2014 as part of the Western Climate Initiative (WCI), and the two jurisdictions have since held quarterly joint auctions for carbon allowances. Ontario's cap-and-trade program took effect in 2017 and was linked to Québec's and California's programs. However, the province's new premier has announced that Ontario's cap-and-trade system will be cancelled, and it has already been delinked from WCI. The remaining provinces and territories are in the process of confirming their positions on a carbon pricing system and/or developing regulatory frameworks to implement systems of their own.

Meanwhile, the Canadian Securities Administrators intends to develop guidance and educational initiatives for issuers with respect to the business risks and opportunities and potential financial impacts of climate change, as well as to consider new disclosure requirements regarding governance and risk management practices respecting climate change.

Crown's Duty to Consult and Accommodate Indigenous People

In Canada, the federal, provincial and territorial governments (i.e., the Crown) have a legal duty to consult with First Nations, Inuit and Métis (collectively, Indigenous) communities when the Crown has knowledge (real or constructive) of established or asserted Indigenous or treaty rights (e.g., traditional uses of land, such as hunting, fishing, trapping and the harvesting and gathering of plants; and interests in culturally relevant archaeological sites) and contemplates conduct that might adversely affect these rights. Such consultation may, in appropriate circumstances, lead to a duty on the Crown to accommodate Indigenous people. Accommodation measures vary widely: for example, the modification of a proposed project, enhanced environmental monitoring and mitigation measures, training and employment for Indigenous people and financial contributions to Indigenous communities.

The Crown's duty to consult and accommodate can be triggered by a federal, provincial or territorial approval, licence, permit or any other activity that could potentially adversely affect Indigenous or treaty rights, such as the expansion or initiation of resource extraction operations. As a result, these governments have generally instituted Crown consultation processes for proposed projects within their jurisdictions. For projects involving both federal and provincial/territorial governments, the Crown generally tries to coordinate consultation efforts to minimize duplication. The Crown will also try to coordinate its consultation process with any existing consultation or participation procedures required by land claim or similar self-government agreements.

The scope and content of the Crown's duty to consult and accommodate vary widely, are highly fact specific and are proportionate to the strength of the asserted Indigenous or treaty right and the seriousness of the potentially adverse impact upon it. In other words, the consultation activities to be undertaken and how they are approached will vary widely from project to project. For example, if there is little impact on an asserted or established Indigenous or treaty right, the level of consultation required may simply be a duty to give notice, disclose and share information and discuss important decisions to be taken in relation to the proposed project. When the adverse impact on Indigenous rights is potentially greater, the Crown's consultation requirements would be more substantial (e.g., more extensive consultation, mitigation and/or accommodation).

The Crown's duty to consult and accommodate can be triggered by a federal, provincial or territorial approval, licence, permit or any other activity that could potentially adversely affect Indigenous or treaty rights.

Indigenous groups do not currently have a "veto" over what the Crown can do.

Although the Crown must act in good faith to provide meaningful consultation appropriate to the circumstances, there is currently no legal duty on the Crown to ultimately reach an agreement with an Indigenous group. Indigenous groups do not currently have a "veto" over what the Crown can do. However, the Crown has frequently been subject to litigation alleging failure to fulfill its consultation obligations and, in its efforts to achieve reconciliation with Indigenous peoples, has committed to implement the United Nations Declaration on the Rights of Indigenous Peoples (including the goal of securing free, prior and informed consent). As the Crown reviews its laws and policies to ensure alignment with the Declaration, it is expected that consultation and accommodation commitments will extend beyond the legal duty to consult.

Indigenous peoples have unique knowledge about the local environment, and this Indigenous traditional knowledge is seen as an important part of project planning, resource management and environmental assessment. For example, the proposed federal impact assessment regime would expressly require the consideration of Indigenous traditional knowledge. When sharing their traditional knowledge, some communities may request that an Indigenous traditional knowledge access agreement (also referred to as a protocol agreement or memorandum of understanding) be negotiated, setting out how that knowledge will be accessed and used.

A private sector proponent does not have an independent common law duty to consult with or accommodate Indigenous people (but may have an express statutory obligation to consult, such as in Ontario's Environmental Screening Process or renewable energy appeal process for electricity projects, or under Ontario's *Mining Act*). However, while the common law legal duty to consult rests solely with the Crown, private sector proponents often play an important role in the Indigenous consultation process. For example, the Crown often delegates certain procedural aspects of consultation regarding a proposed project to the project proponent, including day-to-day consultation activities. In these cases, the Crown will generally supervise these activities and their outcomes to ensure that any impacts of the proposed project on established or asserted Indigenous or treaty rights are appropriately addressed, mitigated and/or accommodated.

While the final responsibility for consultation and accommodation rests with the Crown, private sector proponents often help fund Indigenous participation in the consultation process and enter into impact and benefit agreements (IBAs) to facilitate Indigenous accommodation. IBAs can mitigate risks of Indigenous litigation, direct action or negative publicity. In exchange for access and some restriction of rights, the Indigenous community may receive employment, education and community benefits, as well as some form of royalty interest, revenue sharing and/or equity participation. Project proponents would be well-advised to ensure that appropriate consultation and accommodation have been conducted because the failure to do so represents a significant risk of project delays and increased project costs for project proponents. Developers with delegated or statutory responsibilities should identify and engage potentially affected Indigenous communities as early as possible. A memorandum of understanding with such communities as to consultation protocols may be advisable. In addition, IBAs are often a useful tool to achieve a cooperative working relationship with the affected Indigenous communities.

IBAs can mitigate risks of Indigenous litigation, direct action or negative publicity.

CHAPTER 12

Employment Law

Canadian employment legislation applies to employees who work in Canada even if the employer is outside Canada. Most employees are under provincial jurisdiction, but federal legislation governs employees of federally regulated undertakings such as telecommunications, railways, banking and certain interprovincial enterprises.

Minimum Standards

Each province has employment standards legislation setting out minimum entitlements for employees. Similar standards are provided by the *Canada Labour Code* for employees under federal jurisdiction.

The main areas covered by this legislation include minimum wages, overtime, hours of work, vacation and holidays, pregnancy and/or parental leaves of absence, mass layoffs and notices of termination. Employment standards legislation applies to most employees, but most statutes provide specific exemptions from their requirements for certain types of employees (e.g., commissioned travelling salespersons).

In general, the standards imposed are relatively consistent across Canada. However, there are some significant differences in the details between jurisdictions, not only in the standards required, but also in other matters, such as the remedies available to employees. For example, in Ontario an employer can only be ordered to reinstate a terminated employee in limited circumstances (e.g., if the employer has improperly terminated an employee because she has taken pregnancy leave), whereas the *Canada Labour Code* and Québec legislation give employees potentially much broader rights to seek reinstatement.

The legislated minimum standards cannot be contracted out of or waived by employees. Terms more favourable to employees than the minimum standards can also be agreed upon, in either an individual employment contract or, in the case of unionized employees, a collective agreement. In Canada, agreed terms of employment will typically be more generous to employees, at least in certain respects, than the statutory minimum standards. In addition, non-statutory legal principles may also impose additional obligations on employers, particularly in connection with the termination of employees (see “Termination of Employees” below).

In general, the standards imposed are relatively consistent across Canada. However, there are some significant differences in the details between jurisdictions, not only in the standards required, but also in other matters, such as the remedies available to employees.

In Ontario and Québec, employment standards legislation provides that where a purchaser of all or part of a business employs any of the former employees, their employment is deemed to be continuous for the purpose of the legislation (e.g., if the purchaser later terminates any of these employees, it must recognize their prior service with the seller in giving notice of termination). The *Ontario Employment Standards Act, 2000*, also provides for related employers to be treated as a single employer for purposes of the Act. This is meant to prevent employers from splitting their payroll in order, for example, to avoid paying severance pay. Severance pay is payable to employees with more than five years of service if the employer has a payroll of $2.5 million or more, or if there is a "mass layoff" of 50 or more employees during a six-month period because all or part of the business has closed.

Québec's *Act respecting labour standards* generally does not apply to senior managerial personnel, which has been interpreted as referring only to a limited group of individuals who participate in the decision-making process with respect to the policies and strategies of the organization.

The Québec statute provides recourse for employees who are victims of specified prohibited practices, including psychological harassment. A remedy is also available to employees who have more than two years of service and who believe they were dismissed without cause. An employee who is successful in challenging the employer's conduct may request to be reinstated in his or her employment, in addition to being awarded any lost wages and other benefits.

The Québec statute allows an employee to be absent from work for an extended period of time for reasons related to his or her health or the health of his or her family. For example, an employee can be absent for as much as 104 weeks if his or her minor child has a serious and potentially fatal illness (the right to leaves of absence under the Ontario statute is much less generous). Moreover, the employer has the obligation, at the end of the leave of absence, to reinstate the employee in his or her former position with the same benefits, including the wages to which the employee would have been entitled had the employee remained at work.

In both Ontario and Québec, additional requirements are imposed in respect of simultaneous (or within certain specified time frames) terminations of large numbers of employees, which may include giving additional notice to employees and providing prescribed information regarding the impact of the termination to provincial authorities.

Labour Relations

Canada promotes the principle of collective bargaining between employers and employees. Employees, excluding those in managerial positions, may form bargaining units represented by specific trade unions. Unions are often organized along industry lines, such as the automotive or retail industry.

An employee who is successful in challenging the employer's conduct may request to be reinstated in his or her employment, in addition to being awarded any lost wages and other benefits.

Once a union has been certified and has given notice to the employer, the employer has a duty to bargain with the union in good faith to reach a collective agreement. A number of statutory conditions must be met before employees can lawfully strike or an employer can lawfully lock them out. Conciliation, arbitration and mediation are tools available to help employers and employees settle disputes. Labour disputes are adjudicated in Ontario by the Ontario Labour Relations Board, in Québec by the Tribunal administratif du travail, and for federally regulated employees by the Canada Industrial Relations Board. These specialized tribunals also deal with issues relating to the organization of unions and their representation of employees, with a view to preventing unfair labour practices and encouraging good faith bargaining.

While some Canadian jurisdictions limit the use of strikebreakers and require employers to maintain striking workers as employees, the *Québec Labour Code* prohibits altogether an employer from hiring anyone to replace striking or locked-out employees unless the replacement is a management employee who works in the establishment affected by the strike or lock-out.

Equality

HUMAN RIGHTS

The federal government and all the provincial governments have adopted human rights legislation, which prohibits discrimination in the workplace.

In Ontario, the *Human Rights Code* provides that, subject to bona fide occupational requirements, an employer must treat people equally without discrimination or harassment on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex (including pregnancy and breast-feeding), sexual orientation, age, record of offences, marital status, family status, gender identity, gender expression or physical or mental disability. Alcohol or drug dependence has been found to be a disability for the purpose of the *Human Rights Code*. Therefore, employers in Ontario generally cannot impose mandatory drug testing of all employees. The Human Rights Tribunal of Ontario deals with all claims of discrimination filed under the Code. It resolves applications through mediation and adjudication. It can make orders when it finds that a complaint is justified, awarding monetary compensation or other restitution to the complainant, or requiring a party that contravenes the Code to comply with it.

The federal government and all the provincial governments have adopted human rights legislation, which prohibits discrimination in the workplace.

The Québec *Charter of human rights and freedoms* provides that no one may discriminate on prohibited grounds in respect of the hiring, apprenticeship, duration of probationary period, vocational training, promotion, transfer, displacement, laying-off, suspension, dismissal or conditions of employment of a person or in the establishment of categories or classes of employment. The prohibited grounds are race, colour, sex, gender identity or expression, pregnancy, sexual orientation, civil status, age (except as provided by law), religion, political convictions, language, ethnic or national origin, social condition, handicap or the use of devices to palliate a handicap.

However, the *Charter* specifies that distinction, exclusion or preference is deemed non-discriminatory if it is based on the aptitudes or qualifications required for employment or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or an institution devoted exclusively to the well-being of an ethnic group. It also provides that every employer must pay equal wages to every employee performing equivalent work at the same place without discrimination on prohibited grounds.

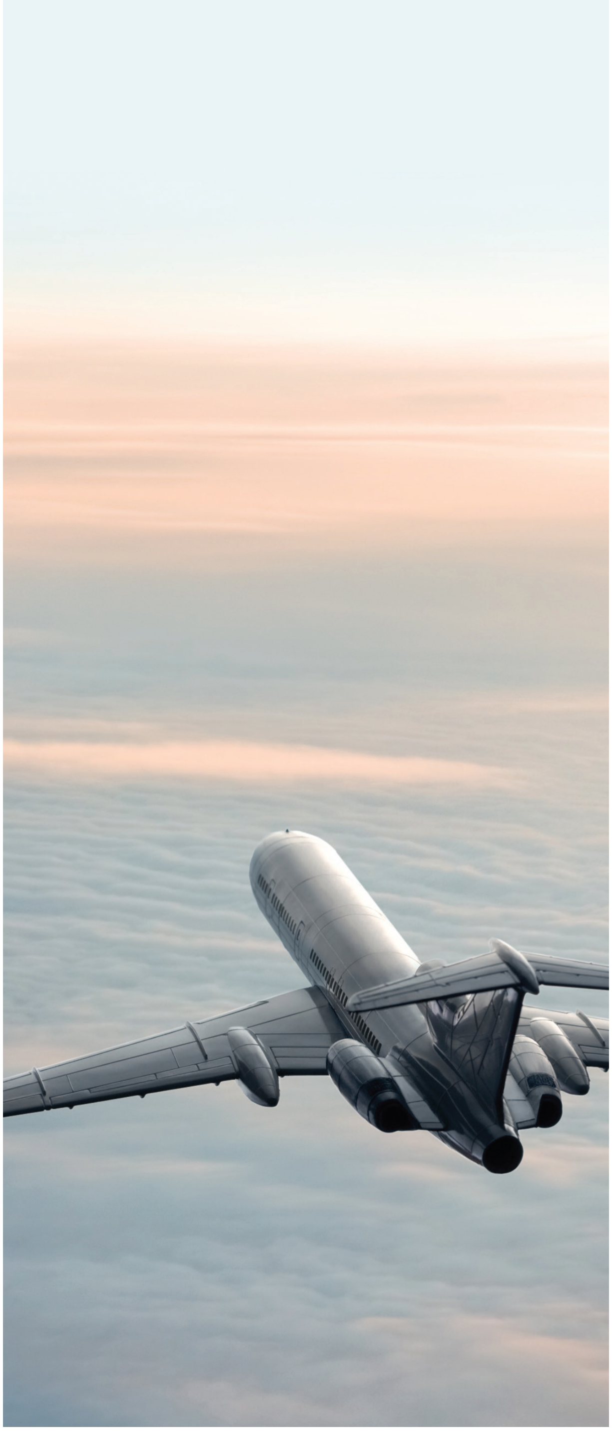
Québec's Commission des droits de la personne et des droits de la jeunesse investigates complaints of discrimination and acts as a conciliator between the parties. If conciliation fails, the matter may go to negotiated settlement or before an arbitrator or, if recourse to such remedies is not agreed to by the parties, to a hearing before the Tribunal des droits de la personne. The Tribunal may impose any remedial measures, including the reinstatement of a worker, when such outcome would be fair and expedient under the circumstances.

PAY EQUITY

It is illegal in every province in Canada to pay a woman less for doing the same job as a man.

Ontario and Québec each have adopted, through a *Pay Equity Act,* the principle of equal pay for work of equal value. Women in "female job classes" who perform jobs of similar value to employees in "male job classes" have the right to salary readjustments.

In Ontario, the Act applies to all private sector employers that employ 10 or more employees and all employers in the public sector. However, in the private sector, certain provisions of the Ontario Act requiring an employer to devise a pay equity plan apply only to employers with 100 or more employees. In Québec,



Ontario and Québec each have adopted, through a *Pay Equity Act*, the principle of equal pay for work of equal value.

the Act applies to private and public sector employers with 10 or more employees. Employer obligations vary depending on the number of employees and include devising a pay equity plan if the employer employs 50 or more employees, and setting up a pay equity committee if it employs 100 or more employees.

EMPLOYMENT EQUITY

The *Employment Equity Act* applies to federal sector employers only. The legislation is an "affirmative action/hiring quota" system designed to encourage employers to hire and promote women, Indigenous people, persons with disabilities and visible minorities. Certain non-federal sector employers must comply with the *Employment Equity Act* in order to obtain contracts with the federal government.

Employment Insurance

Employers and employees in Canada are required by the *Employment Insurance Act* to contribute to the employment insurance account administered by the federal government. Employee premiums are calculated each year. For 2018, the employee premium is 1.66% (1.3% in Québec) of insurable earnings up to a maximum of $51,700 (so that the maximum employee premium in 2018 is $858.22, or $672.10 in Québec). The employer must pay a premium equivalent to 1.4 times the employee's premium. The employer's contributions are deductible for tax purposes as a normal business expense and may be reduced if the employer supplies a salary insurance scheme to its employees.

Employment insurance benefits are paid to employees who lose their jobs due to layoff or termination. Employees on maternity leave, parental leave or absent due to illness are also covered.

Self-employed persons are ineligible. No benefits are paid to those who quit a job without cause or who are fired for misconduct.

For 2018, the employee premium is 1.66% (1.3% in Québec) of insurable earnings up to a maximum of $51,700 (so that the maximum employee premium in 2018 is $858.22, or $672.10 in Québec).

Québec's *Act respecting parental insurance* provides for a parental insurance plan that grants benefits to parents upon the birth of their child or the adoption of a minor. Every employee resident in Québec and every Québec employer is required to pay a premium. The 2018 contribution is 0.548% for the employee and 0.767% for the employer of earnings up to a maximum of $74,000. The maximum contribution payable in 2018 by the employee is $405.52 and by the employer is $567.58.

Canada Pension Plan

The Canada Pension Plan (CPP) is compulsory. With the exception of employers and employees in Québec, all employers and employees in Canada are required to contribute to this Plan. Québec has a provincial pension scheme (QPP), which provides benefits comparable to the CPP's benefits.

All provinces also have pension benefits standards legislation governing the elements of a private pension plan.

For more details regarding the CPP, QPP and pension benefits standards legislation, see the Retirement Plans, Employee Benefits and Savings Plans chapter of this guide.

Occupational Health and Safety and Workers' Compensation

Each province has enacted legislation to establish certain standards for occupational health and safety and to compensate employees who are injured in the course of their employment. The *Canada Labour Code* has similar regulatory standards for employees and employers under federal jurisdiction.

In Ontario, employers must meet the following safety standards in the *Occupational Health and Safety Act*:

- encourage health and safety programs through mandatory committees of management and worker representatives;
- impose duties on employers, supervisors, workers and other persons (e.g., owners) concerning workplace safety;
- provide employees with access to information regarding the presence of hazardous materials at the workplace;
- permit employees to refuse to work when they have reason to believe that their safety or that of another employee is endangered; and
- protect employees from violence and harassment.

The legislation is enforced internally by workplace health and safety committees and externally by inspectors appointed by the Ontario Ministry of Labour. Directors and officers of a corporation have a duty to take reasonable care to ensure that the corporation complies with the statute.

Some Ontario employers must register with the Workplace Safety and Insurance Board under the *Workplace Safety and Insurance Act*. The failure to do so within 10 days of becoming an "employer" is an offence. Most workers injured in accidents arising from employment or suffering from an occupational disease receive compensation from the fund established under this legislation, but cannot sue the employer for damages arising from such injuries.

In Québec's *Act respecting occupational health and safety* is intended to eliminate dangers to the health, safety and physical well-being of workers. It grants an employee the right to refuse to perform work if there is reasonable cause to believe that the work would expose him or her to risks to health, safety or physical well-being or expose an unborn or breast-fed child to such risks, in the case of a pregnant or breast-feeding worker. Employees may agree with employers upon more favourable working conditions than the minimum standards required by law, but employees cannot contract out of or waive the statutory minimum standards.

Québec's *Act respecting industrial accidents and occupational diseases* provides for compensation for injuries arising from employment and may include income replacement, compensation for bodily injuries, treatment, rehabilitation and death benefits. Compensation is based on a no-fault system. Workers injured by accidents arising from employment or suffering from an industrial disease may receive compensation from the fund established for such purposes; they cannot, however, sue the employer for damages. In certain circumstances, the statute may apply to employers who do not have an establishment in Québec at the time when the accident occurs or the disease is contracted.

Under the Workplace Hazardous Material Information System, employers in all provinces have an obligation to provide information and educational programs to employees who work with hazardous materials.

Employer Health Tax

The Ontario Health Insurance Plan is partially funded by an employer health tax. Employers who have permanent establishments in Ontario are required to pay the tax at a graduated tax rate ranging from 0.98% to 1.95% per year, depending on the total amount of remuneration paid in the year by the employer to its employees. Employers in Ontario with annual payrolls of less than $5 million are exempt from employer health tax on the first $450,000 of their Ontario payrolls.

Under the *Act respecting the Régie de l'assurance-maladie du Québec,* except for a few employers, every employer in Québec must pay to the Minister of Revenue a contribution of up to 4.26% of the wages paid to its employees in the province to finance the health plan.

Termination of Employees

In the absence of just cause for termination (which is generally construed narrowly by courts and tribunals in Canada), all employees – whether unionized or not – are entitled to notice of termination. The notice may be by way of "working notice" or pay in lieu of such notice. The amount of notice is, at a minimum, the statutory requirement as set out in the relevant employment standards legislation, or the requirement of the applicable collective agreement for unionized employees. Because minimum statutory employment standards for notice of termination cannot be contracted out of or waived, terms in an employment agreement that provide for "termination at will" or for notice of less than the statutory minimum will not be enforceable. Otherwise, a notice period for termination stipulated in an employment agreement will, in most cases, be enforceable. However, Canadian courts are often reluctant to enforce employment agreements that appear to have been imposed on employees by an employer, with little opportunity for employees to negotiate the terms.

If a non-unionized employee is employed for an indefinite term, and no specific period of notice of termination has been stipulated in an employment agreement, upon the employee's termination, the employee is entitled to sue in court for damages if the notice of termination has not been "reasonable," in addition to the employee's right to the statutory minimum notice or payment in lieu of notice.

A court's determination of what is "reasonable" will depend on the individual circumstances of the employee, primarily length of service, age, character of employment (i.e., level in the corporate hierarchy), remuneration, availability of similar alternative employment in the geographic locale and whether the employee has been enticed away from previous secure employment. The conduct of the employer at the time of the termination may also be a factor in determining compensation.

Reasonable notice of termination, as construed by a court, will usually exceed the minimum statutory requirements. Although statutory notice of termination generally will not exceed eight weeks, a court may award a long-service employee notice of 16 months or more.

Workforce Training

Québec's *Act to promote workforce skills development and recognition* requires most employers with payrolls in excess of $2 million to spend an amount representing at least 1% of their total payrolls on eligible training expenditures. Employers that do not spend the minimum amount fixed by law are required to pay to the Minister of Revenue the difference between the statutory amount and the amount actually spent.

CHAPTER 13

Retirement Plans, Employee Benefits and Savings Plans

Retirement Plans

Canadians typically receive retirement income from three sources: government-administered pension programs, employer-sponsored retirement savings programs and personal savings.

The Canada Pension Plan is a compulsory, contributory, earnings-related plan for employees that provides basic retirement, survivor, death and long-term disability benefits.

GOVERNMENT PENSION PROGRAMS

Canada has many government-administered pension, benefit and welfare programs that provide a certain degree of social security. Old Age Security (OAS) provides pensions to individuals from the age of 65, subject to residence requirements. Pensioners with high individual net incomes must repay part or all of the maximum OAS pension amount. For those with low incomes, a Guaranteed Income Supplement and an Allowance (paid to spouses and common-law partners of pensioners) may also be payable. These benefits are financed out of general tax revenues.

The Canada Pension Plan (CPP) is a compulsory, contributory, earnings-related plan for employees that provides basic retirement, survivor, death and long-term disability benefits. For individuals employed or resident in Québec, the Québec Pension Plan (QPP) is applicable and is substantially similar to CPP. The employee's contribution under CPP or QPP is a percentage of earnings that is matched by the employer's contribution.

CPP provides several possible types of benefits for employees who made a minimum contribution to the Plan:

- retirement pensions to contributors who have reached 65 years of age (or are between 60 and 64 years of age, subject to meeting certain requirements);
- benefits to a surviving spouse and/or surviving dependent child of the contributor; and
- disability benefits to a contributor who is no longer able to secure substantially gainful employment.

The employee's and employer's contributions for 2018 are each 4.95% of pensionable earnings over $3,500, up to a maximum of $55,900 (therefore, the maximum contribution payable in 2018 by each employee and employer is $2,593.80).

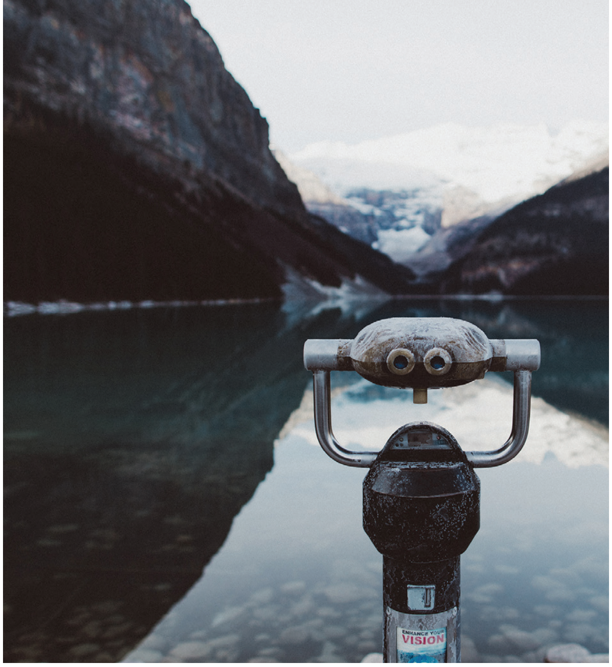
EMPLOYER-SPONSORED RETIREMENT SAVINGS PROGRAMS

Many employers voluntarily offer private pension plans. These may be specific to a single employer or multi-employer pension plans that are administered by boards of trustees. Generally, pension plans are defined benefit, defined contribution or hybrid plans. Defined benefit plans are becoming less and less common in the private sector. They, like employment and labour matters generally, are governed by federal or provincial legislation depending on the nature of the particular business or undertaking. To qualify for preferential tax treatment, pension plans must also be registered under the federal *Income Tax Act* and comply with the requirements of that Act.

Federal and provincial pension benefits standards legislation sets out minimum standards applicable to pension plans and specifies rules relating to many aspects of the pension arrangement, including the following:

- funding
- eligibility
- pension formula
- pensionable service
- contribution requirements
- vesting and locking-in
- early, normal and postponed retirement
- accrual of benefits and forms of pension
- investing and withdrawing pension fund assets
- transfers of pension fund assets
- amendments or discontinuance of a pension plan

Employers with operations in more than one province or territory may operate one pension plan that is registered where the plurality of members work. The pension plan also provides pension benefits for members employed in the other provinces or territories.



Where an employer provides a registered pension plan to employees, the level of benefits that can be provided from the plan is limited by the registration rules of the *Income Tax Act*. A supplementary arrangement is needed if the pension income that the employer wishes to provide is in excess of that limit.

Supplementary pension arrangements are commonly known as Supplementary Executive Retirement Plans (SERPS), top-up or top-hat plans. These plans may take a variety of forms and may be formal, informal, funded or unfunded.

Employers can also offer other retirement savings programs such as group registered retirement savings plans and deferred profit-sharing plans. Registered retirement savings plans and deferred profit-sharing plans permit employees to save for retirement on a tax-sheltered basis. Under the *Income Tax Act*, these plans are subject to specified contribution limits and qualified investment restrictions.

Employers can also offer other retirement savings programs such as group registered retirement savings plans and deferred profit-sharing plans.

The federal government has introduced the additional option of a pooled registered pension plan (PRPP). The PRPP is intended to provide a low-cost retirement savings option for employers that currently do not provide retirement plans. The federal government, Nova Scotia, Québec, Saskatchewan, Manitoba and Ontario have all enacted PRPP legislation and supporting regulations.

Employee Benefits

Every province and territory provides a health insurance program. Generally, these programs cover hospital and medical care. Public programs are funded by general tax revenues and, in some provinces, premiums or payroll taxes. The employment insurance and workers' compensation programs are described in the Employment Law chapter of this guide. Employee benefits provided by employers evolved largely to supplement the basic protection offered by government programs.

Employee benefit plans may include a wide range of life insurance benefits, accidental death and dismemberment coverage, long-term and short-term disability benefits and medical, drug and dental coverage. These plans are often complex in order to manage the financial and other risks of providing the benefits and to ensure tax-effectiveness.

Some employers also provide for employee benefits after an employee retires; however, due to the increased costs, the recent trend has been to reduce or terminate benefits or require retirees to pay premiums.

Employee benefit plans may include a wide range of life insurance benefits, accidental death and dismemberment coverage, long-term and short-term disability benefits and medical, drug and dental coverage.

Equity-Based Incentive and Savings Plans

Equity-based incentive and savings plans are useful tools in building effective compensation structures. These plans are very commonly used to reward and retain executives for the medium to long term.

There are a myriad of possible plan designs available, including share purchase plans, phantom share plans, share appreciation rights plans, deferred share unit plans, share option plans, performance share unit plans and restricted share unit plans.

In order to ensure that unintended legal consequences do not arise when implementing these types of plans, employers must consider the requirements of the *Income Tax Act* and provincial securities legislation.

CHAPTER 14

Temporary Entry and Permanent Residence

Anyone other than a citizen of Canada who wishes to work lawfully in Canada has two options: temporary entry or permanent residence. Every applicant for admission to Canada must meet Canadian federal government requirements. However, if an applicant will be employed in or reside permanently in Québec, he or she must satisfy Québec immigration criteria as well. In recent years, other provinces of Canada have negotiated so-called Provincial Nominee Programs with the federal government. These programs enable provinces to streamline the federal government's processing of the applications of workers and permanent residents if provincial authorities are persuaded that a local employer's need for an applicant or an applicant's professional qualifications will yield economic benefit.

The following discussion is intended primarily to outline in general terms the rules facilitating the admission of business persons to Canada, as well as cross-border movement in North America under the North American Free Trade Agreement (NAFTA) and among World Trade Organization (WTO) member nations under the General Agreement on Trade in Services (GATS). All applicants for admission to Canada (and any dependants accompanying them) are subject to general security and health restrictions, which are not discussed in this summary.

An employer that wishes to employ in Canada a person who is neither a permanent resident of Canada nor a Canadian citizen must, in most cases, assist that person in obtaining an employment authorization.

Temporary Entry

GENERAL

An employer that wishes to employ in Canada a person who is neither a permanent resident of Canada nor a Canadian citizen must, in most cases, assist that person in obtaining an employment authorization. This is typically done by obtaining a job offer validation from an Employment and Social Development Canada (ESDC) office. In some cases, it will not be necessary to obtain a job offer validation from ESDC. For example, senior management can be admitted to Canada under the intra-corporate transfer policy, which does not require that the company obtain a job offer validation in respect of such personnel.

To obtain a validation of an employment offer, the employer will generally be required to satisfy Canadian authorities that employment opportunities for Canadians will not be adversely affected if it employs the non-resident. This will entail convincing Canadian authorities that the employer has attempted to hire Canadians for that position and either no Canadian fulfilled the job requirements or no Canadian responded.

With a few exceptions described in the next paragraph, all persons who have obtained permission to work temporarily in Canada will be issued an employment authorization document, commonly called a work permit, at a port of entry upon their arrival in Canada. Employment authorizations may be issued for an initial period of six months to one year but may be extended for several years following the initial date of entry.

Some people need not obtain an employment authorization – for example, diplomats, "head office" employees who visit a Canadian affiliate for less than 90 days for the purpose of internal consultations, and business or government representatives who come to Canada to purchase or sell goods for that business or government for less than 90 days, provided that they do not sell directly to the general public.

INTERNATIONAL AGREEMENTS

Canada is a party to several international agreements relating to trade and commerce in general. These agreements supplement Canada's immigration legislation and policies, which have for the past several years increasingly been designed to facilitate the objectives of Canadian business interests.

NAFTA provides a streamlined procedure under which certain North American business persons who are citizens of the United States or Mexico may enter Canada to work temporarily. GATS provides similar rules for more restricted categories of citizens of WTO member nations. The procedures under GATS are similar to those under NAFTA and therefore only major differences will be noted.

Under NAFTA, there are four categories of business persons who qualify for the streamlined process:

- business visitors
- traders and investors
- professionals, and
- intra-company transferees.

A "business visitor" is a business person who is seeking temporary entry into Canada for one of a series of specific purposes listed in NAFTA. Persons who so qualify need not apply for a work permit and may be admitted to Canada at a port of entry.

A "trader" is a business person who seeks temporary entry to carry on substantial trade in goods and services and who will be employed in a supervisory or executive capacity.

An "investor" is a business person who seeks entry to develop and direct operations of a business in which he or she has invested or will invest a substantial amount of capital.

Employment authorizations may be issued for an initial period of six months to one year but may be extended for several years following the initial date of entry.

A “professional” is a business person who will engage in a specified profession while in Canada temporarily (NAFTA has a much longer list of specified professions than GATS). The minimum requirements, generally speaking, are a bachelor’s degree, sometimes combined with practical experience. Under GATS, the three-month period for which a professional may be admitted cannot be extended. NAFTA has no such restriction.

An “intra-company transferee” is a person who has been employed by the employer, or its affiliate, for at least one year within the three-year period immediately before the date of the application (or, under GATS, for at least one year immediately preceding the application) and who is coming to Canada to work temporarily for the same employer, or an affiliate, in a capacity that is executive, managerial or involves specialized knowledge.

Traders, investors, professionals and intra-company transferees who are U.S. or Mexican citizens coming into Canada temporarily must obtain work permits. They need not comply with the prior approval procedures, petitions, labour certification tests and other similar procedures generally required to obtain a work permit.

Permanent Residence

GENERAL

A person who wants to settle permanently in Canada can be admitted under one of three main classes of immigrants: the family class, the refugee class (which will not be discussed) or the economic classes.

To be admitted under the family class, an applicant must be sponsored by a close family member who is a Canadian citizen or permanent resident. The family class includes a spouse, a common-law partner, a conjugal partner, a dependent child, a parent or

The “Start-up Visa” program seeks to link immigrant entrepreneurs with Canadian private sector funders and mentors.

grandparent, or, in some cases, another close relative. There is a yearly limit to the number of permanent resident applications that will be considered for the sponsorship of a parent or grandparent. However, qualified persons may apply for a “Parent and Grandparent Super Visa,” which is a multiple-entry visa that will allow an applicant to remain in Canada for up to 24 months at a time without the need for renewal and will be valid for up to 10 years.

The economic classes are outlined in more detail below.

THE BUSINESS IMMIGRATION PROGRAM

The Business Immigration Program is a special program designed to facilitate immigration for qualified business persons or persons who will contribute significantly to Canada’s cultural or athletic spheres. It applies to two categories of immigrants, “self-employed persons” and those who qualify under the “Start-up Visa” program.

“Self-employed persons” are those with relevant experience who have the intention and ability to become economically established in Canada and who have participated at a world-class level in cultural activities or athletics, or who have experience in farm management.

The “Start-up Visa” program seeks to link immigrant entrepreneurs with Canadian private sector funders and mentors. The program is intended to foster innovation, job creation and the establishment of companies that will be able to compete globally, by assisting such immigrant entrepreneurs in navigating the Canadian business environment and helping Canadian private sector firms to benefit from the influx of talented innovators from around the world.

In order to qualify under the Start-up Visa program, an applicant has three options. An applicant can qualify by securing a minimum investment of $200,000 from a designated Canadian venture capital fund. An applicant could also qualify for the program by securing a minimum investment of $75,000 from a designated Canadian "angel investor" group. A third option is for an immigrant entrepreneur to obtain the support of a designated Canadian business incubator through a competitive process. Designated business incubators will choose among business proposals with strong growth potential and benefit to Canada. Start-up Visa applicants must demonstrate competence in either English or French by submitting the results of language testing by an approved agency and must have completed at least one year of post-secondary education. Applicants must demonstrate that upon entry to Canada they will have sufficient funds to support themselves and any dependants accompanying them. At present, the minimum funds required range from $12,475 for a single applicant to, for example, $33,014 for a family of seven persons. These amounts are updated annually.

QUÉBEC

If an immigrant's destination is Québec, a permanent resident visa will be issued if federal officials are satisfied that the immigrant meets the Canadian health and security criteria and a Québec officer has determined that (i) if the applicant is an economic immigrant, he or she meets the Québec selection criteria; or (ii) if the applicant is an immigrant in another class, he or she meets the Canadian selection criteria or the joint Québec and Canadian selection criteria.

PROVINCIAL NOMINEE PROGRAMS

The federal government has entered into provincial nominee agreements with Newfoundland and Labrador, Nova Scotia, New Brunswick, Prince Edward Island, Ontario, Manitoba, British Columbia, Alberta, Saskatchewan and Yukon. Such agreements allow the provinces to select immigrants to fulfill specific economic needs, or create and expand employment and business opportunities. The federal government retains the responsibility for issuing immigrant visas to provincial nominees and their accompanying dependants after they have met all federal legislative requirements, including those related to health, absence of a criminal record and security.

Provincial nominee programs are primarily directed at selecting skilled workers whose qualifications are particularly suited to the needs of a particular provincial economy, although some provinces are also interested in nominated business applicants as well. Applications are made initially to provincial authorities. Each province has its own selection criteria, but in most instances a pre-arranged job offer will be essential. A major advantage of such programs is that they may offer successful applicants expedited visa processing.

SKILLED WORKERS

Through recent initiatives, Canada has indicated that its immigration programs should select as permanent residents individuals with professional, managerial and technical expertise that is valued by Canadian employers. Persons who have worked or studied in Canada in prescribed circumstances are recognized as desirable immigrants who have shown the ability to adapt to Canadian economic realities.

Canadian Experience Class

The Canadian Experience Class (CEC) enables certain applicants to seek permanent residence under a streamlined procedure. A CEC applicant must be in a province other than Québec and must be either a temporary foreign worker with at least two years of full-time skilled work experience in Canada or a foreign graduate from a Canadian post-secondary institution with at least one year of skilled work experience in Canada. Skilled work experience contemplates occupations that are classified as managerial, professional or technical, as well as the skilled trades.

A temporary foreign worker will be assessed on only two selection criteria: work experience and ability in English or French. A foreign graduate of a Canadian post-secondary institution will also be assessed on the basis of his or her education.

Federal Skilled Worker Class

Under the Federal Skilled Worker Class (FSWC), an applicant either must have secured a valid arranged offer of employment from a Canadian employer or must demonstrate that he or she has at least one year of continuous and paid work experience within the last 10 years in National Occupational Classification Skill level 0, A or B. The FSWC uses a point system

Provincial nominee programs are primarily directed at selecting skilled workers whose qualifications are particularly suited to the needs of a particular provincial economy.

weighted to reflect that youth and competence in English or French are critical predictors of an applicant's success in the Canadian labour market. A maximum of 12 points are awarded to persons between the ages of 18 and 35. One point is deducted for each year thereafter, such that an applicant who is 47 years old or more will receive no points for the age factor. In addition, an applicant must submit to a test of English or French language skills from a designated agency and satisfy criteria with respect to work experience, education and adaptability.

International PhD students are eligible to apply under the FSWC if they are enrolled in a PhD program at a provincially or territorially recognized private or public post-secondary educational institution in Canada, have completed at least two years of study toward a PhD and are in good academic standing at the time they apply or have graduated from a PhD program no more than 12 months before the date that the application is received. However, an international PhD student will not qualify if the student has received an award requiring the student to return to his or her home country to apply the knowledge and skills acquired in Canada and has not yet satisfied the terms of the award.

Federal Skilled Trades Class

Under the Federal Skilled Trades Class (FSTC), those who are qualified in a skilled trade may apply for permanent resident status. Applicants must satisfy criteria with respect to English or French language skills, training and work experience. Applicants must have either an offer of full-time employment for a total period of at least one year or a certificate of qualification in that skilled trade issued by a provincial or territorial body.

Express Entry Program

Express entry is not a discrete immigration program. Rather, it is an online application system to streamline the selection and processing of applications within the FSWC, the FSTC, the CEC and some categories of applicants within the provincial nominee programs. The system aims to accelerate the selection and admission of immigrants with skill sets that are viewed as enabling the applicant to be more likely to achieve success in Canada.

Applicants who believe they qualify for one of the four classes mentioned above can apply online, and their application will constitute an "expression of interest." An applicant who demonstrates eligibility for at least one of the four classes will enter the express entry "pool." At periodic intervals, applicants in the pool will receive an Invitation to Apply (ITA) for immigration to Canada on the basis of eligibility for one of the four classes. The decision to issue an ITA is made by the federal or a provincial government, or by a Canadian employer.

CHAPTER 15

Civil Litigation

At the apex of the judicial system is the Supreme Court of Canada, which hears appeals from the provincial and territorial courts of appeal, as well as from the Federal Court of Appeal. All Federal Court and Federal Court of Appeal judges, as well as the judges of the Supreme Court, are appointed by the federal government.

Introduction to the Canadian Judicial System

Canada is a federation made up of 10 provinces and three territories, which all have primary constitutional jurisdiction over the administration of justice, although there is also a Federal Court, which deals with matters under federal jurisdiction. The courts of the Canadian judicial system are organized in a hierarchy, in which the trial courts are subordinate to appellate courts. The lowest level consists of provincial and territorial courts, which have limited jurisdiction and whose judges are appointed by the provincial and territorial governments. The next level consists of the superior courts of each province and territory, which are of general jurisdiction. The judges of these courts are appointed by the federal government, although these courts remain the administrative responsibility of the provincial and territorial governments. The next level consists of appellate courts: the provincial and territorial courts of appeal, as well as the Federal Court of Appeal. Finally, at the apex of the judicial system is the Supreme Court of Canada, which hears appeals from the provincial and territorial courts of appeal, as well as from the Federal Court of Appeal. All Federal Court and Federal Court of Appeal judges, as well as the judges of the Supreme Court, are appointed by the federal government.

The Federal Court has jurisdiction over claims against the government of Canada and civil actions in federally regulated areas such as admiralty, intellectual property and aeronautics, as well as challenges to decisions of federal administrative tribunals. The Federal Court has no general civil jurisdiction, unlike provincial and territorial superior courts. In Canada, there is a presumption that the provincial superior courts have jurisdiction to administer both federal and provincial law. As a result, some disputes fall within both provincial and federal judicial jurisdiction.

With the exception of the province of Québec, all of the provinces and territories are common law jurisdictions. Québec, however, is a civil law jurisdiction that modelled its first civil code after the French *Napoleonic Code*. The rules and procedures governing legal proceedings in each of the provinces and territories are similar, although there are some differences. This overview focuses on the rules applicable in Ontario (a common law jurisdiction) and Québec (Canada's only civil law jurisdiction).

PROCEEDINGS IN ONTARIO AND QUÉBEC

The superior courts of Ontario and Québec are of general jurisdiction and can hear any matters – both criminal and civil – within the province that are not specifically excluded by statute or rules of procedure. Proceedings at first instance in the superior courts are heard by a single judge. The role of the judge in Québec (in contrast to some other civil law jurisdictions) is limited to an adjudicative role, as is the case in common law jurisdictions like Ontario. The judge plays no role in investigating the facts of the proceeding.

In Québec, there are no jury trials in civil matters. In Ontario, the parties have the right to have the case heard by a jury in all matters. In practice, jury trials are common in personal injury litigation, but rarely invoked in commercial disputes. There are no civil proceedings that must be tried by a jury. The court retains discretion to strike out a jury notice and require a trial by judge alone. A jury notice can be struck out on the basis of the complexity of the case.

The official languages of Canada are English and French, and a party to a legal proceeding in Canada, including in Ontario and Québec, is generally entitled to have the matter tried in either English or French.

Commencing and Responding to Legal Proceedings in Canada

STEPS REQUIRED BEFORE COMMENCING LEGAL PROCEEDINGS

Generally speaking, a party is not required to do anything before commencing proceedings by filing the appropriate document with the court. However, there are exceptions to this rule. For example, when

A party contemplating litigation should seek legal advice as soon as it becomes aware that it may have a claim, to protect against the expiry of any potential limitation period.

the constitutionality of a law is challenged or the government (federal or provincial) is otherwise involved, special advance notice to the government may be required before or at the time of commencing proceedings.

It is nonetheless common practice for a party contemplating litigation to send a demand letter to the opposing party before commencing proceedings if doing so will not result in any prejudice to its claim. In fact, it is often advisable to send such a demand because it may determine when interest will begin to run on the claim.

Each province prescribes its own time periods within which a proceeding must be commenced. In Ontario, the general limitation period for most civil claims, such as breach of contract and negligence, is two years. In Québec, the general limitation period for most civil claims is three years. However, the limitation period may vary in certain circumstances. In addition to limitation periods, particularly in the common law provinces and territories, but also in certain circumstances in Québec, a claim can be barred for delay by equitable doctrines such as laches or acquiescence. A party contemplating litigation should seek legal advice as soon as it becomes aware that it may have a claim, to protect against the expiry of any potential limitation period.

COMMENCING LEGAL PROCEEDINGS

In Ontario, court proceedings can be brought in one of two ways: an action or an application.

An action is usually commenced by the plaintiff issuing a statement of claim. However, when there is insufficient time to prepare a statement of claim, the plaintiff may commence an action by issuing a notice of action, which contains a short statement of the nature of the claim. The statement of claim must then be issued within 30 days of the notice of action being issued. A statement of claim must be served on the defendants within six months of the commencement of the action. An action requires the exchange of pleadings, mutual disclosure of evidence and a full trial.

An application is commenced by the plaintiff issuing a notice of application and, in contrast to an action, is typically a more summary type of proceeding. A proceeding may be brought by application only when a statute or the *Rules of Civil Procedure* so authorize. Applications are used when there are no material facts in dispute and it is possible to argue the issues in dispute on the basis of a paper record (with evidence given by affidavit and out-of-court cross-examinations, rather than live testimony from witnesses in court).

In Québec, all proceedings are instituted by originating application. The originating application is accompanied by a summons calling on the defendant to formally appear in the record.

RESPONDING TO LEGAL PROCEEDINGS

In both Ontario and Québec, once the defendant has been served with the originating process, the defendant has a prescribed period of time in which to respond, in order to participate in the proceeding. In an Ontario action, the defendant must file a statement of defence. In an application in Ontario, a party named as a respondent must file a notice of appearance. In Québec, responding parties must file an answer to the summons and follow with either an oral or a written statement of defence, depending on the complexity or special circumstances of the case.

In both Ontario and Québec, a defendant may file a counterclaim if it wishes to make a claim against the plaintiff. A defendant may also join another defendant or a third party to the proceeding. Where there are multiple defendants, any defendant may also bring a crossclaim against one or more of the other defendants. Finally, at any time before judgment, a party that is interested in an action to which it is not already a party may seek permission from the court to intervene in the proceeding, either as a party or as a friend of the court.

DISCOVERY PROCESS

In civil proceedings in Canada, the nature and scope of a dispute are defined by the pleadings delivered by the parties. The pleadings consist primarily of the documents referred to above: in Ontario, a statement of claim or notice of application and a statement of defence; in Québec, an originating application and a statement (oral or written) of defence. The pleadings are concise statements that set out (or plead) all of the material facts to a dispute. The pleadings are intended to define the facts and issues that are relevant to the trial.

Documentary Discovery

In Ontario, every party to an action is required to produce to the opposing parties all relevant documents within its power, possession or control, except documents protected by privilege. The documents are accompanied by an affidavit of documents sworn by the party. The affidavit encloses a list of all relevant documents and states that, after a diligent search of that party's files and records, those are the only relevant documents to be produced. The definition of "documents" includes paper documents, emails, computer files, tape recordings, videos and electronic media. The definition of "relevance" is also broad.

The opposing party is entitled to receive a copy of every document that is not privileged listed in the affidavit of documents. Privileged documents are generally those that are created for the purpose of giving or receiving legal advice. Where legal advice of any kind is sought from a professional legal adviser, the confidential communications relating to the giving or receiving of such advice are permanently protected from disclosure by the client or by the legal adviser unless the client waives the protection. Documents that are created for the dominant purpose of actual or reasonably contemplated litigation are also protected by a form of privilege.

In Québec, the exhibits in support of a judicial application must be listed in the summons to the defendant (and then subsequently delivered to the defendant) or delivered to the defendant concurrently with the originating application. In addition, each party may make requests to the other to produce specific and identifiable relevant documents. Subject to privilege and the rules of admissibility of evidence, the parties are required to provide copies of the documents requested.

In Ontario, every party to an action is required to produce to the opposing parties all relevant documents within its power, possession or control, except documents protected by privilege.

In both Québec and Ontario, a party is allowed, prior to trial, to ask the other party questions out of court and to have the questions and answers officially recorded by a court stenographer.

In both Ontario and Québec, the court may order third parties to produce relevant documents before trial, if it is in the interests of justice to do so.

Oral Discovery

In both Québec and Ontario, a party is allowed, prior to trial, to ask the other party questions out of court and to have the questions and answers officially recorded by a court stenographer. The official transcripts of these "examinations" may later be put into the trial record and may also be used to impeach a witness on cross-examination at trial. A party is normally entitled to examine only one representative of the opposing party, unless the parties consent otherwise, and in exceptional circumstances the court may grant leave to examine multiple representatives.

Objections may be made by the parties during oral discovery. Such objections may then be submitted to a judge for adjudication.

In both Ontario and Québec, written interrogatories (whereby questions are asked and answered in writing) are available in place of oral discovery, but are used infrequently.

Deemed/Implied Undertaking Rule

With certain limited exceptions, the parties to an action are not permitted to use the evidence or information obtained from the other party during documentary and oral discovery for any purpose other than the court proceeding in which such information was obtained.

Motions and Other Interlocutory Proceedings

PRE-TRIAL PROCEEDINGS

A party may bring a motion (in Ontario) or an application (in Québec) to the court at any time, either before or during trial. Other than in circumstances of exceptional urgency, the other parties must be given advance notice of such a motion or application and they must be provided with adequate opportunity to respond.

MOTIONS FOR SUMMARY JUDGMENT OR TO DISMISS PROCEEDINGS

In Ontario, either party may bring a motion for summary judgment at a preliminary stage if it can demonstrate to the court that there is no genuine issue requiring a trial. Motions for summary judgment are common in Ontario proceedings. A court may also dismiss a proceeding that limits freedom of expression on matters of public interest (so-called gag proceedings), or that the court otherwise considers to be frivolous, vexatious or an abuse of process.

Québec does not have a summary judgment procedure. Québec does, however, allow the court to impose a wide variety of sanctions for "improper use of procedure," including the dismissal of a proceeding on its merits if it is clearly unfounded, frivolous or dilatory. The court in Québec also has the discretion to sanction in a variety of ways a party's conduct that is vexatious, quarrelsome, in bad faith or excessive, which is intended (among other things) to sanction proceedings that are commonly referred to as "SLAPP" (strategic lawsuits against public participation) cases. In Québec, the burden of proof on a party seeking the dismissal of an action at a preliminary stage on any grounds is very high.

INJUNCTIONS

In both Ontario and Québec, a party may ask the court for an injunction, which is an order either preventing a person from engaging in certain conduct or requiring a person to perform a particular act. Injunctions may be permanent and awarded by final judgment or may be granted on an interim basis, pending a final judgment. An interim injunction will generally be granted only if the moving party can establish that it will suffer irreparable harm (harm that cannot be

In Ontario, either party may bring a motion for summary judgment at a preliminary stage if it can demonstrate to the court that there is no genuine issue requiring a trial.

compensated in monetary damages) in the absence of the injunction and that the balance of convenience favours granting the injunction. The general rule in both provinces is that the party seeking the injunction must give an undertaking or deposit security to pay for any damages suffered by the other party as a consequence of the interim injunction if the court later determines that the injunction should not have been issued.

SPECIAL ORDERS: MAREVA INJUNCTIONS, ANTON PILLER ORDERS AND NORWICH ORDERS

A "Mareva injunction" is named after the English case of *Mareva Compania Naviera SA v. International Bulkcarriers SA*. This type of injunction enjoins a party from disposing of or transferring assets in the court's home jurisdiction and, if the circumstances so warrant, worldwide. A Mareva injunction will not be granted absent proof that there is a real risk that the defendant will dissipate assets, thus rendering a final judgment against the defendant ineffectual.

An "Anton Piller order" is named after the English case of *Anton Piller KG v. Manufacturing Processes Ltd*. This type of order allows a plaintiff to enter the premises of the defendant to seize and preserve evidence to further its claim in a civil action. These orders are granted only when the plaintiff has a strong case against the defendant and can demonstrate on the facts that, absent such an order, there is a real possibility that relevant evidence will be destroyed or otherwise disappear.

A "Norwich order" is named after the English case of *Norwich Pharmacal Co. v. Customs and Excise Commissioners*. This type of order allows a party to obtain information from a third party (against whom the moving party has no cause of action). To obtain such an order, in addition to establishing a valid claim against the defendant, the plaintiff must establish (among other things) that the third party against whom discovery is sought is both more than a mere witness to the alleged wrongdoing and the only practical source of information available. The plaintiff will be expected to pay a reasonable fee to such third party and to reimburse any expenses incurred by the third party as a result of the Norwich order.

Mareva injunctions, Anton Piller orders and Norwich orders are available throughout Canada, including in Ontario and Québec.

Mareva injunctions, Anton Piller orders and Norwich orders are available throughout Canada, including in Ontario and Québec. These types of orders are generally sought without giving notice to the defendant. As a result, the moving party must make full and frank disclosure to the court, including disclosure of facts or arguments that may work against the moving party's case.

PRE-JUDGMENT ATTACHMENT ORDERS AND SEIZURES

In Ontario, if the proceedings concern a claim to an interest in land, the plaintiff can, with the authorization of the court (which may be sought without notice to the defendant), register a "certificate of pending litigation" against the title to the property. Such registration will not limit the disposition of the property, but it will put third parties on notice of the claims of the plaintiff that can lead to an eventual charge on the property.

In Québec, at any time before judgment, a plaintiff may apply to a judge for authorization to seize the defendant's property before judgment if there is a reason to believe that without this remedy the plaintiff may be unable to recover its debt. The property is seized by a court officer and then entrusted to a guardian designated by the court, unless the plaintiff authorizes the defendant to remain in possession of the seized property. The property seized before judgment will not be handed over to the plaintiff until there is a final judgment in its favour on the merits. A plaintiff may also seize, before judgment and without the authorization of a judge, the defendant's property in certain exceptional cases specifically provided for by law, including when the property is movable (chattel) property that a plaintiff has a legal right to revendicate.

Trial Practice in Canada

PRE-TRIAL PRACTICE

In Ontario, once documentary and oral discovery has been completed, a pre-trial conference is held in which, if it appears that the case will not be settled, the court will try to find ways to simplify the case by seeking admissions and otherwise limiting the issues in dispute. In Québec, such pre-trial conferences only take place in some cases. In both provinces, a party has the right to seek admissions from the other party in advance of trial.

WITNESSES

In both Ontario and Québec, the parties may call any witnesses and introduce any evidence into the record that they believe might support their positions, subject to the rules of evidence. A witness, once duly sworn, will first be examined by the party that called the witness and will then be cross-examined by the other party.

A witness who refuses to attend to give evidence voluntarily before a court in Ontario or Québec may be compelled to attend by court summons, provided that the witness is resident in Canada. In both Ontario or Québec, when there is no right to compel a witness to attend a trial, the evidence of that witness may be obtained through the issuance of letters of request (also known as letters rogatory), in which case the court issues an order seeking the assistance of a foreign court or a rogatory commission to order that a witness in the foreign jurisdiction submit to an out-of-court examination.

DOCUMENTARY EVIDENCE

All documentary evidence at trial must generally be introduced through the oral testimony of a witness who has personal knowledge of the documents concerned, unless all parties consent to admission of the documentary evidence.

EXPERT REPORTS

The usual practice in Ontario is for the parties to retain their own experts when necessary, although the court can also, on its own motion, appoint an independent expert to opine on an issue in certain circumstances. The parties may cross-examine a court-appointed expert. Subject to objections by the parties, the report of a court-appointed expert will form a part of the evidence at trial. The written report of an expert retained by a party must be provided to the other parties within a stipulated period of time, failing which the expert's testimony may be excluded. In Ontario, the number of expert reports that can be filed without leave of the court is limited to three.

In Québec as well, it is usual for the parties to retain their own experts when necessary, although the parties are required to justify why they do not intend to file a joint expert opinion and this justification may be challenged by the court. Moreover, in Québec, the court can, at any time and on its own motion, appoint an independent expert to opine on an issue. The reports of the experts will form part of the evidence at trial. The parties may cross-examine an expert appointed by a party of adverse interest, but examinations of joint experts or court-appointed experts are limited to asking for clarifications on points covered by these experts in their reports, obtaining the expert's opinion on new evidence introduced during trial and any other purpose with authorization of the court. In Québec, the parties cannot seek more than one expert per area or matter of expertise unless the court authorizes otherwise. And when the parties deliver contradictory expert reports, the court can order the experts to meet to reconcile their opinions, identify the points that divide them and report to the court and the parties about the outcome of the meeting.

JUDGMENTS, ORDERS AND APPEALS

Judgments and Orders

Following trial, the court will issue a decision on the merits of the parties' dispute. Decisions are generally rendered in writing. In Ontario, although the court decides the matter and may issue reasons for judgment, it is generally the parties who draft the formal judgment and submit it to the court for approval and signature. In Québec, the judgment is drafted and issued by the court and signed by the presiding judge.

In both Ontario and Québec, final judgments may be amended, set aside or varied, but only in very limited circumstances. In Ontario, an order may be

set aside or varied if it is established that the order was obtained by fraud or that new facts have been discovered that were not available at the time of trial and would very likely have affected the outcome. Similarly, in Québec, an order may be varied or set aside in any of the following circumstances: there was a defect in the procedure; the judge went beyond the conclusions sought or failed to rule on one of the essential grounds of the suit; judgment was rendered upon documents that were only subsequently discovered to be false or following fraud of the adverse party; or decisive documents were discovered since the judgment was rendered, although the party or its lawyer acted with due diligence.

Appeals

Normally, the only option available to a party following a final judgment is an appeal to a higher court, which is allowed in most instances. In both Ontario and Québec, a judge will not hear an appeal from his or her own decision, nor participate on a panel hearing any such appeal. Further, in both provinces, an appellate court has broad discretion to make any order it considers just on the appeal, including setting aside the decision below and substituting its own judgment, referring the matter back to the same or a new judge for a subsequent hearing or determination, or dismissing the appeal altogether.

Generally, an appeal court will give significant deference to findings of fact made by the trial judge or a jury, and will only overturn such a finding when it is plainly wrong and constitutes a palpable and overriding error. Pure findings of law are afforded less deference and generally will be overturned if they are found to be incorrect. Findings of mixed law and fact are typically entitled to the same level of deference accorded to findings of fact.

Default Judgments

In both Ontario and Québec, a plaintiff can obtain a default judgment against a defendant who, after being served with the originating process, fails to file a defence with the court (or in Québec, to answer the summons). A default judgment can be set aside in certain circumstances. In Québec, a party seeking to set aside a default judgment must establish that it was prevented from filing a defence by surprise, by fraud or for some other sufficient reason justifying its failure to defend the proceeding. In Ontario, a court will set aside a default judgment if the defendant can establish that its failure to file a defence was not wilful or deliberate and that it moved promptly to have the default judgment set aside.

Consent Judgments

In both Ontario and Québec, a defendant can, at any stage of a proceeding, consent in whole or in part to the plaintiff's claim. If the defendant has consented to only a portion of the plaintiff's claim, a judgment may be immediately obtained for that portion of the claim, and the proceedings will continue in respect of the balance of the claim.

Normally, the only option available to a party following a final judgment is an appeal to a higher court.

Special Proceedings

CLASS ACTIONS

A class action is a proceeding instituted by one or more persons who seek to represent the interests of a “class” of persons with similar claims against the same defendant or defendants. In both Ontario and Québec, the person seeking to represent a class, generally referred to as a “representative plaintiff,” must bring a motion or application seeking approval of the court to proceed with the action as a class proceeding. Ontario and Québec have similar tests that must be satisfied before the court will authorize a class action. The court will assess, among other things, whether there is sufficient commonality between the claims of the proposed representative plaintiff and the members of the class so that it is appropriate and in the interest of justice to permit the case to proceed as a class action.

If a class action is authorized, the class action will proceed to a “common issues” trial (unless the parties agree to settle it before trial). Such a trial is intended to decide all of the issues common to the members of the class. Once resolved, a protocol will usually be established to address any outstanding individual issues that could not be determined on a class-wide basis.

If a class action is not authorized, the action may continue as an individual action. In practice, however, this rarely occurs.

SIMPLIFIED PROCEDURES

A number of provinces have simplified procedures that can be used to resolve disputes of lower monetary value. For example, in Ontario, claims for $100,000 or less in respect of money, real property or personal property must be brought under a simplified procedure. This procedure provides for a faster and less expensive determination of disputes. Similarly, in Ontario, cases involving $25,000 or less can be brought before the Small Claims Court, which requires less formal procedures than the Superior Court. In Québec, although there is no simplified procedure as such, in cases in which the amount claimed or the value of the property claimed is less than $30,000, no pre-trial examination of witnesses is permitted. Moreover, as long as the plaintiff is not an entity with more than 10 employees, if the amount of the claim is $15,000 or less, the case must generally proceed before Small Claims Court, where representation by lawyers is only very exceptionally permitted.

A class action is a proceeding instituted by one or more persons who seek to represent the interests of a “class” of persons with similar claims against the same defendant or defendants.

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COMPETITION TRIBUNAL PROCEEDINGS

Proceedings concerning alleged violations of the *Competition Act* may be commenced before the Competition Tribunal. The *Competition Act* governs matters such as mergers, misleading advertising and restrictive trade practices (see the Competition Law chapter of this guide). The tribunal is a strictly adjudicative body that operates independently of any government department. The tribunal is composed of experts in economics, business and law.

SECURITIES COMMISSION PROCEEDINGS

Each of Canada's provinces has a securities regulator that oversees the capital markets, including equities, fixed income securities and derivatives (see the Financing a Business Operation chapter of this guide). In Ontario, the Ontario Securities Commission (OSC) is a self-funded Crown corporation accountable to the Ontario legislature. The OSC has broad powers to enforce the Ontario *Securities Act* and to investigate allegations of misconduct in the capital markets.

Proceedings before the OSC include allegations against individuals or companies suspected of violating securities law or acting contrary to the public interest. In addition, the OSC conducts hearings on regulatory matters such as takeover bids and reviews decisions from certain self-regulatory organizations, stock exchanges and clearing agencies. Proceedings before the OSC are heard by a panel of commissioners with expertise in matters of law and finance. The OSC has its own rules and procedures. Decisions of the OSC may be appealed to a court, but Ontario courts generally show deference to the expertise of the OSC.

In Québec, the Autorité des marchés financiers (AMF) has the mandate to administer all the laws governing the supervision of Québec's financial sector, including the securities sector. Québec's independent Financial Markets Administrative Tribunal (Tribunal administratif des marchés financiers, or TMF) functions as an administrative tribunal charged with exercising certain powers provided for in the Québec *Securities Act*. The TMF can, for example, make an order regarding a takeover bid or issuer bid, order the cessation of an activity in respect of a transaction in securities or derivatives, or make an order prohibiting a person from acting as a director or senior executive. Once filed with the Superior Court, a decision of the TMF becomes executory in the same way as a decision of the Superior Court. The TMF can also review decisions of the AMF. The TMF has its own rules of procedure. Depending on the matter, some decisions of the AMF or the TMF are subject to appeal to a court, but others are final.

Alternative Dispute Resolution

In Canada, disputes can be resolved by agreement of the parties through various alternative dispute resolution (ADR) mechanisms, including arbitration and/or mediation.

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MEDIATION

Mediation involves a neutral mediator who assesses the dispute between the parties and attempts to facilitate a settlement. Mediation is generally non-binding in nature and can result in a resolution of a dispute only if all the parties to the dispute agree to the terms of a settlement.

In Ontario, most proceedings commenced in the Superior Court are subject to mandatory mediation. There are a few exceptions to this general rule, including actions that are listed on the Commercial List, a specialized division of the Superior Court in Toronto that deals with complex commercial matters.

In Québec, parties are required to consider private prevention and resolution processes (like mediation and arbitration) before referring their disputes to the courts. The Québec courts also provide the option, at any stage of the proceedings, of settlement conferences that are conducted by a judge in private, confidentially, without prejudice and at no cost to the parties. Parties to litigation in Québec may also agree to appoint a private mediator to hold a settlement mediation.

ARBITRATION

Parties may choose to resolve a dispute through arbitration, another ADR mechanism. The procedure and parameters of the arbitration can generally be agreed on by the parties in an arbitration agreement. There are, however, statutory provisions that apply to arbitrations conducted in Ontario and Québec.

In Ontario, an arbitration will be subject to either the *International Commercial Arbitration Act or the Arbitration Act, 1991*. The *International Commercial Arbitration Act* is applicable to commercial disputes if the parties have places of business in different countries. The Act provides for arbitration based on the Model Law adopted by the United Nations Commission on International Trade Law (UNCITRAL). This model is procedurally flexible, allowing the parties involved to design a procedure that best suits them within the statutory framework.

If the *International Commercial Arbitration Act* does not apply, the *Arbitration Act, 1991* will apply to domestic arbitrations if the parties have agreed, whether in writing or orally, to submit a dispute to arbitration. Under the Act, arbitrators may rule in their own jurisdiction. When a proceeding is commenced in an Ontario court in respect of a matter that is subject to arbitration, the court, on application by one of the parties, will stay the court proceeding in favour of arbitration, except in certain limited circumstances. An Ontario court may, however, make various orders to assist the arbitration process.

In Québec, arbitration agreements are a recognized (nominate) contract under the *Civil Code of Québec* and do not require formal recognition to be enforceable. Arbitrators have the power to decide matters relating to their own competence (or jurisdiction). When an action is taken before a court and the parties have an existing arbitration agreement regarding the subject matter of the dispute, the court may refer the case to arbitration if so requested by one party before the case is set down for trial and if that party has not submitted to the jurisdiction of the court. A judge cannot interfere with the arbitration process except where specifically authorized by the *Civil Code of Québec*, but may grant provisional measures to assist the arbitration process on a motion of a party. The procedure of an arbitration conducted in Québec is governed by the contract or, failing that, by the rules contained in the *Civil Code of Québec*.

Costs and Recovery of Litigation Expenses

In both Ontario and Québec, a portion of a party's litigation expenses may be recovered through an award of costs. Costs are normally awarded to the successful party, but the court has the discretion not to award costs or even to award them to the losing party. The court may consider various factors in exercising its discretion to award costs, including the complexity of the proceeding and the conduct of any party that tended to unnecessarily prolong the proceeding or that was improper, vexatious or unnecessary. The costs awarded by the court usually do not cover the full legal expenses incurred by the party.

In Ontario, costs include both lawyers' fees and out-of-pocket disbursements and are awarded on either a "partial indemnity" basis or a "substantial indemnity" basis. Substantial indemnity costs are typically calculated at 1.5 times partial indemnity costs and are generally only made to sanction improper conduct of one of the parties. When deciding the issue of costs, Ontario courts will also consider a written offer to settle made by one party before trial.

In Québec, costs are limited to administrative fees charged to file proceedings and certain disbursements, such as fees for printing, transcript fees and expert fees. The court may punish substantial breaches noted in the conduct of the proceedings by ordering a party to pay a portion, or all, of the professional fees of the other party's lawyer. However, awards of costs for lawyers' fees are only exceptionally granted in Québec.

In both Ontario and Québec, costs may also (though very exceptionally) be awarded against the lawyer for a party, rather than the party itself, if there has been an abuse of process by the lawyer.

Enforcement of Foreign Judgments

Because Canada is a federal state in which the provinces have constitutional jurisdiction over the administration of justice, a judgment of a civil court in one province or territory is not automatically enforceable in another province or territory. In this respect, it is no different from a judgment rendered by a court in a foreign country. However, in Ontario and the other common law provinces and territories of Canada, there are well-established common law principles and statutory procedures enabling a judgment ordering the payment of money rendered by either a court in another province of Canada or a court in a foreign country to be enforced, without relitigating the case on its merits.

A judgment of a court outside Ontario will be enforced in Ontario if the defendant submitted to the jurisdiction of the court that gave the judgment, either by agreement or by participating in the proceeding, or if the claim had a "real and substantial connection" to the jurisdiction in which the judgment was rendered. Assuming that there is no jurisdictional issue, very few defences can be raised against the enforcement of a foreign judgment. The available defences include

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that the foreign judgment was obtained by fraud or in a manner contrary to natural justice. These defences are rarely successful. An Ontario court will not re-examine the merits of the claim. The fact that the laws of a foreign jurisdiction are different in both substance and procedure from those in Canada or that the defendant might have had some defence in a Canadian action that was not available in the foreign proceeding is not a barrier to enforcement of a foreign judgment.

Ontario also has legislation providing for reciprocal enforcement of judgments from other provinces and territories of Canada and the United Kingdom. The statutory procedure is not always used because it is not significantly more advantageous than enforcement under common law principles and because the criteria applied and the defences available are substantially the same.

In Québec, any judgment from another jurisdiction is similarly considered a foreign judgment. In deciding whether to enforce a foreign judgment, the court will not engage in an examination of the merits of a decision, but may refuse to recognize a foreign judgment if the court determines that (i) the foreign court had no jurisdiction to render the judgment; (ii) the foreign judgment was rendered in contravention of fundamental principles and procedure; (iii) a dispute between the same parties, based on the same facts and having the same object, has given rise to a judgment rendered in Québec, is pending before a Québec court or has been decided in another jurisdiction and the latter judgment meets the necessary conditions for recognition in Québec; (iv) the outcome of the judgment is manifestly inconsistent with public order as understood in international relations; or (v) the decision enforces obligations arising from the taxation laws of the foreign country (unless that country has agreed to enforce obligations arising from the taxation laws of Québec). Furthermore, a foreign judgment rendered by default will not be recognized by a Québec court unless the plaintiff demonstrates that the document initiating the foreign proceeding was duly served on the defaulting party under the laws of the foreign jurisdiction.

A plaintiff can usually readily enforce in Ontario or Québec a judgment for the payment of money that was rendered by a court in another province or territory in Canada or by a court in any other developed country.

Therefore, in practice, a plaintiff can usually readily enforce in Ontario or Québec a judgment for the payment of money that was rendered by a court in another province or territory in Canada or by a court in any other developed country.

CHAPTER 16

Insolvency and Restructuring Proceedings

Canada has a complex, modern and robust system of insolvency and restructuring proceedings governed by a combination of federal or provincial statutes and jurisprudence. Canadian insolvency proceedings can be described as practical, effective, responsive and accessible. Canada's regime is well positioned to handle the inevitable insolvencies in traditional industries as well as in emerging industries and technologies such as cannabis, blockchain, cryptocurrency and artificial intelligence. It is an exciting time in Canadian restructuring law as new decisions and advancements are occurring daily.

The *Bankruptcy and Insolvency Act* (BIA) and the *Companies' Creditors Arrangement Act* (CCAA) are the most frequently used Canadian insolvency statutes. The BIA and the CCAA allow an insolvent debtor to undertake a restructuring or liquidation process. Increasingly, complex restructurings are also implemented using the *Canada Business Corporations Act* (CBCA).

It is a basic principle of Canadian insolvency law that foreign creditors will have the same rights as domestic creditors in local insolvency proceedings.

The *Bankruptcy and Insolvency Act* (BIA) and the *Companies' Creditors Arrangement Act* (CCAA) are the most frequently used Canadian insolvency statutes. The BIA and the CCAA allow an insolvent debtor to undertake a restructuring or liquidation process.

Canadian Insolvency Proceedings

There are six key insolvency mechanisms in Canada:

a) CCAA proceedings

b) a plan of arrangement under the CBCA

c) receivership (court appointed and private)

d) BIA proposal

e) bankruptcy

f) *Winding-up and Restructuring Act* (WURA) proceedings

Other than private receivership, each provides for a stay of proceedings prohibiting stakeholders from taking any enforcement steps against the debtor. In bankruptcy or BIA proposal proceedings, the stay is automatic and the scope is statutory. In a court appointed receivership or CCAA, CBCA or WURA proceedings, the stay is imposed by court order and the scope is discretionary. As a result of the stay, while such a proceeding is pending, creditors (including secured creditors) usually cannot exercise the rights and remedies that they would otherwise have against the debtor and its assets. Such claims must be pursued within the insolvency proceeding. The stay does not, however, affect "eligible financial contracts," which are defined to include derivatives agreements, futures, options, securities lending transactions, repurchase agreements for securities or commodities and various other transactions.

Unless a cease trade order is issued, the publicly traded securities of an insolvent debtor will continue to trade (although, as a practical matter, the value or marketability of the securities will be adversely affected). Cease trading orders are often issued when debtors no longer wish to incur the costs associated with continuing public disclosure obligations.

In Canada, certain wage, pension, withholding tax and government remittance claims are treated on a super-priority basis. In addition, because of statutory liabilities imposed upon directors for unpaid wages and statutory withholding and remittance obligations, many of these liabilities are satisfied as part of a proceeding. In conjunction with this, a national program exists to assist and compensate workers who are unpaid in certain circumstances. Defined benefit pension plans are a particular concern in Canada as the law is constantly evolving.

Other than as discussed above, government claims rank equally with those of other creditors. Contaminated real estate creates difficult issues in Canadian insolvency proceedings. Local counsel should always be consulted when dealing with these issues.

CCAA PROCEEDINGS

Large insolvent entities generally employ the CCAA because of its flexibility and efficiency. It allows an insolvent debtor to design a bespoke liquidation or restructuring plan. CCAA is a debtor-in-possession, court-supervised proceeding that facilitates a compromise or arrangement between an insolvent debtor company and its stakeholders, including both secured and unsecured creditors, so that the company can continue in business. A debtor can also sell its business or liquidate under the CCAA, typically pursuant to a court-approved sales and investor solicitation process.

The CCAA is available to any company incorporated in Canada (or with assets or business activities in Canada) that is insolvent and whose total creditor claims exceed $5 million, either alone or as part of a corporate group. The CCAA does not apply to banks, insurance companies, loan companies, trust companies and authorized foreign banks, all of which are dealt with under WURA.

A CCAA proceeding is commenced when a discretionary order is issued staying proceedings against the debtor company and granting other relief and protection from its creditors. A monitor, who cannot be the debtor's auditor and must be a licensed trustee, must be appointed by the court to oversee the business and financial affairs of the company and its dealings with creditors. Because of the broad

A CCAA proceeding is commenced when a discretionary order is issued staying proceedings against the debtor company and granting other relief and protection from its creditors.

discretion given to the supervising CCAA court, there is no specific form of stay order prescribed by the CCAA, although in some provinces (including Ontario and Québec), template model orders have been endorsed by the courts. The CCAA provides a framework for certain aspects of the restructuring, including the disclaimer or resiliation of contracts, the availability and terms of any super-priority debtor-in-possession financing, the sale of assets out of the ordinary course of business, special arrangement for critical suppliers and the assignment of contracts without consent.

While the CCAA debtor is under the protection of the stay, the company continues to be managed by its board of directors and management. Filing under the CCAA does not alter the statutory or personal liability of the directors and officers. However, the stay order may extend to the debtor's directors and officers for certain liabilities that they incurred prior to the filing, and the compromise of certain liabilities may be provided for in a plan. Furthermore, a filing under the CCAA typically provides for a court-ordered priority charge over the debtor's assets (with the amount and priority negotiated with the debtor's secured creditors who are being "primed" by the charge) in favour of the directors and officers as protection against any statutory director and officer liabilities that they may incur during the CCAA proceedings merely as a result of their position as directors and officers, to the extent not covered by existing director and officer insurance.

A CCAA debtor may file a plan of compromise or arrangement for creditors' approval at a meeting of each class of creditors. Approval of a majority of the number of creditors voting and two-thirds of the value of the claims of the creditors voting is required. A creditor-approved plan must also be sanctioned by the court, which must find it to be fair and reasonable. A failed plan does not result in automatic bankruptcy. Equity claims (which include third-party indemnity claims arising in relation to equity) cannot be paid until all creditors are satisfied in full. In a liquidating CCAA, there may be no plan unless it is necessary for distribution purposes.

Filing under the CCAA does not alter the statutory or personal liability of the directors and officers.

CBCA PROCEEDINGS

Canadian corporate statutes such as the CBCA provide for an arrangement scheme to restructure and implement fundamental changes to the debt and/or equity of a distressed corporation. Such reorganizations can often be completed quickly and with less impact and cost as compared with a full insolvency proceeding. Referred to as "balance sheet restructurings," these proceedings have been particularly effective in the resource and commodities industries but are becoming more common across all sectors. Arrangements are subject to court supervision and a vote of the affected securityholders. However, a corporate plan of arrangement is not practical if an operational or broader restructuring is needed.

RECEIVERSHIP

Receivers may be appointed privately or by a court, but, for a variety of reasons, court appointments are far more common. A receiver will realize against the property, assets and undertaking of the debtor and will distribute the proceeds in accordance with the relative priorities of the creditors. A receiver may be appointed as receiver and manager with the authority to operate the debtor's business as a going concern, or simply as a supervisor.

A secured creditor may appoint a private receiver over the property, assets and undertaking of a defaulting debtor pursuant to a contractual power granted by the debtor to the creditor in security documents. In all circumstances, the secured creditor must demand repayment of outstanding amounts and must give a statutory notice of intention to enforce its security to the debtor at least 10 days prior to the receiver's appointment. In a court-appointed receivership, the court order appointing the receiver will grant a stay of proceedings. There is no stay of proceedings available in a private receivership.

A court-appointed receiver is not an agent of the debtor or of any creditors. As an officer of the court, it has duties and obligations, which are prescribed by statute and the appointment order. There are no statutory criteria establishing which entities may be subject to receivership proceedings. As a result, the terms of the appointment of a receiver are largely a function of the court's discretion.

BIA PROPOSAL

An insolvent debtor may choose to restructure its affairs through the consensual compromise of creditors' claims under the BIA. This mechanism is known as a BIA proposal.

A BIA proposal is generally commenced by the debtor filing a Notice of Intention to Make a Proposal, which triggers an automatic stay of proceedings. From the initial filing until the end of the proposal process, a licensed trustee must act in connection with the proposal. The BIA specifies that a proposal must be filed within six months of the beginning of the process. A proposal under the BIA may be made to creditors generally, or the creditors may be separated into classes, based on commonality of interest. The BIA requires that certain payments, such as outstanding wages, certain pension obligations and government

remittances, must be paid in full and cannot be compromised in a proposal. A proposal is deemed to be accepted only if all classes of creditors vote in favour by a majority in number and two-thirds in value of the creditors voting in each class and is also subject to the court's approval. A failed proposal will result in automatic bankruptcy.

Due to the strict statutory code and time frame governing BIA proposals, most complex Canadian insolvency restructurings are not carried out as proposals. If the restructuring requires a sophisticated remedy that is not available under the BIA – for instance, if the debtor needs to maintain uninterrupted supply from critical suppliers who have no contracts with the debtor, or if the restructuring process will take longer than six months – the CCAA is typically used. Banks, insurance companies, loan companies, trust companies and authorized foreign banks cannot make BIA proposals.

As in a CCAA proceeding, the company continues to be managed by its board of directors and management during a proposal proceeding. Directors and officers will be liable for all personal liabilities that accrue during their tenure. However, the automatic stay of proceedings triggered upon the commencement of proposal proceedings extends to directors of the corporation to prevent stakeholders from bringing an action against a director for a claim that arose prior to the commencement of the proceedings. In some cases, certain claims against the directors and officers may be compromised and released as part of the proposal.

BANKRUPTCY

Bankruptcy results in the liquidation of an insolvent entity either voluntarily or involuntarily and can be initiated either by the debtor or by its creditors. Upon an assignment into bankruptcy or the issuance of a bankruptcy order, all of the property, assets and undertaking of the bankrupt will vest in a bankruptcy trustee for the general benefit of creditors (subject to the interests of secured creditors). As a result, generally, the directors and officers will resign prior to the bankruptcy. However, the directors and officers will remain liable for all personal liabilities accrued during their tenure.

The bankruptcy trustee will realize against unsecured assets. The proceeds will be distributed, in accordance with the detailed rules set out in the BIA, to the unsecured creditors that have proven claims on a pro rata basis, subject to the payment of trust claims, certain government claims, secured claims and statutorily mandated preferred claims. Other than statutory rights of redemption by the bankruptcy trustee, bankruptcy does not affect the rights of secured creditors or involve secured assets. Banks, insurance companies, loan companies, trust companies and authorized foreign banks cannot be put into bankruptcy (see "WURA Proceedings" below).

WURA PROCEEDINGS

Although it is also possible for most insolvent corporations to be liquidated under the WURA (but not corporations federally incorporated), in practice this statute is used almost exclusively for the winding-up of insolvent regulated financial institutions under the supervision of their regulators, in conjunction with the *Canada Deposit Insurance Corporation Act* (CDIC Act) and the *Bank Act*.

A proposal is deemed to be accepted only if all classes of creditors vote in favour by a majority in number and two-thirds in value of the creditors.

Under the CDIC Act, an order can be made vesting all the shares and subordinated debt issued by a bank in the Canada Deposit Insurance Corporation or appointing the latter as a receiver. The *Bank Act* includes provisions allowing the Superintendent of Financial Institutions to take control of the assets of a bank and manage the winding-up process. In practice, these steps are combined with WURA proceedings as they provide the statutory framework for dealing with creditors' claims.

As a practical matter, the banking and financial sector is much more concentrated in Canada than in most other developed countries, and insolvencies or liquidations of significant financial institutions are rare.

International Issues

ASSETS LOCATED IN A FOREIGN JURISDICTION

Orders of Canadian courts are generally effective only in Canada. Assets of a Canadian insolvent debtor located in a foreign jurisdiction will require the Canadian court to request a court in that foreign jurisdiction to issue a parallel stay order or a parallel insolvency proceeding for protection. Such orders have been granted across the globe; however, given the proximity and trade relations, the vast majority of such parallel proceedings have involved Canada and the United States.

CANADIAN RECOGNITION OF FOREIGN PROCEEDINGS

Canadian courts have the jurisdiction and discretion to recognize foreign insolvency proceedings. Canada has largely adopted the UNCITRAL Model Law on Cross-Border Insolvency. However, the approach here differs from that of other countries, and there are some important differences that are unique to Canada.

Principally, the recognition of foreign proceedings does not deprive the Canadian court of jurisdiction in the event that there is a fairness or equity issue. As a result, even if a Canadian court recognizes a foreign proceeding, that foreign proceeding must treat Canadian creditors and assets in a manner substantially consistent with Canadian legal standards.

Assets of a Canadian insolvent debtor located in a foreign jurisdiction will require the Canadian court to request a court in that foreign jurisdiction to issue a parallel stay order or a parallel insolvency proceeding for protection.

CHAPTER 17

Foreign Anti-Corruption Measures

The *Corruption of Foreign Public Officials Act* is Canada's principal legislation aimed at combating the bribery of foreign public officials in connection with international business transactions. It is somewhat similar to measures found in the U.S. *Foreign Corrupt Practices Act* and the U.K. *Bribery Act.*

The *Corruption of Foreign Public Officials Act* (CFPOA) is Canada's principal legislation aimed at combating the bribery of foreign public officials in connection with international business transactions. It is somewhat similar to measures found in the U.S. *Foreign Corrupt Practices Act* and the U.K. *Bribery Act*.

Anti-Corruption Offences and Exceptions

Under the CFPOA, it is a criminal offence in the course of business to give, offer or agree to give or offer, directly or indirectly, a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official:

- as consideration for an act or omission by the official in connection with the performance of his or her duties or functions; or
- to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

Giving even relatively small benefits, such as token gifts, can constitute an offence under the CFPOA, although it may be difficult to characterize a trivial benefit as being given as consideration for an act or omission. It is clear that the offence can apply to non-monetary benefits, such as free or subsidized housing or tuition, but the scope of prohibited benefits remains unclear, since to date there have been few contested proceedings under the CFPOA.

The prohibition applies to offering or giving benefits not only to legislators or judges, for example, but also to anyone holding an administrative position with a foreign state and to employees of state boards, commissions or corporations who are performing duties on behalf of a foreign state. ("Foreign state" includes both foreign countries and their political subdivisions, such as cities or provinces, and agencies.) However, the prohibition applies only in respect of persons currently holding such a position, not former or anticipated public office holders.

The CFPOA contains saving provisions that allow for the payment of certain types of benefits. For example, benefits that are permitted or required under the laws of the foreign state or public international organization for which a foreign public official performs duties or functions do not violate the anti-corruption offence. The CFPOA also does not prohibit payment of reasonable expenses incurred in good faith by or on behalf of a foreign public official that are directly related to the execution of a contract with the foreign state for which the official performs duties or functions.

The CFPOA no longer provides an exception for "facilitation payments," which were payments made to expedite or secure the performance by a foreign public official of a routine act that is part of the official's duties or functions.

Books and Records Offence

The CFPOA also includes a separate offence prohibiting certain deceptive bookkeeping practices "for the purposes of bribing a foreign public official" for a business advantage, or to hide such bribery – for example, keeping separate accounts that do not appear in official records, not recording transactions, recording non-existent expenditures, falsely describing entries, and early destruction of records.

It remains to be seen whether Canadian courts will interpret the concept of "bribery" in this records offence as coinciding with the general CFPOA prohibition on giving certain benefits to foreign public officials, in which case this offence may not add much to the anti-corruption offence. In any event, this records offence is narrower than a similar offence under the U.S. *Foreign Corrupt Practices Act*, which imposes a general obligation on securities issuers to keep accurate records and does not require that any inaccuracy be for the purpose of bribery.

The CFPOA expressly applies to conduct outside Canada by Canadian citizens and Canadian corporations.

Offences in the *Canadian Criminal Code* and *Income Tax Act* prohibiting forgery or falsification of documents may also cover some of the same conduct as the CFPOA's books and records offence.

Scope of Application of the CFPOA

The CFPOA expressly applies to conduct outside Canada by Canadian citizens and Canadian corporations. Canadian courts have also generally applied Canadian criminal sanctions to conduct that has a real and substantial connection to Canada, whether or not the offenders are Canadian. A court has held that the CFPOA did not give the Canadian government the right to prosecute a foreign citizen accused of having received unlawful payments, when the accused had never been in Canada and all of his alleged conduct in violation of the CFPOA took place outside Canada. However, the individual could be charged if and when he enters, or is extradited to, Canada.

Penalties and Sanctions

A violation of the CFPOA is punishable by a fine at the discretion of the court and imprisonment for up to 14 years. CFPOA offences are not subject to any limitation period.

The CFPOA is a federal government enforcement priority to demonstrate compliance with Canada's international treaty obligations. Certain high-profile cases are presently ongoing.

Resolutions of charges against corporations have included ongoing probation and audits. Property obtained or derived from a CFPOA offence may in some circumstances be forfeited. Civil actions for economic torts based on unlawful acts, such as unlawful interference with economic relations, are also possible.

Liability for Conduct of Affiliates

As the principal CFPOA offence prohibits anyone from directly or indirectly giving, offering or agreeing to a prohibited type of benefit, in certain cases, a parent company may be considered to indirectly give a prohibited benefit actually paid by its subsidiary.

Individual persons who hold positions with more than one affiliate may also incur multiple liabilities in respect of the same conduct. A parent company might also be liable for aiding and abetting or counselling a CFPOA offence committed by a subsidiary.

Risk Assessment, Due Diligence and Compliance Measures

CFPOA issues should be considered by a purchaser contemplating a merger or acquisition in Canada. Breaches of the CFPOA by the target may result in significant fines, damage claims and investigation and other costs that arise only after closing. Identification of a possible CFPOA liability prior to closing may affect the price the purchaser is willing to pay for the target.

Anti-corruption due diligence may include reviewing the target's anti-corruption policies and procedures, interviewing key personnel, and, in particularly sensitive cases, performing background checks and reviewing email. When undertaking CFPOA due diligence, consideration should be given to whether the target (i) operates in countries or businesses known for a high degree of corrupt behaviour; (ii) sells or distributes in high-risk countries; (iii) sells to government entities, including state-owned or state-financed corporations; (iv) has joint ventures with government or quasi-governmental entities; (v) requires significant government approvals and licences to operate in high-risk countries; (vi) deals frequently with customs authorities in high-risk countries; or (vii) relies on relationships with third-party agents or consultants who interact with foreign officials on the target's behalf.

The following may constitute red flags that warrant investigation: payments in cash, unusual scholarships or charitable contributions as well as lavish gifts, unexplained introductions of third parties into transactions, agent relationships with government officials, payments made in a country other than where the relevant business is conducted, transactions lacking an apparent economic purpose and excessive compensation or commission percentages in relation to the services provided.

International businesses should also adopt a comprehensive compliance and monitoring program to educate employees and minimize the risk of illegal conduct by their employees, including communicating a clearly articulated code of conduct and policy, consistently applying disciplinary processes for violations of the code, implementing a system of internal controls, maintaining accurate books and records, establishing a reporting system and helpline, and conducting independent audits. A similar approach should be taken with third parties such as agents and partners – for example, by including "compliance with law" and "right to audit" clauses in agency contracts.

About Davies

Davies is a law firm focused on high-stakes matters. Committed to achieving superior outcomes for our clients, we are consistently at the heart of their largest and most complex deals and cases. With offices in Toronto, Montréal and New York, our capabilities extend seamlessly to every continent. Contact any of our lawyers to talk with us about your situation.

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