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Doing Business in Canada

Overview

Doing Business in Canada

No decision to establish or invest in a business abroad should be made without a basic understanding of the legal framework in which the business operates or will operate. The following broad overview of the Canadian legal environment will help potential investors to become familiar with principal business laws and practices in Canada.

Government and Legal System

Canada has a federal system of government. The Canadian federal state consists of a federal government, ten provincial governments and three territorial governments, each with its own sphere of legislative competence. In addition, the provincial governments delegate legislative authority to local municipal governments. At all levels, governments may delegate regulatory power to specialized administrative agencies, boards or commissions. Consequently, a business may well be subject to federal, provincial and municipal legislation, as well as administrative regulation and the common law developed by the courts.

Alternative Vehicles for Doing Business

Foreign investors most often conduct business in Canada through either a Canadian branch operation or a Canadian subsidiary corporation. A foreign business could also enter the Canadian market by forming an unlimited liability company, partnership, or joint venture with other parties. Alternatively, the foreign business may establish one or more Canadian sales representatives, distributors or franchisees.

A number of considerations must be addressed when choosing the appropriate commercial vehicle for entering the Canadian market. Tax consequences and limited liability tend to be the key considerations for most businesses. Incorporation of a limited liability subsidiary corporation is an attractive option because it ensures that Canadian operations will have a legal existence separate from that of the parent and thus the parent would not ordinarily be responsible for liabilities of the subsidiary. However, if the Canadian operations are not expected to generate profit for some years, initial operation as a branch could produce considerable tax savings (as discussed more fully below).

Subsidiary Corporations

Subject to certain exceptions, a business may incorporate under the federal or any of the provincial or territorial corporate statutes. In any case, incorporation is accomplished simply by filing Articles of Incorporation and paying a modest fee to the appropriate government authority. A number of factors guide the investor in choosing between federal and provincial/territorial incorporation.

Due consideration must be given to whether the company needs to protect its business name across the country. A federal corporation may carry on business in every province under its corporate name, even if another corporation is already using a similar name in a province or territory. This is not the case with a provincially/territorially incorporated company. A provincially/territorially incorporated company is only entitled to do business in its province/territory of incorporation. While both federally and provincially/territorially incorporated companies still need to be registered to do business in each province or territory where they carry on business, an issue could arise if the name of a provincially/territorially incorporated company conflicts with that of an existing corporation or business entity in another province or territory. Federal incorporation is, therefore, a good choice if a business requires countrywide name protection. On the other hand, provincial/territorial incorporation offers advantages in situations where business operations are restricted to a single province/territory.

Each federal corporation must now maintain a register of registered holders and beneficial owners of shares representing 25% or more of a corporation's voting rights or fair market value, as well those with direct or indirect control over such shares. These registers are not public, however corporations must disclose their contents to the federal corporate registrar and certain regulatory or governmental authorities upon request. Furthermore, shareholders and creditors are also able to request access to this information subject to certain conditions. British Columbia has enacted similar legislation and it is reasonable to expect that these changes will serve as a model for equivalent amendments to other provincial and territorial corporate legislation.

Branch Operation

A foreign corporation operating a branch usually must obtain an extra-provincial licence from each province wherein it intends to conduct business. The law of each such province should be consulted. For example, to receive an Ontario extra-provincial licence, the foreign corporation must conduct and submit a corporate name search establishing that use of the corporation's name is permitted under Ontario law.

Canadian corporations generally act through a board of directors elected by the shareholders. If the subsidiary is incorporated under the federal statute, at least 25% of the subsidiary's board must be resident Canadians, defined as Canadian citizens or permanent residents ordinarily residing in Canada. For corporations involved in uranium mining, book publishing, distribution or retailing, or film or video distribution, a majority of the board members of the corporation must be resident Canadians. Provincial corporations statutes also impose a range of differing requirements for the residency of directors. Ontario and Alberta, for example, requires that 25% of the directors be resident Canadians except where an Ontario corporation has less than four directors, in which case at least one director must be a resident Canadian. Certain other provinces, such as British Columbia and Quebec, have no residency requirement.

The federal and many provincial corporate statutes permit shareholders to use a unanimous shareholder agreement to partially or entirely restrict the directors' powers to manage the corporation's business and affairs.

Taxation

As already noted, the foreign investor must carefully consider local tax laws when structuring inbound investments. The federal, provincial and municipal governments of Canada each impose taxes on businesses in Canada.

Income Tax

The federal and each provincial government impose a tax on income. The federal Income Tax Act (the "ITA") and corresponding provincial statutes impose tax on the world-wide income of Canadian residents. By contrast, non-residents are generally taxed only on income derived from Canadian sources.

Income Tax on a Canadian Branch

Foreign investors that are entitled to benefits afforded by an international tax treaty with Canada generally will only be taxed on income earned by their Canadian operations if they have a permanent establishment in Canada. "Permanent establishment" is broadly defined in such international tax treaties.

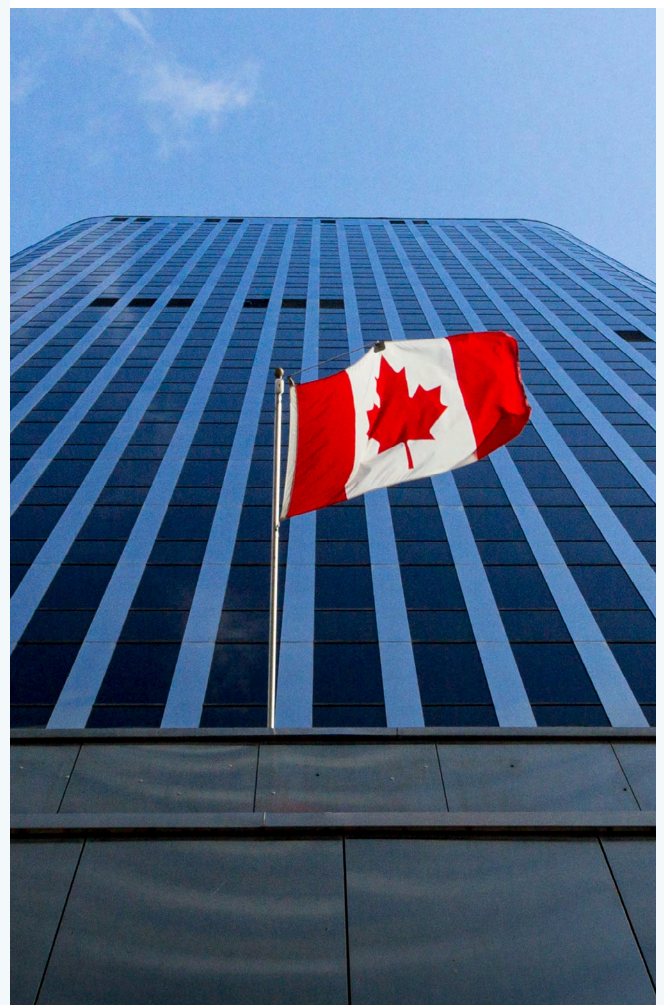
For example, the Canada-United States Income Tax Convention (1980), as amended (the "US Treaty") defines a permanent establishment in Canada of a US enterprise, such as a US resident corporation, to be a fixed place of business through which the US resident corporation (a "US Resident Corporation") wholly or partly carries on business. Such fixed places of business include: places of management, branches, offices, factories, workshops, sites of natural resource extraction, and building sites or construction or installation projects lasting more than twelve months. A permanent establishment also exists where a dependent agent, acting on behalf of a US Resident Corporation, has authority to conclude contracts in the corporation's name and habitually exercises this power in Canada.

Unlike most other treaties with Canada, US enterprises that provide services in Canada will also generally be deemed to provide such services through a permanent establishment in Canada where (a) the services are performed by an individual who is present in Canada for 183 days or more in a 12-month period and, during the periods in which the individual is present in Canada, more than 50% of the enterprise's gross active business revenue consists of income derived from such services performed in Canada by the individual; or (b) the services are provided in Canada for 183 days or more in a 12-month period with respect to the same or connected1 project for customers who are either Canadian residents or who maintain a permanent establishment in Canada and the services are provided in Canada in respect of that permanent establishment.

[1] The Diplomatic Notes included in Annex B to the Fifth Protocol to the Treaty, which entered into force on December 15, 2008 (the "Protocol"), state that projects will be considered to be connected if they constitute a "coherent whole, commercially and geographically".

A US Resident Corporation carrying on business in Ontario through a permanent establishment (as defined for purposes of both the Ontario tax legislation and the US Treaty) generally is liable for tax at a combined general rate of 26.5% on conventional business income attributable to the permanent establishment. Broken down, this rate consists of federal tax at a rate of 15% and Ontario tax at a rate of 11.5%. Lower rates apply in respect of certain manufacturing and processing income. The applicable provincial income tax rates in the provinces of Quebec, Alberta and British Columbia in respect of conventional business income attributable to those provinces are currently 11.5%,10% and 12% respectively. The other provinces and territories similarly levy income tax on business income attributable to permanent establishments in those provinces and territories.

Ontario also imposes a corporate minimum tax at a rate of 2.7% on corporations that are subject to regular Ontario tax and that (either alone or together with associated corporations) have total assets with a value of more than CDN$50 million and total revenue of more than CDN$100 million. The Ontario minimum tax that a corporation pays in any year may be credited against regular Ontario income tax owing over the subsequent twenty years. Generally, corporations only pay Ontario corporate minimum tax to the extent it exceeds income tax payable for a taxation year.



In addition to the basic corporate income taxes, foreign corporations are, in simplified terms, liable to a 25% federal branch profits tax on after-tax profits in Canada that are not invested in qualifying Canadian assets. This rate is subject to reduction where the foreign corporation is entitled to the benefits afforded by an international tax treaty with Canada. For example, a US Resident Corporation that carries on business in Canada through a permanent establishment, and is entitled to claim the benefits of the US Treaty, is generally liable to pay a 5% federal branch profits tax. Further, by virtue of the US Treaty, the first CDN$500,000 of branch earnings will generally be exempt from branch profits tax. The branch profits tax is designed to equal the withholding tax that would have been levied on dividends paid by a Canadian subsidiary to its foreign parent corporation had a Canadian subsidiary been utilized to carry on the business activities in Canada.

In computing the taxable income of a non-resident corporation carrying on business in Canada through a branch, the amount of deductible interest for Canadian tax purposes will be limited pursuant to the Canadian thin capitalization rules. In essence, these rules preclude the Canadian branch from deducting interest on the portion of its interest-bearing loans from certain specified non-residents (i.e., persons who do not deal at arm's length with the non-resident corporation) that exceeds 60% of the aggregate cost of the property (net of any third party debt) that is used by the non-resident corporation to carry on business in Canada.

Income Tax on a Canadian Subsidiary

A subsidiary incorporated in Canada is deemed to be a Canadian resident and is, therefore, subject to tax in Canada on its world-wide income. The above-noted tax rates for non-resident corporations carrying on business in Alberta, British Columbia, Ontario or Quebec also apply to Canadian subsidiaries operating in those provinces. However, the federal branch profits tax does not apply to Canadian subsidiaries.

If a Canadian subsidiary borrows from its non-resident parent corporation or from other specified non-residents, the ability of the subsidiary to deduct interest is subject to the limitations imposed by the Canadian thin capitalization rules. In essence, these rules preclude the Canadian subsidiary from deducting interest on the portion of its interest-bearing loans from certain specified non-residents that exceeds one and a half times its equity (i.e., essentially paid-up capital and contributed surplus attributable to certain specified non-residents and non-consolidated retained earnings). An amount paid or credited as interest by the Canadian subsidiary to a specified non-resident that is not deductible as a result of the Canadian thin capitalization rules is generally deemed to have been paid to the specified non-resident as a dividend.

Such a deemed dividend will be subject to Canadian withholding tax as described below.

Amounts paid or credited by a Canadian subsidiary to a non-resident parent on account of dividends, certain royalties, and certain interest payments are subject to Canadian withholding tax at a general rate of 25%. However, the applicable rate of withholding tax may be reduced by an applicable tax treaty. For example, the US Treaty reduced withholding tax rate in respect of dividends is 5% where the beneficial owner of the dividends is a US Resident Corporation that owns at least 10% of the Canadian subsidiary's voting stock (otherwise, the applicable US Treaty reduced rate is 15%). The US Treaty reduced withholding tax rate in respect of royalties is 10%. Conventional interest payments made to "arm's length" non-resident lenders are generally not subject to Canadian withholding tax. The US Treaty also generally eliminates Canadian withholding tax on conventional interest payments made to "non-arm's length" US resident lenders (assuming they are entitled to the benefits of the US Treaty). In most of Canada's other tax treaties, the reduced rate of withholding tax applicable to "non-arm's length" lenders is 10%.

In computing taxable income, a Canadian subsidiary may generally carry unused business losses back three years and forward twenty years in accordance with the detailed rules in the ITA. However, because Canada does not have a consolidated tax reporting system, losses incurred by a Canadian corporation cannot be applied to reduce the taxable income of affiliated Canadian corporations. Subject to certain restrictions, historical business losses may generally be assumed by a Canadian successor corporation following an amalgamation or by a Canadian parent corporation after its wholly-owned subsidiary is wound-up. Where control of a corporation has been acquired, use of business losses is generally restricted to prevent trading in losses.

Transfers of goods or services between a foreign investor and its Canadian subsidiary must be executed at an arm's length price. Should the parties agree to a different price, the Canadian tax authorities may adjust the pricing or recharacterize the transaction as having been executed at an arm's length price for income tax purposes pursuant to the Canadian transfer pricing rules. Such a recharacterization could also give rise to a secondary adjustment by the Canadian tax authorities pursuant to which the Canadian subsidiary may be deemed to have paid a dividend to the foreign investor, which dividend would be subject to Canadian withholding tax as described above. Taxpayers must also contemporaneously document the basis for their transfer prices in respect of non-arm's length transactions, as failure to do so may result in the imposition of penalties.

Capital Gains

The types of Canadian property that may give rise to a Canadian tax liability on their disposition by foreign investors generally include real property situated in Canada, property used in carrying on business in Canada that forms part of the business property of a Canadian permanent establishment, and shares of a Canadian company where the value of such shares is, directly or indirectly,derived principally from real property situated in Canada.

Foreign investors are generally required to include in taxable income and are subject to Canadian income tax on one-half of capital gains realized on the disposition of certain types of Canadian property. A capital gain is generally equal to the difference between the proceeds of disposition and the acquisition cost of a particular property.

Entitlement to Treaty Benefits

Not all foreign investors will be entitled to the benefits afforded by an international tax treaty with Canada. For example, pursuant to a "limitation on benefits" article in the US Treaty, access to the benefits afforded by the US Treaty are generally restricted to residents of the US that either: (i) are "qualifying persons" as defined in the article; or (ii) satisfy one of certain tests relating to their establishment, operation, or ownership. Furthermore, US Treaty benefits are generally not available to certain hybrid entities.

Several of Canada's newer tax treaties (for example the recently-concluded tax treaty with Hong Kong) contain anti-avoidance rules similar to the "limitation on benefits" article in the US Treaty, but that operate by denying benefits if it is reasonable to conclude that obtaining that benefit was one of the principal purposes of any arrangement or transaction, unless it is established that granting that benefit in the circumstances would be in accordance with the object and purpose of the relevant provisions of the treaty.

Of particular significance, US resident shareholders of a Canadian unlimited liability company formed under the laws of the provinces of Alberta, British Columbia or Nova Scotia (a "ULC"), which has "checked-the-box" to be treated as a disregarded entity for US tax purposes, will generally not be entitled to claim US Treaty benefits in respect of amounts paid to, or derived by, the US shareholders from the ULC. Nevertheless, certain payments from ULCs can be structured to take advantage of benefits afforded by the US Treaty. If not so structured, the general statutory rate of certain withholding tax (i.e., 25%) will be exigible in respect of such payments to the extent withholding tax is applicable.

Furthermore, the Canadian taxing authorities have historically been of the view that US limited liability companies ("US LLCs") are not entitled to claim the benefits afforded by the US Treaty. However, by virtue of changes introduced by the Protocol in 2010, a US resident that is considered to have derived income through an entity, such as a US LLC, for US tax purposes, may be able to claim the benefits afforded by the US Treaty in respect of such income where, by virtue of the US entity being treated as fiscally transparent under US law, the US tax treatment of the income derived through the entity is the same as it would have been had the income been derived directly by the US resident.

Canada is a signatory to, and has enacted into law, the Organisation for Economic Co-operation and Development's Multilateral Instrument, which will have numerous impacts on the interpretation of Canada's tax treaties. It has entered into force in Canada (a) on January 1, 2020 for withholding taxes, and (b) for other taxes (including capital gains taxes) for taxation years beginning on or after June 1, 2020. The Multilateral Instrument will require each of Canada's tax treaties to be interpreted as if they contain a "principal purpose" test similar to that described above for the tax treaty with Hong Kong.

Other Taxes

Value-Added Taxes

The federal government imposes a multi-stage value-added tax (referred to as the goods and services tax or the "GST") that applies to domestic supplies of most types of property and services within Canada at a rate of 5%. The provinces of Ontario, Nova Scotia, New Brunswick, Newfoundland & Labrador and Prince Edward Island (collectively, the "HST provinces") have harmonized their sales tax regimes with the GST and the combined tax is referred to as the harmonized sales tax ("HST").

Each HST province sets its own provincial tax rate to combine with the 5% federal GST rate. The current HST rate in Ontario is 13%, consisting of the 8% Ontario component and the 5% federal component. Quebec does not impose the HST, but instead imposes the Quebec sales tax ("QST"), which is substantially similar to the GST, at the rate of 9.975%. The GST and QST impose a combined tax rate of 14.975%. Alberta currently imposes no provincial sales tax.

A registered supplier generally charges and collects GST/HST and, where applicable, QST at the time of sale, or on lease or licence payments, as agent on behalf of the applicable tax authorities. Under its agreements with the HST provinces, the federal government allocates and remits periodically to each HST province the appropriate provincial portion of the HST. Registration with the Canada Revenue Agency (the "CRA") for the GST automatically results in HST registration as well; however QST registration must be done separately with the Quebec tax authority.

Certain types of transactions are specifically exempted from GST/HST and QST (e.g., the provision of financial services) or are taxable at a 0% rate, that is, zero-rated (e.g., sales of certain medical devices), such that no GST/HST or QST applies.

GST/HST and QST are intended to be final taxes on consumers, and are not intended to be borne as direct costs for most businesses. The taxes generally apply at each point in the distribution chain. Registered businesses can generally claim input tax credits ("ITCs") on their GST/HST returns to recover GST/HST payable by them on business inputs, except to the extent that they relate to making exempt supplies by the businesses. Similarly, QST registrants can generally claim input tax refunds ("ITRs") on QST payable by them. The ITCs/ITRs are generally credited against GST/HST or QST liabilities (such as taxes collectible/collected) or refunded.

Certain large businesses may be subject to ITC/ITR restrictions relating to QST and the provincial component of HST paid on certain goods and services.

A non-resident of Canada who makes taxable supplies in Canada in the course of a business carried on in Canada must generally register for the GST/HST. In addition, in certain cases, a non-resident that is not required to register for GST/HST purposes may be permitted to voluntarily register (which the non-resident may wish to do in order to claim ITCs). In either case, if such a non-resident registrant does not have a permanent establishment in Canada, the non-resident would generally be required to post security with the CRA. The amount of security would generally be equal to 50 percent of the non-resident's net tax liability or refund (essentially the amount of GST/HST charged minus the amount of any ITCs claimed, subject to certain adjustments, as applicable) for the previous 12-month period (or an estimate of its net tax for the first 12-month period beginning on the date of registration).

Commercial imports of goods into Canada generally attract GST at the border. ITC claims may be available to recover such GST. HST generally applies at the border to goods imported into Canada for personal use by residents of HST provinces. QST may be collected at the border on the import of personal use goods into Quebec by Quebec residents.

Persons may also need to pay GST/HST or QST (through a self-assessment system) on imported services, intangible property and goods imported into Canada (or transferred within Canada from one province/territory to another one with a higher tax rate). If transferred within Canada to a province or territory with a lower tax rate, then a tax rebate could be available. Note that no self-assessment would generally be required in a case where the tax would be fully recoverable by ITC/ITR claim if the tax were payable. To put suppliers in Canada on an equal competitive footing with suppliers abroad, many "exports" of property and services to non-residents of Canada are zero-rated so that no GST/HST or QST applies and ITCs/ITRs are available on business inputs.

Provincial Retail Sales Taxes

The provinces of British Columbia, Saskatchewan and Manitoba currently impose a single stage general retail sales tax ("RST") on the end-consumer or user (tax is paid only by the final consumer, business, institution, or individual) at a 7% general rate in British Columbia, 6% general rate in Saskatchewan and 7% general rate in Manitoba (proposed to be reduced to 6% effective July 1, 2020). Certain types of transactions attract their own unique tax rate, such as transfers or leases of "luxury vehicles" in British Columbia. Subject to specific exemptions, the consumer or end-user generally pays the RST at the time of purchase or import of goods, software, and certain taxable services. Rental payments for leasing goods can also be taxable.

To increase RST revenues, these three provinces have broadened the RST base beyond traditional restrictions. In its budget released in April 2017, Saskatchewan expanded the RST base to impose RST on services performed on real property and real property contracts. This budget also imposed RST on insurance premiums and benefit plans, restaurant meals and snack foods, and children's clothing. In addition, Manitoba also taxes certain insurance premiums. Other provinces retain RST on certain limited types of transactions. For example, Ontario taxes certain insurance premiums and benefits plans.

A licensed or registered vendor or lessor/licensor charges, collects, reports and remits the RST as agent on behalf of the provincial tax authority. Otherwise, a "consumer," "purchaser" or "user" in a province may be required to self-assess RST, and report and pay the RST to the province. Goods, software, taxable services or insurance imported into the province, or purchased for re-sale but diverted for the purchaser's own consumption or use, could trigger such RST self-assessment obligations.

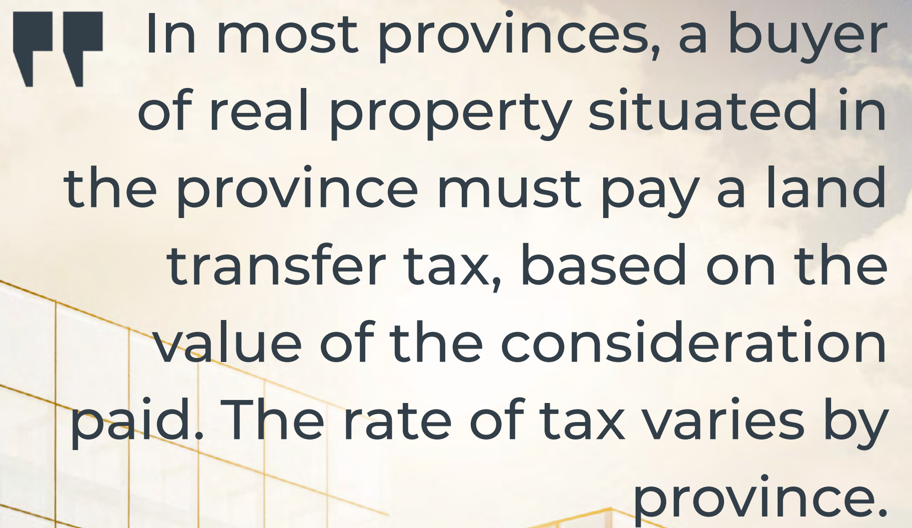
Persons making taxable retail sales, or leasing or licensing property in taxable transactions, within an RST province in which they carry on business should generally obtain an RST licence or registration number in the province. In certain circumstances, the obligation to obtain such a licence or registration may be extended to an out-of-province vendor selling goods into the province or maintaining inventory in the province, irrespective of whether the vendor carries on business in the province. In addition, there may be a statutory definition of "carrying on business in the province" that broadens the concept of what is meant by this phrase under general legal principles. Non-resident contractors may be required to register and/or post security for RST obligations, parties making payments to non-resident contractors may be required to holdback certain amounts from the payments to apply, as needed, against the contractors' RST liabilities, and clearance certificates may be needed from the provincial tax authority.

Customs Duties

Canada levies customs duties on certain goods imported into Canada and applies additional excise taxes and duties on specific goods. The tariff classification and origin (tariff treatment) of imported goods determines the applicable rate of the customs duty. If the goods satisfy specific rule-of-origin criteria, they may qualify for preferential duty rates. For example, US or Mexican goods that satisfy the North American Free Trade Agreement ("NAFTA") Rules of Origin generally receive duty-free entry where the exporter provides the importer with a duly completed and signed NAFTA Certificate of Origin. Once implemented, the United States–Mexico–Canada Agreement, the successor to NAFTA, will modify certain rules of origin for certain imported products (notably automotive products, which will require 75% North American content, increased from 62.5%).

Effective January 1, 2015, the General Preferential Tariff ("GPT") treatment was eliminated for goods originating in 72 countries, including Brazil, India and China.

The "transaction value" of imported goods is the primary method to determine the value of the goods for purposes of applying the ad valorem duty rate to calculate customs duty. Transaction value means the sale price in a sale for export to a purchaser in Canada, adjusted by specified additions and deductions, as required. GST applies to most imported "commercial goods", regardless of whether customs duties apply. The 5% GST is generally calculated on any duties and excise taxes. However, the importer, or another person involved in the transaction, may be eligible to recover all or a portion of the GST paid on imported commercial goods by way of ITC or rebate claims. Consumer imports of goods may attract GST/HST, or GST and RST or QST, depending on the consumer's residence.



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Provincial Land Transfer Tax

In most provinces, a buyer of real property situated in the province must pay a land transfer tax, based on the value of the consideration paid. The rate of tax varies by province. For example, in Ontario the rate is 0.5% on the first CDN$55,000 of value, 1% on the next CDN$195,000 of value, and 1.5% on the balance, except in the case of a single family residence or two such residences, where a rate of 2% applies on any consideration which exceeds CDN$400,000, and a rate of 2.5% applies on any consideration which exceeds CDN$2,000,000. The City of Toronto also imposes its own land transfer tax at rates identical to those of the province of Ontario. The province of Alberta does not impose a land transfer tax.

In Ontario, effective April 21, 2017, a 15% tax is also imposed on the purchase or acquisition of an interest in residential property located in the Greater Golden Horseshoe Region by individuals who are not citizens or permanent residents of Canada or by foreign corporations (foreign entities) or taxable trustees. This tax, termed the "Non-Resident Speculation Tax," applies in addition to Ontario's current Land Transfer Tax.

In British Columbia, the rate is 1% on the first CDN$200,000 of value, 2% on the next CDN$1,800,000 of value, and 3% on the balance. In addition, there is a land transfer tax of 15% on all residential property located within the Metro Vancouver Regional District that is being transferred to a foreign buyer. This would include a foreign national, a foreign corporation, a Canadian corporation controlled by a foreign national, and a trustee where the beneficiary of the trust is a foreign national or a foreign corporation.

Alberta currently does not have a land transfer tax, but there is a land transfer registration fee based on the value of the property, being a base fee of CDN$50, plus CDN$2.00 for each CDN$5,000 or portion thereof of the value.

Municipal Taxes

Local governments levy annual real estate taxes on real property owners. These taxes generally are based on the assessed value of the property. Municipalities also levy local business taxes and, in some cities, a land transfer tax is imposed on the sale of real property.

Immigration Considerations

Entry to Canada is governed by the *Immigration and Refugee Protection Act of Canada* ("IRPA") and its Regulations, which apply to citizens of all countries, as well as trade agreements. With any proposed entry to Canada of a foreign worker, the initial exercise is to determine if the person can work in Canada temporarily without a work permit.

Working Without a Work Permit

- An employee of a corporation that conducts business outside of Canada may be exempt from the requirement to obtain a work permit if that employee will be in Canada as a "business visitor" to consult with employees of a corporate subsidiary or branch or a customer or supplier. The basic criteria applicable to business visitors is as follows:

- there must be no intent to enter the Canadian labour market;

- the activity of the foreign worker must be international in scope, that is, there is a presumption of an underlying cross-border business activity, such as after-sales service; and

- there is a presumption that the foreign worker's primary source of remuneration remains outside of Canada, the principal place of business is outside Canada, and the accrual of profits occurs outside of Canada.

Temporary Work Permits

In most circumstances, individuals who are not Canadian citizens or permanent residents will require a work permit to engage in work-related activities in Canada. Canadian companies seeking to hire foreign nationals and multinational companies wishing to transfer foreign nationals to their Canadian operations must comply with the IRPA and its Regulations.

As a result of international agreements, legislation and government policies, some occupations and activities do not require a Labour Market Impact Assessment ("LMIA", discussed below). Where an exemption from the LMIA process is available, the time required to obtain a work permit can be significantly shortened. Two common exemptions are identified below:

- **Intra-Company Transferees:** Executives, senior managers and specialized knowledge workers may be eligible to obtain a work permit as intra-company transferees from business operations

outside Canada. No LMIA is required. This exemption is useful for multinational companies requiring oversight of Canadian operations or as a means to allow foreign talent to assist in building business operations in Canada.

- **NAFTA or CPTPP Professionals:** NAFTA and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP") facilitate temporary entry into Canada for American and Mexican citizens as well as citizens of several Pacific countries (Japan, South Korea, Australia, etc.) involved in the trade of goods or services or in investment activities. NAFTA and the CPTPP provide exemptions for business visitors, intra-company transferees, professionals, traders and investors.

Other exemptions may also be available depending on the circumstances.

If no exemption from the LMIA process applies, the employer and foreign worker must follow a two-step process. First, the prospective employer applies to Employment and Social Development Canada ("ESDC") for a LMIA. In order to obtain a LMIA, the employer will have to satisfy ESDC that it has conducted recruitment for a Canadian citizen or permanent resident and could not fill the position, or that the skills and requirements of the position are such that there is no Canadian citizen or permanent resident who could fill the position. Employers must apply for a LMIA well in advance of the individual's arrival in Canada and be cognizant of all of the obligations required by the LMIA process. If the LMIA is issued, the employee must then complete the second step and obtain the work permit.

Depending upon the country of origin, the individual may also need a visa to enter Canada. If so, the visa routinely is sought at the time of application for a work permit. Visa applications can be submitted electronically or at a Canadian consulate.

Permanent Residence

The path to Canadian permanent residence is a separate process from that required to work temporarily, although employment in Canada may assist in obtaining permanent residency under certain federal economic immigration programs. Each economic immigration program has its own unique criteria and application process. Four common categories are identified as below.

In addition to the above, other opportunities to qualify for permanent residence may exist for individuals in particular circumstances. Different considerations apply for a worker who intends to reside in Quebec.

Self-Employed Applicants. To qualify, the individual must have both the intention and the ability to establish a business that will make a significant contribution to specified economic activities. The individual is also subject to an assessment based on education, experience, age, ability in English and/or French and adaptability.

Federal Skilled Worker Class. This class includes persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada and who intend to reside in a province other than Quebec. All applicants must have at least one year of work experience in one of the designated occupations.

Canadian Experience Class. The Canadian Experience Class is reserved for workers who have at least one year of work experience in Canada and have the skills and experience in a designated profession.

Investors and Entrepreneurs. The federal Immigrant Investor program and Entrepreneur program were terminated in 2014. However, the Quebec Investor program and the Quebec Entrepreneur program are operative.

Labour and Employment law Considerations

Legislative authority over labour relations and employment law is divided between the federal and provincial governments. Federal law governs employment in federal works, undertakings and businesses such as aeronautics, banking, and telecommunications. The vast majority of employment relationships in Canada are governed by provincial law.

Minimum Standards

All Canadian jurisdictions have enacted minimum standards for the basic terms and conditions of employment. Such legislation may include minimum standards for matters such as minimum wage, hours of work, overtime pay or lieu time, statutory holidays, vacation, certain leaves of absence, individual and mass/group terminations and layoffs. Generally, neither employers nor employees are free to avoid or "contract out" of the minimum standards by individual contract. Of particular note, there is no such thing as "at will" employment in Canada. Absent just cause for termination, employees are entitled to notice of termination (or compensation in lieu thereof). Except for Quebec, the amount of such notice can be contractually agreed upon, subject to statutory minimums.

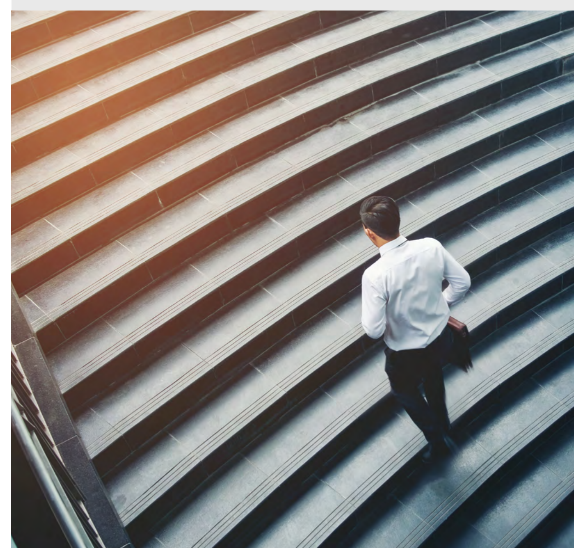
Trade Unions and Labour Relations

Federal and provincial legislation also governs labour relations. A trade union may be certified as the exclusive bargaining agent for an appropriate group of employees, known as the bargaining unit. Managers and other employees in a position of confidence concerning labour relations are usually excluded from the bargaining unit. Once the union is certified, the employer must bargain with the union in good faith and attempt to reach a collective agreement. A strike or lockout can be called lawfully only after certain conditions are met. Legislation also prohibits any strike or lockout during the term of the collective bargaining agreement. Any disputes arising from or subject to the agreement must be resolved through grievance and arbitration procedures.

Workers' Compensation and Occupational Health and Safety

The federal Canada Labour Code and various provincial statutes regulate occupational health and safety. Most occupational health and safety legislation includes an obligation to develop and maintain certain policies and/or programs with respect to workers' health and safety, including workplace harassment and violence. Additionally, each of the provinces has enacted workers' compensation legislation that contains provisions related to workplace accidents and illnesses. Such legislation typically sets out a no-fault statutory system of compensation to address the claims of workers injured in the course of employment or stricken with an occupational disease. Some provincial legislation requires that certain federal employers participate in the provincial workers' compensation schemes.

In provinces that do not require participation by federal employers, such federal employers are required to have private insurance plans to cover workers who are absent due to work-related illness or injury.



Statutory Withholdings and Employer Contributions

Canadian employers must contribute to both the Canada Pension Plan (or for Quebec, to the Quebec Pension Plan) and Employment Insurance on behalf of their employees. Contributions may then be deducted as a business expense for income tax purposes. Furthermore, employers must deduct from employee income and remit to appropriate authorities their employees' income tax, Employment Insurance premiums and Canada Pension Plan (or Quebec Pension Plan) contributions. Some jurisdictions have other statutory withholding, contribution or premium payment obligations (e.g., Quebec Parental Insurance).

Pay Equity

Some jurisdictions have enacted pay equity legislation mandating equal pay for work of equal value. Such legislation is generally designed to redress inequity in the wages paid to employees working in jobs traditionally held by women. Some employment standards and human rights legislation also prohibit sex or gender discrimination in compensation. The rules regarding pay equity and discrimination are complex and require a detailed review of relevant workers and wages.

Human Rights

Federal and provincial human rights legislation prohibits discrimination and harassment in employment on the basis of certain characteristics, such as sex (including pregnancy), gender, age, race, ancestry, ethnicity or place of origin, family, civil or marital status, religion or creed, disability, sexual orientation, gender identity or expression, political convictions, language and social condition. Such statutes typically require employers to accommodate employees with such characteristics up to the point of "undue hardship".

Pensions and Retirement Savings

Federally regulated pension plans are governed by the *Pension Benefits Standards Act*, and each of the provinces has unique pension benefits legislation. Such legislation sets out requirements and restrictions applicable to certain types of pension plans. Some employers provide other types of retirement savings benefits, such as matching an employee's contributions to their Registered Retirement Savings Plan ("RRSPs").

Public Health Care

Each Canadian province has a public health care system providing its residents with universal access to medical care in the province. Typically, a special tax is imposed to fund healthcare costs. For example, Ontario imposes an employer health tax based on the employer's gross payroll subject to certain exemptions (approximately 2%). Many Canadian employers offer their employees supplemental health, dental and vision benefits and/or disability, life, accidental death and other forms of private insurance.

Foreign Investment Review/Restrictions

Investment Canada Act

Whenever a non-Canadian investor establishes a new Canadian business or acquires control of an existing Canadian business (regardless of whether that "Canadian business" is owned by non-Canadians), a Notification under Canada's foreign investment legislation – the *Investment Canada Act* ("ICA") – is required. This is a filing that can be made prior to or within 30 days following the closing of the investment. The Notification requires, among other things, detailed information concerning the nature of the Canadian business being established or acquired, the directors and officers of the investor, and the identities of the individual(s) or government that ultimately control the investor.

There is no filing fee and, in the ordinary course, submission of the Notification does not trigger a substantive review. However, a review on the basis of national security issues may be initiated or raised as a possible consideration within 45 days after submission of the Notification. Where the identity of the investor and/or the nature of the Canadian business may implicate Canada's national security, consideration should be given to submitting the Notification in advance of closing in order to preemptively identify and address national security issues.

In addition to the potential for a national security review, in limited cases investments which exceed specified financial thresholds are subject to review under a "net benefit to Canada" test. Ministerial approval is required for such transactions, typically pre-closing, but in certain cases post-closing as a result of the transaction structure. The initial review period is 45 days, but the length of the entire review process can be (and typically is) longer. The test to determine whether an investment is "reviewable" is complex, with thresholds that vary depending on the transaction structure, the nationality of the investor, whether a state-owned enterprise is involved and whether the Canadian business being acquired carries on certain cultural business activities.

For a direct investment by an investor which is a national of a world trade organization (WTO) member state or controlled by a WTO national, and provided the investor is not a state owned enterprise or a "trade agreement investor" (as defined below), the review threshold is met if the Canadian target has an enterprise value of CDN$1.075 billion for 2020. The threshold will be adjusted annually by a GDP-based index.

For a direct investment by a "trade agreement investor" (investors who are nationals of EU member states, the United States, Chile, Colombia, Honduras, Mexico, Panama, Peru, South Korea, Australia, Brunei, Japan, Malaysia, New Zealand, Singapore and Vietnam), and provided the investor is not a state owned enterprise, the review threshold is met if the Canadian target has an enterprise value of CDN$1.613 billion for 2020. The threshold will be adjusted annually by a GDP-based index.

The calculation for enterprise value differs depending on whether the Canadian entity is a public company, a private company, or being acquired by way of an asset purchase:

- For publicly-traded companies, the enterprise value is equal to the market capitalization of the entity plus its liabilities (other than operating liabilities) minus its cash and cash equivalents. Market capitalization is determined by the average daily closing price of the entity's securities multiplied by the average daily number of outstanding securities. The average is determined over the most recent 20 day trading period before the first day of the month immediately preceding the time of investment. The value of securities not on the market is decided via a good faith determination by the investor. The values of the company's liabilities and cash are determined based on the most recent quarterly financial statements of the Canadian entity.
- For private companies, the enterprise value is equal to the total acquisition value of the entity plus its liabilities (other than operating liabilities) minus its cash and cash equivalents. If 100% of the voting interests are being acquired, the total acquisition value is equal to the total consideration payable for those interests. If less than 100% of the voting interests are being acquired, the total acquisition value is a combination of the consideration paid for the voting interests which are acquired and a good faith determination by the investor of the fair market value of the remaining voting interests. Once again, the values of the company's liabilities and cash are determined based on the most recent quarterly financial statements of the Canadian entity.
- If the Canadian entity is being acquired through the purchase of all or substantially all its assets, the enterprise value is equal to the total acquisition value plus its liabilities minus its cash and cash equivalents. The acquisition value is the total amount of consideration payable for the acquisition. The liabilities are equal to the total liabilities (other than operating liabilities) assumed by the non-Canadian investor. Finally, the cash and cash equivalents are calculated based on the total cash and cash equivalents transferred to the non-Canadian investor.

If the WTO investor is a state-owned enterprise (meaning that the investor is either directly affiliated with a foreign government or government agency, or is controlled or influenced by a foreign state, whether directly or indirectly), the review threshold is met if the value of the assets of the Canadian entity being acquired exceeds CDN$428 million for 2020. This threshold is revised annually based on Canada's GDP.

Indirect acquisitions by WTO investors of non-cultural businesses are not reviewable, but Notification must be given.

The threshold for non-WTO investors investing in a Canadian business not controlled by a WTO member is CDN$5 million for a direct investment and CDN$50 million for an indirect investment. Any non-Canadian investment to acquire control of a Canadian cultural business (such as book publishing), regardless of whether or not the vendor or investor is a WTO member, will have the same reduced thresholds.

As discussed above, the test for approval of a reviewable matter is whether the investment is likely to be of "net benefit to Canada", which is assessed based on a broad range of economic factors. There are additional special criteria applicable to acquisitions by foreign state-owned enterprises or acquisitions of a cultural business.

Exempt Transactions

Certain transactions to acquire controlling interests in Canadian entities are exempt from the provisions of the ICA (save for the provisions related to national security). Among these exemptions are the acquisition of voting interests by a trader or provider of venture capital in the ordinary course of business, acquisition of shares through the realization of loan security, acquisition of control for the purpose of facilitating financing so long as the acquirer divests within two years, and the acquisition of control due to a merger or amalgamation type transaction where the ultimate control of the acquired Canadian entity remains unchanged.

National Security

The federal Cabinet is empowered to review, and ultimately to block, any investment it considers "could be injurious to national security". While no specific definition of national security is provided in the ICA, the following factors may be taken into account in a national security review:

- The potential effects of the investment on Canada's defence capabilities and interests;
- The potential effects of the investment on the transfer of sensitive technology or know-how outside of Canada;
- Involvement in the research, manufacture or sale of goods/technology relating to control goods such as firearms and munitions;
- The potential impact of the investment on the security of Canada's critical infrastructure. Critical infrastructure refers to processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of Canadians and the effective functioning of government;
- The potential impact of the investment on the supply of critical goods and services to Canadians, or the supply of goods and services to the Government of Canada;
- The potential of the investment to enable foreign surveillance or espionage;
- The potential of the investment to hinder current or future intelligence or law enforcement operations;
- The potential impact of the investment on

- Canada's international interests, including foreign relationships; and,
- The potential of the investment to involve or facilitate the activities of illicit actors, such as terrorists, terrorist organizations or organized crime.

It is possible that national security grounds could be invoked to review investments by non-Canadians in areas as diverse as mining (particularly uranium and other materials of military importance), finance, transportation, ports, electricity, oil and gas, and pipelines.

Specific Industry Legislation

In addition to the ICA, other statutes contain ownership and investment restrictions with respect to specified industries, such as financial services, airlines, broadcasting and communications. Any proposed investment or acquisition in these sectors therefore must be assessed in light of the specific regulatory regime to which that industry is subject.

Competition, Marketing and Products Regulation

Competition Act

The *Competition Act* is Canada's primary antitrust and trade practices legislation. The Act contains a mixture of criminal offences, discretionary reviewable practices, and private damage actions. Criminal offences, such as conspiracy, bid-rigging and some forms of misleading advertising are prosecuted in criminal courts. As such, the case must be proven beyond a reasonable doubt and strict rules of evidence apply. Non-criminal reviewable practices include mergers, abuse of dominant position, certain agreements between competitors, resale price maintenance, refusals to deal, and various vertical market restrictions. Practices that result in a substantial prevention or lessening of competition are subject to restraint and corrective action by the Competition Tribunal (the "Tribunal"), a specialized adjudicative body for non-criminal antitrust matters. Administrative monetary penalties may be imposed for abuse of dominant position (up to CDN$10 million in respect of the first order, and up to CDN$15 million for subsequent orders.)

Mergers

The *Competition Act* applies to any merger, regardless of its size, that either occurs in Canada or has an impact on competition in Canada. Mergers that impact competition are regulated by discretionary administrative and civil laws rather than by criminal prohibitions. The Commissioner of Competition (the "Commissioner"), and ultimately the Tribunal should the Commissioner refer the case, scrutinizes the merger to determine whether it is likely to prevent or lessen competition substantially. Although the Tribunal may not find against a merger solely on the basis of market share, concentration data remains a key consideration in any analysis. Ease of entry into the market, effectiveness of remaining competition, and the likelihood of business failure are other factors that the Commissioner must consider under the Act.

Merger Pre-Notification

Size-of-parties and size-of-transaction tests determine whether a merger pre-notification filing is required in Canada. The size-of-parties test requires that the parties to a transaction, together with their affiliates, have Canadian assets or annual gross revenues from sales in, from or into Canada exceeding CDN$400 million. The size-of-transaction test requires that the value of the Canadian assets to be acquired, or annual gross revenues from sales generated by those assets, exceeds CDN$96 million (in 2020 - this threshold is adjusted annually).

Similar albeit more complicated thresholds apply to acquisitions of voting shares, amalgamations and other combinations.

If pre-notification is required, the parties may not close the transaction until the filing has been made and a mandatory waiting period of 30 days expires. The period commences when the completed filing is delivered to the Commissioner.

A fee of CDN$75,055.68 is payable in connection with a filing in 2020/2021 and is adjusted annually based on the Consumer Price Index.

The 30-day waiting period can be extended by the Commissioner if she/he requests the parties to supply additional information, much like the second request procedure in the United States. If the Commissioner elects to require the parties to provide additional information that is "relevant" to an assessment of the transaction, a further mandatory waiting period will run until 30 days after the Commissioner's requirements have been fully satisfied (subject to early termination by the Commissioner). No form is prescribed and the Commissioner's request is not subject to judicial oversight.

Marketing and Product Regulation

A number of federal and provincial statutes, as well as the common law, regulate advertising and marketing of products in Canada.

Intellectual property

The most common types of intellectual property are trademarks, trade-names, trade secrets (including know-how and show-how), patents, industrial designs and copyrights.

Trademarks

Since the coming into force of Canada's new *Trademarks Act* on June 17, 2019, a trademark is now defined as a sign or combination of signs that is used or proposed to be used by a person for the purpose of distinguishing their goods or services from those of others. A trademark can also be a certification mark, which distinguishes goods or services of a defined standard from those that are not.

The rights associated with a trademark can be acquired through use of that mark in association with goods or services (or both) that results in the trademark having goodwill in Canada, or by registration. Under the new Trademarks Act, use is no longer a prerequisite to registration. Although an applicant no longer has to publicly declare a filing basis in the application, an applicant must nevertheless have either used the trademark in Canada or have a bona fide intention to do so.

The 2019 changes to the *Trademarks Act* and Trademark Regulations significantly affected all aspects of trademark prosecution, registration, opposition and cancellation. These changes include new fees-per-class for filing and renewal, new examination criteria and changes to the opposition grounds. Additionally, the changes provided applicants with the ability to register a broader list of non-traditional marks with evidence of acquired distinctiveness in Canada, including: sounds, holograms, moving images, scents, tastes, colours per se, three-dimensional shapes, modes of packaging, textures, and positions.

The changes in the *Trademarks Act* assisted Canada to accede to the Madrid Agreement, Singapore Treaty and the Nice Agreement. Accession to the Madrid Agreement permits simplified filing procedures for Canadians seeking to register their trademarks internationally and allows foreign applicants to request an extension of their international rights to Canada through the International Bureau of the World Intellectual Property Organization. However, it is recommended that foreign applicants appoint a Canadian agent as soon after filing as possible, as the Canadian Intellectual Property Office (CIPO) will only communicate with the applicant or a registered Canadian agent.

Although trademark registration is not essential to acquire or protect trademark rights that are available at common law, registration does provide a number of significant advantages. Most importantly, a trademark registration in association with goods and/or services gives the owner the exclusive right to use the trademark throughout Canada in association with those goods and services.

A registration also confers upon the owner the right to prevent others from using the registered mark in a manner that is likely to have the effect of depreciating the value of the goodwill attaching thereto. Additionally, a registration certificate provides a rebuttable evidentiary presumption that the trademark is distinctive of the goods and services listed in the certificate, and that it is owned by the registered owner, and registrations can be filed with Canada Border Services to permit officers to detain counterfeit shipments.

Further, a Canadian trademark registration is the only means available to a foreign company to become eligible to commence arbitration proceedings against bad faith registrants of .ca domain names corresponding to the company's trademark, and to register such .ca domain names in its own right.

Registration under the *Trademarks Act* can ensure this exclusive right for an initial term of ten years with the possibility of unlimited renewals for further ten year terms. Under the predecessor legislation, registrations and renewals were for fifteen year terms. While use is no longer a requirement for registration (as mentioned above), use is still necessary to maintain a trademark registration. While the ability to claim a Priority Filing Date from an international trademark application remains available, trademark registrations in Canada may no longer rely on foreign registrations of the same mark as a basis for registration in Canada.

The distinctiveness of a trademark may be preserved in Canada if all users of the mark, other than the trademark owner, are licensed to use the mark by or with the owner's authority and if the owner of the mark has direct or indirect control over the character and quality of the licensee's goods or services under the trademark. A failure to properly license the trademark can lead to an impairment of distinctiveness and a loss of rights. The *Trademarks Act* provides that where public notice is given of the fact that a trademark is used under license and the identity of the owner, it is to be presumed that the trademark is used under license from the owner and that the owner has control over the character and quality of the licensee's goods and services unless the contrary is proven.

In 2019, mandatory French language signage rules came into full force in Quebec after a three-year grace period that applied to signage in place as of November 24, 2016. The intent of the new rules is to ensure that French-language wording is visible to consumers.

The Charter of the French language requires the use of French in commerce in Quebec, which requires that French appear and be given equal or greater prominence than any other language appearing on labels, packaging or signs. A long-standing exception is for "recognized trademarks"; it has been held that a federally registered Canadian trademark constitutes a recognized trademark for the purposes of the Charter and its regulations. If a non-French language trademark appears on place of business signage, a sufficient presence of French must be added, such as a generic term, description, slogan or other indicia, providing information regarding the products or services offered. The French wording must be permanently visible, and present in a manner both similar to and as easily seen as the non-French mark.

Trade-Names

The name under which any business operates constitutes the trade name of the business, whether or not it is the name of a corporation, a partnership or an individual. This is so regardless of whether it is the name of a corporation, a partnership, or an individual. In practice, the trade name often is an abbreviation of the full corporate name, shortened for convenience. While provincial business names legislation does require a business to register its trade name in the provinces in which business is carried on, such legislation does not provide the registrant with any exclusive right in the registered trade name.

The common law does provide some limited exclusivity for trade names in the geographic area in which the business has a reputation and goodwill. However, as is often the case, where a trade name is also used to distinguish goods and services from those of a competitor, one should consider registering the trade name as a trademark in order to enjoy the full benefits of registration under the *Trademarks Act.*

Trade Secrets

There is no specific legislation in Canada concerning trade secrets. Trade secrets are protected at common law by physical and organizational procedures, such as access controls, and by legal agreements, such as confidentiality and license agreements. Adequate steps must be taken by the owner of trade secrets to treat information as secret or confidential at all times. The protection will last as long as the confidentiality is maintained, unless contractually expressed otherwise.

Remedies for unauthorized use or disclosure of confidential information can include injunctive relief (temporary or permanent), an order prohibiting use or disclosure, punitive damages and either damages suffered by the possessor or the profits earned by the violator. A plaintiff must show that the unauthorized use of information has been to his or her detriment

Patents

In Canada, letters patent are available to protect inventions. One may obtain a patent for any new or improved useful art, process, machine, manufacture or composition of matter. Under the *Patent Act*, the patent holder has the exclusive right, for the term of the patent, to make, construct, use, and sell the invention. If an invention is disclosed to the public more than one year before the Canadian patent application is filed, it will no longer be eligible for patent protection in Canada, regardless of a foreign priority claim. However, the Canadian filing date accorded to a Patent Cooperation Treaty (PCT) national phase Canadian patent application is the international filing date. Under current Canadian patent law, a patent can protect the holder for a maximum term of twenty years from the date of filing for applications filed on or after October 1, 1989. However, Certificates of Supplementary Protection (CSPs) are now available under the *Patent Act* to provide up to two years of *sui generis* protection for new pharmaceutical products protected by an eligible patent, from the expiry of the patent. CSPs were introduced to meet commitments under Canada-European Union Comprehensive Economic and Trade Agreement (CETA).

Canada is also a party to the Paris Convention for the Protection of Industrial Property, the Patent Cooperation Treaty (PCT) and the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure. In addition, Canada has ratified the Patent Law Treaty (PLT) which came into force in Canada on October 30, 2019. CIPO is part of a Global Patent Prosecution Highway (PPH) pilot program aimed at significantly fast tracking examination of a patent application, provided that a corresponding application exists with one of the PPH pilot partners. If the requirements for participation are met, an applicant can get the first Canadian patent examination action faster and at no additional charge to regular fees.

Maintenance fees, the amount of which will depend in part on the whether the owner is a large or small entity, are due each year during the pendency of a patent application as well as each year of the term of the granted patent.

Applications for a patent are normally open for public inspection eighteen months

after they are filed. A person who infringes a patent is liable to the patentee and all persons claiming under the patentee (including exclusive and non-exclusive licensees) for all damages after the grant of the patent sustained by reason of the infringement, and is also liable for reasonable compensation for any damage sustained as a result of acts occurring after the patent application became open for public inspection that would have constituted an infringement had the patent been granted at that time

Industrial Designs

Industrial designs protect the visual or ornamental features of useful articles to the extent that those features are not wholly functional. An application for registration must be filed within one year of the design being made available to the public. Under the current *Industrial Design Act*, the total term of protection is the longer of ten years from the registration date and fifteen years from the filing date, provided that the maintenance fee is paid. A registration confers to the owner the exclusive right in Canada to make, import for the purpose of trade or business, or sell, rent or offer for sale or rent any article to which the design has been applied.

Copyrights and Moral Rights

Copyright law protects the owners of a broad range of original works and performances. Such works include art (such as paintings, photographs and diagrams), literature (such as books, business documents and computer programs), drama (such as films and plays) and music. Copyright protects against unauthorized reproduction or performance of the work, as well as the sale, distribution or importation of infringing works

Copyright subsists in Canada in every published original literary, dramatic, musical and artistic work, if the work was first published in a Berne Convention country in such a quantity as to satisfy the reasonable demands of the public having regard to the nature of the work; in general, "publication" occurs by making copies available to the public

Under Canadian law, the author of a work is the first owner of the copyright. However, there are a few exceptions to this principle. For example, employers own the copyright in works created by their employees "in the course of employment", in the absence of a contrary agreement. However, because of the limited scope of that phrase, and the fact that this only applies in the context of copyright, an express assignment of copyrights is almost ubiquitously sought even in employment contexts

Although registration is not required for copyright protection, registration under the *Copyright Act* is permitted and does provide significant benefits. A certificate of registration is a rebuttable evidentiary presumption that copyright subsists and that the registrant is the owner, and is deemed to provide the public with notice that copyright subsists. This is important because only injunctive relief is available if the infringer was unaware that copyright subsisted in the work. Where the infringer has reasonable grounds for suspecting that copyright subsisted, a successful plaintiff in a copyright infringement action can seek to recover damages and an accounting of profits resulting from the infringement, or statutory damages to a maximum amount of $20,000 per work infringed.

Further, marking is not a requirement in Canada, but it is advisable to protect a work with the © symbol or the word "copyright" followed by the year of first publication and the name of the copyright owner.

Irrespective of who owns the copyright, the author of a work or performance protected by copyright automatically owns the moral rights associated therewith. In Canada, moral rights consist of three rights, namely: the right of attribution (the right to be associated with the work or performance by name or pseudonym where reasonable in the circumstances); the right of anonymity (the right of the author to remain anonymous); and the right to the integrity of the work or performance (the right to not have the work or performance distorted, mutilated or otherwise modified, or used in association with a product, cause or institution, to the prejudice of the author's honour or reputation). Moral rights may be waived, but are not assignable. Thus, a provision that purports to "assign" all intellectual property rights from an author or owner of a copyrightable work is, in many instances, incomplete in Canada, as a specific and separate waiver of moral rights must also be obtained to fully extinguish the author's right.

Privacy

Canada has a complex network of laws applicable to privacy and data protection, including legislation governing the collection, use and disclosure of personal information by private sector organizations and public bodies/institutions, as well as specific statutes applicable

to personal health legislation. Some jurisdictions have enacted statutory privacy torts, and there is an evolving body of case law respecting common law privacy rights. Class action lawsuits with respect to data breaches are also becoming more common in Canada.

Private Sector

Private sector businesses in Canada may be subject to various privacy statutes, including the federal *Personal Information Protection and Electronic Documents Act*, as well as substantially similar provincial legislation, being the British Columbia and Alberta Personal Information Protection Acts and Quebec's Act respecting protection of personal information in the private sector. Some of the key privacy law requirements that may be applicable to private sector businesses include:

- obtaining an individual's consent when the business collects, uses or discloses the individual's personal information;
- minimizing collection of personal information to only what is necessary in the circumstances;
- collecting, using and disclosing personal information only for reasonable purposes that are disclosed in advance;
- collecting personal information by fair and lawful means;
- limiting disclosures of personal information (including of employees) when engaging in commercial transactions such as mergers and acquisitions;
- implementing personal information policies that are clear, understandable and readily available;
- implementing technological, organizational and physical safeguards that are appropriate based upon the sensitivity of the personal information; and
- mandatory breach reporting in some jurisdictions.

Other Industry-Specific Guidelines

Some organizations, such as financial institutions, may be subject to sector-specific legislation and/or regulatory guidelines regarding the handling of personal information. For example, both the Investment Industry Regulatory Organization of Canada and the Office of the Superintendent of Financial Institutions have issued expectations regarding the reporting of data breaches and other technology and cybersecurity incidents.

Environmental

Federal and provincial governments, and to a lesser extent municipal and local governments, regulate environmental matters in Canada. At the federal level, there is general legislation dealing with environmental protection as well as specific regulatory schemes dealing with matters such as greenhouse gas emissions, ozone-depleting substances, fisheries and protection of fish habitat, transportation and handling of dangerous goods, federal project environmental impact assessments, nuclear matters, shipping and navigation, import/export of hazardous wastes, and identification and monitoring of new chemicals and biological substances. Provincial legislation deals mainly with contaminated land development, permits and approvals for certain land, water and air projects, discharges to the environment, waste management, securities risk disclosure, waste reduction and recycling, spills reporting, mitigation and conservation, emission allowances and reporting, contaminated sites remediation and reclamation, and environmental impact assessments and review. Municipal regulations play a role in regulating local matters such as pesticides, noise and odour emissions. In certain provinces, such as Quebec, regulation of industrial air pollution is done by regional municipal governments in conjunction with the provincial government. Generally speaking, provincial environmental regulation tends to be more comprehensive than its federal counterpart which is more concentrated in the specific areas of federal regulation such as those noted above. However, there is a degree of overlap and depending on the location and the nature of the activities, a business may face regulation from all three levels of government.

Other Considerations

Anti-Spam Laws

Canada's anti-spam law – known as CASL – is one of the strictest, if not the strictest, anti-spam laws in the world. Despite the unofficial "anti-spam" moniker, the law regulates a broad range of normal commercial communications and electronic interactions, and not just nuisance emails and malicious actors. It enforces a mandatory "opt-in" regime that requires a sender to have express (or statutorily-defined implied) consent prior to sending any commercial electronic messages. CASL also regulates handling of electronic transmission data and the installation of software, and applies to electronic communications or transactions into, or from, Canada. CASL is enforced by the Office of the Privacy Commissioner of Canada, the Competition Bureau, and the Canadian Radio-television and Telecommunications Commission, and violations of CASL can lead to substantial penalties.

Consumer Protection

The federal government and each of the provinces and territories have some form of consumer protection legislation, with the standard of protection provided to consumers being similar across jurisdictions. The federal legislation concerns the advertising, labeling, and sale of consumer goods sold in Canada.

On the other hand, the provincial legislation concerns contractual matters related to the sale of goods, such as conditions of sale and warranties. For example, there is an implied warranty that services provided are of a reasonably acceptable quality. The legislation also imposes: (i) information requirements for certain types of consumer agreements (and in some cases requires a written copy of the agreement to be provided to the consumer); and (ii) requirements for online sales through websites and apps. Unfair practices such as false or misleading representation are prohibited. Finally, provincial legislation also requires the licensing/registration of some types of businesses such as collection agencies, real estate agents, automobile dealers, and direct sellers.

Currency or Exchange Controls

Notably, Canada has no system of currency or exchange controls restricting the repatriation of Canadian business capital or earnings to non-Canadian investors.

Directors' and Officers' Liability

Directors and officers of businesses incorporated federally or provincially (with the exception of the provinces of Nova Scotia and Prince Edward Island) have a duty of care and a fiduciary duty to the corporation. The fiduciary duty requires a director to act honestly and in good faith with a view to the

best interests of the corporation.

This includes the disclosure of any conflicts of interest and not taking personal advantage of any opportunities which are being pursued by the corporation. On the other hand, the duty of care requires directors and officers to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. Directors' and officers' decisions are examined based on whether or not they acted reasonably in light of what they knew or ought to have known at the time when the decision was made. A breach of either duty can result in personal liability for directors and officers in addition to corporate liability.

Personal liability can also extend to directors in other situations. For example, directors and officers can be liable for unpaid wages of employees, unpaid corporate taxes after winding up, and for breaches by the corporation of environmental legislation if the director participated in or acquiesced to the breach. Directors and officers looking to protect themselves from personal liability may be able to do so through directors and officers insurance or corporate indemnification depending on the situation.

Electronic Documents and Signatures

In Canada, electronic documents can be used in place of written documents in most cases. Under federal legislation, electronic signatures meet general signature requirements, while a secure electronic signature satisfies a requirement for a seal. Also, federally incorporated entities can satisfy all of their written document requirements with the use of electronic documents. At the provincial level, legislation differs amongst the provinces. In Ontario and Alberta, electronic documents satisfy any legislative requirement for a document to be in writing with certain exceptions such as wills, some powers of attorney, and some transfers of interests in land.

Franchise Legislation

Six Canadian provinces (Alberta, British Columbia, Manitoba, New Brunswick, Ontario and Prince Edward Island) have enacted franchise-specific legislation ("franchise legislation"). The franchise legislation is remedial in nature, intended to address the perceived power imbalance between franchisors and franchisees. Accordingly, the provisions of the franchise legislation are broadly construed by the courts in favour of franchisee protection.

The determination of whether an arrangement comes within the definition of a "franchise" is objectively set out in the franchise legislation. Importantly, neither the intention of the parties, nor the nomenclature used in describing the agreements is relevant in determining whether a "franchise" arrangement exists. In many cases distribution, license or dealer agreements are found by courts to be "franchises" under franchise legislation based on the nature of the relationship between the parties.

There are a number of obligations imposed on franchisors under the franchise legislation. One of the central components of the franchise legislation is the requirement that a franchisor provide franchisees with pre-sale disclosure (in the form of a franchise disclosure document) prior to the signing of any agreement or payment of any money to the franchisor. The franchise disclosure document must present in a succinct manner all "material facts" (including certain prescribed information) relevant to permit the franchisee to make an informed business decision about whether to become or remain a franchisee. As part of the prescribed information, unless an exemption is available, unconsolidated financial statements of the franchisor entity (prepared to at least the Canadian "review engagement" standard) must be included. There are significant consequences for failing to provide a compliant disclosure document including the franchisee's right to rescind the franchise agreement up to two years after signing the franchise agreement, and being refunded for payments made to the franchisor. Additionally, if a franchisee suffers loss as a result of misrepresentation or a non-compliant franchise disclosure document, it has a statutory right of action for damages against the franchisor, certain

related parties (which may include the foreign parent of a franchisor entity that is directly involved in the grant of the franchise), and the director(s) and officer(s) of the franchisor entity that sign the certificate(s) to the franchise disclosure document.

Beyond pre-sale disclosure, the franchise legislation imposes a duty of fair dealing on both franchisor and franchisee in exercising their rights and performing their respective obligations under a franchise agreement. Franchisees also have the right to associate with each other and to form or join franchise associations. In each case, there are statutory rights of action for breaches of those statutory obligations. Finally, it is also important to note that franchisees cannot waive their rights under the franchise legislation, so any attempt to do so, by contract or otherwise, is void.

French Language Requirements in Québec

Québec is the largest Canadian province by land mass and second largest by population. French is the primary language of roughly 80% of Québec's population and it is the only province in Canada where French is the official language. In Québec, the use of French in business is governed by the *Charter of the French Language* which places some requirements on businesses not present anywhere else in Canada.

As a result of the Charter, a business cannot make knowledge of the English language a requirement for employment, or lay off an employee solely because they are exclusively French speaking. Written communications to staff must be drawn up in French (or French and another language), along with most business documents such as promotional materials, order forms and invoices. A business operating in Québec must have a French name that appears at least as prominently as any English name. Finally, businesses which employ 50 or more people may be required to establish a francization program to generalize the use of French at all levels of the business.

Packaging and Labelling

Product packaging and labelling is regulated at both federal and provincial levels through statutes of general application and statutes applicable to specific products, including hazardous or potentially dangerous products.

The Consumer Packaging and Labelling Act (the "CPLA") is the principal federal statute regulating prepackaged products sold to consumers. It requires that these products bear accurate and meaningful labelling information, prohibits false and misleading representations, and sets out mandatory label requirements such as a product's common name and net quantity in metric units of measurement. There are detailed rules concerning, for example, label placement and labelling of imported products. The CPLA requires mandatory label information to be in both English and French; in practice, mandatory and non-mandatory information is presented in both languages on most Canadian packaging. The CPLA also regulates standard container shapes and sizes.

A Cautionary Note

The foregoing provides a summary of aspects of Canadian law that may interest investors considering doing business in Canada. A group of McMillan lawyers prepared this information, which is accurate at the time of writing. Readers are cautioned against making decisions based on this material alone. Rather, any proposal to do business in Canada should most definitely be discussed with qualified professional advisers.

McMillan is a leading Canadian business law firm dedicated to providing solutions-oriented legal advice through our offices in Vancouver, Calgary, Toronto, Ottawa, Montréal and Hong Kong.

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Connect With Us

Sandra M. Knowler | Partner, Business Law | Mergers & Acquisitions

Vancouver
604.893.2334
sandra.knowler@mcmillan.ca
Read Bio >

Greg McIlwain | Partner, Business Law | Mergers & Acquisitions

Calgary
403.231.8375
greg.mcilwain@mcmillan.ca
Read Bio >

John Clifford | Partner, Business Law | Mergers & Acquisitions

Toronto
416.865.7134
john.clifford@mcmillan.ca
Read Bio >

Connect With Us

Martin J. Thompson | Office Management Partner, Ottawa
Partner, Employment & Labour Relations

Ottawa
613.691.6104
martin.thompson@mcmillan.ca
Read Bio >

Enda Wong | Partner, Mergers & Acquisitions
Partner, Private Equity & Venture Capital

Montréal
514.987.5034
enda.wong@mcmillan.ca
Read Bio >

Stephen D. Wortley | Chair, Hong Kong Office
Partner, Capital Markets & Securities

Hong Kong
852.3101.0390
stephen.wortley@mcmillan.ca
Read Bio >

Vancouver | Royal Centre, Suite 1500
1055 West Georgia Street, Vancouver, BC, Canada V6E 4N7
604.689.9111

Calgary | TD Canada Trust Tower, Suite 1700
421 7th Avenue S.W. Calgary, AB, Canada T2P 4K9
403.531.4700

Toronto | Brookfield Place, Suite 4400
181 Bay Street, Toronto, ON, Canada M5J 2T3
416.865.7000

Ottawa | World Exchange Plaza, Suite 2000
45 O'Connor Street, Ottawa, ON, Canada K1P 1A4
613.232.7171

Montréal | 1000 Sherbrooke Street West
Suite 2700, Montréal, Québec, Canada H3A 3G4
514.987.5000

Hong Kong | 3508, Two Pacific Place
88 Queensway, Hong Kong, China
852.2218.7418

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